Nova Law Review

Volume 17, *Issue* 1 1992 *Article* 4

Capital Crime Decisions: 1992 Survey of Florida Law

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Abstract

The United States Supreme Court's decision in Espinosa v. Florida, is by far the most important development in Florida capital punishment law during the survey period.

KEYWORDS: error, rights, conflict

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I. INTRODUCTION

The United States Supreme Court's decision in *Espinosa v. Florida*,[1] is by far the most important development in Florida capital punishment law during the survey period. This article will discuss the potential *Espinosa* has to have a substantial impact beyond its narrow holding. This article will also address other significant developments in this area, including other jury instructions; the nature of the state court's appellate review; guilt and penalty verdicts; "victim impact" evidence; and several aggravating circumstances. The Court's treatment of mitigation, as it involves sentencing in capital cases, continues to be unclear.

II. JURY INSTRUCTIONS

The Florida Supreme Court has not been very pleased with challenges to the standard jury instructions used in capital offense cases.[2] Following *Espinosa*, new thinking in this area will result. In *Espinosa*, the Court rejected the state's argument[3] that an unconstitutionally vague instruction on the heinousness circumstance[4] did not violate the Eighth Amendment

1. 112 S. Ct. 2926 (1992) (jury instruction on heinousness circumstance held unconstitutional).

2. Florida's standard jury instructions are the product of a special committee of supreme court appointees. Its proposed instructions become effective upon approval by the supreme court. The supreme court's approval of an instruction does not preclude subsequent challenges to the instruction. *See* Yohn v. State, 476 So. 2d 123, 126-27 (Fla. 1985) (disapproving standard instruction on insanity defense); Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th Dist. Ct. App. 1984) ("Unfortunately, trial attorneys and trial judges often fail to recognize that instructions promulgated by a Supreme Court Committee on Standard Jury Instructions, whether criminal or civil, are merely the work product of a conscientious committee and not immutable postulates from Olympus. Committees, after all, sometimes construct camels rather than race horses.").

3. The state based its argument on Smalley v. State, 546 So. 2d 720 (Fla. 1989).

4. FLA. STAT. § 921.141(5)(h) (1991) ("The capital felony was especially heinous, atrocious, or cruel.").

because the jury is not "the sentencer" under Florida law.[5] Noting that the trial court must pay deference to the penalty verdict and that, as a result, the sentencing decision is, in practice, divided between the judge and the jury, the Court concluded, "[w]e merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."[6]

A. *Unconstitutional Vagueness*

The jury instruction in *Espinosa* was held to be unconstitutionally vague.[7] Nevertheless, the import of the Court's decision is that Florida penalty phase jury instructions may be found improper, notwithstanding that the judge ultimately imposes sentence. In *Sochor v. Florida*,[8] the Court rejected the defendant's argument that the trial court had improperly instructed the jury on the coldness circumstance[9] where the evidence did not support it.[10] The Court's analysis assumed that an instruction on a legally improper theory, rather than a factually unsupportable theory, would have been unconstitutional; however, the Court declined to presume that the jury had found a circumstance not supported by the evidence.[11] Therefore, under *Espinosa* and *Sochor*, jury instructions presenting improper theories for application of aggravating and mitigating circumstances are subject to attack.

Questions are likely to arise as to whether standard jury instructions on other circumstances unconstitutionally relieve the state of its burden of proof. For instance, the standard instruction on the "avoid arrest" circumstance[12] does not state that, where the decedent is not a law enforcement officer, there must be a strong showing that the dominant or only motive for a murder was the elimination of a witness. Further, the standard instruction does not mention that the mere fact the decedent knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest.[13] Similarly, the standard instruction on the pecuniary gain circum-

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5. *Espinosa*, 112 S. Ct. at 2928.
6. *Id.* at 2929.
7. *Id.*
8. 112 S. Ct. 2114 (1992).
9. *See* FLA. STAT. § 921.141(5)(i) (1991).
10. *Sochor*, 112 S. Ct. at 2122.
11. *Id.*
12. FLA. STAT. § 921.141(5)(e) (1991) ("The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.").
13. *See* Perry v. State, 522 So. 2d 817, 820 (Fla. 1988).

stance[14] fails to recite that the circumstance applies only where "the murder is an integral step in obtaining some sought-after specific gain."[15] Also, the instruction on great risk[16] does not spell out that "'Great risk' means not a mere possibility but a likelihood or high probability;"[17] a great risk to just three persons is insufficient;[18] or the circumstance cannot be based on speculation as to what might have happened had other persons come upon the scene.[19]

Particularly troublesome are the instructions on the coldness and heinousness circumstances. Although the Court has written that the coldness and heinousness circumstances tend to be the most aggravating,[20] it has shrunk from clarifying the instructions on them.

The instruction on the coldness circumstance[21] does not inform the jury of the various constructions and limitations the court has made.[22] These constructions and limitations include: The evidence "must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began."[23] The coldness element requires "calm and cool reflection."[24] The calculation element requires "heightened premeditation" involving "a careful plan or prearranged design to kill."[25] The circumstance does not apply where the "actions took place over one

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14. FLA. STAT. § 921.141(5)(f) (1991) ("The capital felony was committed for pecuniary gain.").

15. Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988).

16. FLA. STAT. § 921.141(5)(c) (1991) ("The defendant knowingly created a great risk of death to many persons.").

17. Hallman v. State, 560 So. 2d 223, 226 (Fla. 1990).

18. *Id.* (quoting Bello v. State, 547 So. 2d 914 (Fla. 1989)).

19. Francois v. State, 407 So. 2d 885, 891 (Fla. 1981).

20. Maxwell v. State, 603 So. 2d 490 (Fla. 1992) ("By any standards, the factors of heinousness, atrocious, or cruel, and cold, calculated premeditation are of the most serious order."); *see also* Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (facts of case insufficient to impose death penalty). The court almost never affirms an override sentence where both circumstances are absent. The last override of this type occurred in Mills v. State, 476 So. 2d 172 (Fla. 1985), and the Florida Supreme Court has since disapproved of its treatment of overrides during 1985. *See* Cochran v. State, 547 So. 2d 928 (Fla. 1989).

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

22. *See* Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (circumstance unconstitutional without limiting construction).

23. Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990).

24. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) ("the element of coldness, i.e., calm and cool reflection, is not present here").

25. Rogers v. State, 511 So. 2d 526 (Fla. 1987).

continuous period of physical attack."[26] The circumstance does not apply where the evidence "is susceptible to conclusions other than finding [the crime] was committed in a cold, calculated, and premeditated manner."[27] "[A]n intent to rob is not indicative of heightened premeditation."[28] The state has the burden of proving beyond a reasonable doubt the absence of a "pretense of justification."[29] A "'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."[30] A pretense of moral or legal justification exists where the defendant consistently has made statements that he killed the victim only after the victim jumped at him, and where no other evidence disproves this claim.[31]

The 1991 standard instruction on the heinousness circumstance is likewise deficient.[32] Although the supreme court order approving the instruction states that the instruction was proposed by the standard jury instructions committee,[33] this is not entirely accurate. On rehearing, the committee proposed this instruction:[34]

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a

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26. Campbell v. State, 571 So. 2d 415 (Fla. 1990).
27. Harmon v. State, 527 So. 2d 182, 188 (Fla. 1988).
28. Jackson v. State, 498 So. 2d 906, 911 (Fla. 1986).
29. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988).
30. *Id.*
31. *Id.* at 224-25.
32. The 1991 instruction provides:

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

In re Standard Jury Instructions, Criminal Cases-No. 90-1, 579 So. 2d 75 (Fla. 1990), *reh'g denied* (Fla. 1991). This instruction supplanted the instruction disapproved in *Espinosa*. *See infra* text accompanying notes 37-43.

33. *In re* Standard Jury Instructions, 579 So. 2d at 75.
34. *See* Eric Cumfer, *Instructing a Capital Sentencing Jury on Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance*, 14 FLA. BAR CRIM. L. SECT. NEWSL., Oct. 1991 at No. 1, 18.

> method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.[35]

The committee's proposed instruction was based on cases such as *Porter v. State*,[36] striking the circumstance where the state did not prove a torturous intent.

The 1991 instruction is subject to two attacks: first that it violates the Eighth Amendment, and second that it violates due process. The Eighth Amendment argument is based on *Espinosa*, *Proffitt v. Florida*,[37] and *Shell v. Mississippi*.[38] *Espinosa* held that the circumstance is constitutional where limited only to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Shell* held that instructions defining "heinous," "atrocious," and "cruel" in terms identical to those used in the 1991 instruction are unconstitutionally vague. While the 1991 instruction says that the "conscienceless . . . pitiless . . . unnecessarily torturous" crime is "intended to be included," it does not expressly limit the circumstance only to such crimes.[39]

The due process argument is one of lifted burdens. The instruction relieves the state of proving the elements of the circumstance as developed in the case law. It does not require the state to prove torturous intent.[40] Nor does it mandate that events occurring after the victim dies or loses consciousness are to be excluded from consideration.[41] The instruction does not state that a lingering death fails to establish the circumstance.[42]

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35. FLA. BAR NEWS, Feb. 1, 1991, at 2.
36. 564 So. 2d 1060 (Fla. 1990).
37. 428 U.S. 242 (1976).
38. 498 U.S. 1 (1990).
39. *See supra* note 32.
40. *Porter*, 564 So. 2d at 1063-64; Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990) ("That the defendant might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily tortuous . . . ."), *cert. denied*, 112 S. Ct. 311 (1991), *later proceeding*, 112 S. Ct. 634 (1991), *vacated*, 112 S. Ct. 3020 (1992). *But see* Mckinney v. State, 579 So. 2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim.").
41. *But see* Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984).
42. *But see* Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."), *cert. denied*, 465 U.S. 1074 (1984).

Nor does it prevent the jury from considering lack of remorse in finding the circumstance.[43]

B. *Reconsideration of Instructions Regarding the Role of the Jury*

Espinosa may also call for reconsideration of instructions regarding the role of the jury. The standard instructions discount the role of the jury, referring to the penalty verdict as "advisory" without mentioning that the trial court must put great weight on that verdict.[44] The United States Supreme Court had previously condemned an argument diminishing the role of the sentencing jury.[45] Still, the Florida Supreme Court found that the standard instruction does not violate *Caldwell* in that the judge is the sentencer and it is enough merely to tell the jury that the penalty verdict is "advisory."[46] The Court may have to revisit this position in view of *Espinosa's* holding that the "sentencer" is both the judge and the jury.

Another issue pertains to the nature of the jury's decision-making process. The sentencing decision is not to be made simply on the basis of toting up the aggravating and mitigating circumstances and seeing which list is longer.[47] Yet the standard instructions do not forbid such a practice in the jury room. Further, the instructions do not tell the jury that it *must* consider mitigating factors.[48] The standard instruction merely says that the jury "may consider" mitigating circumstances established by the evidence.

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43. *But see* Colina v. State, 570 So. 2d 929, 933 (Fla. 1990).

44. *See* Tedder v. State, 322 So. 2d 908 (Fla. 1975) (judge may override life verdict only where virtually no reasonable person could disagree with death sentence); Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988) ("a jury recommendation of death should be given great weight"), *cert. denied*, 489 U.S. 1071 (1989).

45. Caldwell v. Mississippi, 472 U.S. 320 (1985).

46. Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). *But see* Garcia v. State, 492 So. 2d 360 (Fla. 1985), *cert. denied*, 479 U.S. 1022 (1986). "It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to *Caldwell v. Mississippi* and *Tedder v. State*." *Id.* at 367 (citations omitted) (emphasis added).

47. *See* Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978) ("the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum, it requires a weighing of those circumstances"), *cert. denied*, 444 U.S. 919 (1979).

48. *See* Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) ("We have held that in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.") (internal quotation marks omitted).

C. General Problems With Jury Instructions

A more general problem with the jury's role is found in the following brief discussion in *Waterhouse v. State*:[49]

> Waterhouse claims that the jury instructions failed to specify that each juror should make an individual determination as to the existence of any mitigating circumstance. These issues have been waived because counsel did not object to the instruction. In any event, Florida law does not require such an instruction.[50]

The question comes to mind: what *does* Florida law require respecting the finding of mitigation and aggravation? Are sentencing circumstances to be determined individually by each juror, or are they subject to majority vote, or must they be found unanimously? Neither the statute nor the jury instructions provide an answer. Here the Florida statute seems to fall afoul of *Mills v. Maryland*.[51]

In *Mills* the United States Supreme Court found unconstitutional a jury instruction which forbade consideration of a mitigating circumstance unless the jurors unanimously found the circumstance to exist.[52] In *McKoy v. North Carolina*,[53] the Court explained that "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death."[54] Noting that *Mills* requires that in North Carolina's system, "each juror must be allowed to consider all mitigating evidence," it concluded that "such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance."[55]

Florida's standard jury instructions are ambiguously silent on this issue. Although they provide that the penalty verdict is to be decided by a majority vote, they do not mention how many votes are needed to find sentencing circumstances. If jurors could reasonably construe the standard instructions as requiring a majority vote on mitigating circumstances (not an unreasonable construction), then the instructions violate *Mills* and *McKoy*.

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49. 596 So. 2d 1008 (Fla. 1992), *petition for cert. filed*, (Aug. 3, 1992) (No. 92-5354).
50. *Id.* at 1017.
51. 486 U.S. 367 (1988) (plurality opinion).
52. *Id.*
53. 494 U.S. 433 (1990).
54. *Id.* at 442-43.
55. *Id.* at 443.

D. *Endorsement of "Doubling" of Aggravating Circumstances*

The court has long given a cool reception to proposed instructions on "doubling" of aggravating circumstances, but finally endorsed an instruction during the survey period. In *Provence v. State*,[56] the court held it improper for the trial court to use both the felony murder[57] and pecuniary gain circumstances where the murder occurred during a robbery:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances . . . we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.[58]

Similarly, the coldness and pecuniary gain circumstances were merged into one circumstance in *Downs v. State*;[59] the prior violent felony,[60] felony murder, and pecuniary gain circumstances were treated as one in *Jackson v. State*;[61] and the murder of a law enforcement officer,[62] avoiding arrest, and hindering law enforcement[63] circumstance were merged in *Valle v. State*.[64]

The standard jury instructions make no mention of the doctrine forbidding double consideration of circumstances based on the "same aspect" of the offense. In *Mendyk v. State*,[65] the court rejected a proposed

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56. 337 So. 2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977).
57. FLA. STAT. § 921.141(5)(d) (1991).
58. 337 So. 2d at 786 (citations omitted).
59. 572 So. 2d 895 (Fla. 1990), *cert. denied*, 112 S. Ct. 101 (1991); *see also* Anderson v. State, 574 So. 2d 87 (Fla. 1991).
60. FLA. STAT. § 921.141(5)(b) (1991).
61. 575 So. 2d 181, 189-90 (Fla. 1991).
62. FLA. STAT. § 921.141(5)(j) (1991).
63. *Id.* § 921.141(5)(g).
64. 581 So. 2d 40 (Fla. 1991), *cert. denied*, 112 S. Ct. 597 (1991).
65. 545 So. 2d 846, 849 (Fla. 1989), *cert. denied*, 110 S. Ct. 520 (1989).

instruction[66] as "not . . . . be[ing] an entirely correct statement of the law under *Garcia v. State*."[67] Actually, *Garcia* says nothing at all about this issue,[68] and *Mendyk* makes no mention of *Provence*, which the court has followed both before and after *Garcia*.

During the survey period, the court addressed the issue with contrary results. In *Patten v. State*,[69] the trial court overruled defense objections to instructing the jury on both the avoiding arrest and hindering law enforcement circumstances.[70] The defense had asked the judge to force the state to elect between the two circumstances and requested that the jury be instructed on only one of them "in order to avoid a doubling effect." Relying on *Suarez v. State*,[71] the court rejected Mr. Patten's argument.[72] The *Suarez* court stated:

> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is

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66. The proposed instruction provided:

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.

Id. at 849 n.2.

67. *Id.* at 849 (citing Garcia v. State, 492 So. 2d 360, 366 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986)).

68. *Garcia* held that the prosecutorial argument concerning the circumstance of avoiding arrest was not improper notwithstanding Mr. Garcia's claim that the argument was "improperly directed to the aggravating factors of heinous, atrocious and cruel, and cold, calculated and premeditated, factors that were not presented to the jury for consideration." *Garcia*, 492 So. 2d at 366. The court wrote:

> Evidence or comments intended to show a calculated plan to execute all witnesses can also support the aggravating factors of heinous, atrocious and cruel and cold, calculated and premeditated. As the appellee points out, facts cannot be antiseptically packaged when presented to the jury. The jury was properly instructed on the aggravating factors it could consider and we find no error.

Id.

69. 598 So. 2d 60 (Fla. 1992).

70. *Id.* at 63.

71. 481 So. 2d 1201, 1209 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986).

72. *Patten*, 598 So. 2d at 63.

this sentencing order which is subject to review vis-a-vis doubling.[73]

The court went on to note that the judge sentencing Mr. Patten "specifically considered the events as one aggravating circumstance and did not give them a doubling effect in imposing the death sentence."[74] Given the finding in *Espinosa*, this scarcely cures the fact that the jury improperly considered more circumstances than the judge did.

In *Patten*, the court noted that it had "recently held" that "when requested, a defendant is entitled to a limiting instruction advising the jury not to double the weight of multiple aggravating circumstances supported by a single aspect of the crime."[75] The instruction approved in *Castro v. State* is identical with the instruction rejected by the court in *Mendyk*.[76] However, the *Castro* instruction descends from the usual high abstraction of jury instructions and gives an example. What is especially remarkable about *Castro* is that it was written by Justice Barkett, who also authored *Mendyk*, yet *Castro* makes no mention of the *Mendyk* decision.

E. *Other Jury Instructions*

Some recent opinions on several other jury instruction issues during the survey period are worth noting because of their potential impact. In *Geralds v. State*,[77] the court ordered new sentencing proceedings where the state improperly presented the jury with the fact that the defendant had a substantial history of non-violent criminal behavior, notwithstanding that there was a curative instruction.[78] The court stated:

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73. *Suarez*, 481 So. 2d at 1209.

74. *Patten*, 598 So. 2d at 63.

75. *Id.* at 63 n.3 (citing Castro v. State, 597 So. 2d 259 (Fla. 1992)). Both cases were actually decided the same day.

76. The instruction provided:

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

Castro, 597 So. 2d at 261.

77. 601 So 2d 1157 (Fla. 1992).

78. *Id.* at 1161-62.

> Although the judge gave a so-called "curative" instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that the defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court.[79]

In *Wright v. State*,[80] the court held that it was improper to instruct the jury on flight simply because the defendant left the scene of the homicide.[81] In the non-capital case of *Fenelon v. State*,[82] the court went further and condemned flight instructions in all circumstances.[83]

Cruse v. State[84] approved use of an instruction on the defense of insanity by delusion.[85] Although *M'Naghten's Case*[86] is usually cited for the proposition that one cannot be guilty of murder if, because of a mental illness, one did not know right from wrong at the time of the killing. Additionally, it also provides that mental illness is a complete defense to murder where the defendant is under the insane delusion that he is acting in self-defense:[87] "For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment."[88] The state supreme court incorporated this defense into Florida law long ago,[89] and the standard jury instructions formerly included an instruction on this defense.[90]

For some reason this instruction was dropped from the standard jury instructions, and William Cruse unsuccessfully objected to its use in his

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79. *Id.* at 1162 (citing Malcolm v. State, 415 So. 2d 891, 892 n.1 (Fla. 3d Dist. Ct. App. 1982) (labeling such an instruction as being "of legendary ineffectiveness")).

80. 586 So. 2d 1024 (Fla. 1991).

81. *Id.* at 1030.

82. 594 So. 2d 292 (Fla. 1992).

83. *Id.* at 295.

84. 588 So. 2d 983 (Fla. 1991), *cert. denied*, 112 S. Ct. 2949 (1992).

85. *Id.* at 989.

86. 8 Eng. Rep. 718 (H.L. 1843). The prisoner's name is variously spelled. *See* LLOYD WEINREB, CRIMINAL LAW: CASES, COMMENT, QUESTIONS 451 n.3 (3d ed. 1980).

87. *M'Naghten's Case*, 8 Eng. Rep. at 723.

88. *Id.*

89. Davis v. State, 32 So. 822, 828 (Fla. 1902) (approving jury instruction with remark that the instruction "is almost in the identical language used by the judges in answer to the fourth question propounded to them in McNaghten's Case"); Blocker v. State, 110 So. 547, 552 (1926).

90. *See Mordenti*, 418 So. 2d 989, 993 (Fla. 1982).

murder trial, arguing that it tended to mislead the jury.[91] The supreme court rejected his argument.[92] Forgetful of *Davis* and *Blocker*, the court wrote that it had never expressly approved the instruction.[93] It then wrote that:

> [A] careful reading of the instruction shows that the jury was to focus on the delusions as a means of finding insanity only after determining that Cruse was sane under the standard insanity instruction incorporating the M'Naghten test. The additional instruction given by the trial court was actually a second way that Cruse could have been found insane, and it was, therefore, to Cruse's advantage to have the instruction given.[94]

In *Gaskin v. State*,[95] the court rejected an attack on the standard jury instruction defining "reasonable doubt."[96] The court dismissed the unspecified challenge to the instruction in less than a sentence,[97] citing to *Brown v. State*.[98] *Brown* summarily rejected an argument that the standard instruction "dilutes the quantum of proof required to meet the reasonable doubt standard."[99] Citing authorities that simply do not address the issue, the court wrote that the "standard instruction, when read in its totality, adequately defines 'reasonable doubt,' and we find no merit to this point."[100]

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91. *Cruse*, 588 So. 2d at 989.
92. *Id.*
93. *Id.*
94. *Id.* Thus, the court was also apparently unaware that the delusion defense was a product of *M'Naghten*.
95. 591 So. 2d 917 (Fla. 1991), *vacated*, 112 S. Ct. 3022 (1992).
96. Florida's reasonable doubt instruction, which reads as follows, was upheld by the Florida Supreme Court in *Brown v. State*:

> A reasonable doubt is not a possible doubt, speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

565 So. 2d 304 (Fla. 1990), *cert. denied*, 111 S. Ct. 537 (1990).
97. *Gaskin*, 591 So. 2d at 920.
98. 565 So. 2d at 307 n.8.
99. *Id.* at 307.
100. *Id.*

After *Brown* was decided, the Supreme Court found unconstitutional the following Louisiana instruction on "reasonable doubt":

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.[101]

Cage cited to decisions of the circuit courts of appeals generally condemning attempts to define "reasonable doubt."[102] One of those cases, *Monk v. Zelez*,[103] noted that jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized."[104] A sampling of the case law confirms this conclusion.

The Supreme Court, in addressing instructions which equate reasonable doubt with a "substantial doubt, a real doubt," has written: "This definition, though perhaps not itself reversible error, often has been criticized as confusing."[105] Similarly, the Fifth Circuit has held it improper to define a reasonable doubt as "substantial rather than speculative."[106] Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative," a court may be "playing with fire" when it goes beyond that.[107] By itself, it is improper to instruct that the government need not

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101. Cage v. Louisiana, 111 S. Ct. 328, 329 (1990).
102. *Id.* at 330.
103. 901 F.2d 885 (10th Cir. 1990).
104. *Id.* at 889.
105. Taylor v. Kentucky, 436 U.S. 478, 488 (1978).
106. United States v. Rodriguez, 585 F.2d 1234, 1242 (5th Cir. 1978). While the court explained that it had occassion to both sustain and reverse convictions where the jury instructions defining reasonable doubt contrasted "substantial doubt" and "speculation," the court clearly expressed its dissatisfaction with such definitions, warning that courts using such instructions could reasonably expect reversal. *Id.*
107. United States v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979).

prove guilt "beyond all possible doubt."[108] Further, an instruction equating a reasonable doubt with "a real possibility" has been condemned because it may "be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense."[109] In addition, in *Dunn v. Perrin*,[110] the court condemned the following jury instruction defining "reasonable doubt": "It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments . . . ."[111] The court wrote that the instruction "was the exact inverse of what it should have been."[112] *Gaskin* makes no mention of these authorities.[113]

III. COUNSEL

During the survey period, the court treated four broad categories of counsel issues: counsel's obligation, if any, to follow the client's directions; waiver of counsel; conflicts of interest; and the time at which the right to counsel attaches.

A. *Professional Judgment in Conducting the Defense*

Except for a few fundamental decisions, the attorney is to exercise independent professional judgment in conducting the defense.

The Supreme Court has set out the general rule as follows:

> The ABA *Model Rules of Professional Conduct* provide:
> A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued . . . . In a criminal case, the lawyer shall abide by the client's decision . . . *as to a plea to be entered whether to waive jury trial and whether the client will testify.*"[114]

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108. United States v. Shaffner, 524 F.2d 1021, 1023 n.2 (7th Cir. 1975).
109. United States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986).
110. 570 F.2d 21 (1st Cir. 1978).
111. *Id.* at 23-24.
112. *Id.* at 24.
113. *See* Woods v. State, 596 So. 2d 156 (Fla. 4th Dist. Ct. App. 1992).
114. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) (Final Draft 1982) (emphasis added).

> With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client. The ABA Defense Function Standards provide that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client.[115]

During the survey period, the state court dealt with this issue both with respect to trial and appellate counsel.

Though it would seem from *Jones* and the ABA Model Rules that the decision whether to appeal a death sentence would be a "fundamental decision" to be left to the client, the court thought otherwise in *Klokoc v. State*.[116] There, appellate counsel, at his client's request, moved to dismiss the appeal saying that the appellant (who had killed his daughter) wished to be executed.[117] The motion also stated: "It will be appellant's position on appeal, if forced to submit an initial brief, that the death penalty should be imposed."[118] The supreme court denied the motion, writing that "in order for the appellant to receive a meaningful appeal, the court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence."[119] Similarly, the court wrote in *Pettit v. State*:[120] "Pettit did not want to appeal or have counsel for his appeal, but we determined that this wish could not be granted because we have an absolute statutory obligation to review every death sentence."[121]

The court has reached opposite results as to trial counsel, consistently upholding death sentences where counsel failed to present (or even investigate) mitigating evidence at the client's instructions.[122] *Koon* established this procedure:

> 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

115. Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983).
116. 589 So. 2d 219 (Fla. 1991).
117. *Id.* at 221.
118. *Id.*
119. *Id.* at 221-22.
120. 591 So. 2d 618 (Fla. 1992).
121. *Id.* at 620 n.2.
122. *See* Koon v. Dugger, 17 Fla. L. Weekly S337 (June 4, 1992) (citing Pettit v. State, 591 So. 2d 618 (Fla. 1992); Hamblin v. State, 527 So. 2d 800, 804 (Fla. 1988)).

> 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.[123]

The court implicitly rejected Justice Barkett's position that special defense counsel should be appointed by the trial court to present the mitigating evidence.[124] In *Pettit*, the court wrote that, even where the defendant has waived mitigation, the trial court "must carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate."[125] Therefore, pursuant to *Klokoc* and *Koon*, a defendant cannot waive his right to "meaningful" appellate review of a death sentence proceeding, notwithstanding that he may have rendered the sentencing proceeding itself meaningless by waiving mitigation.[126]

In several post-conviction cases, the court has found no ineffectiveness in the failure to investigate where the court attributed the failure to the defendant.[127] Typical is the case of *Rose v. State*, where the defendant, Milton Rose, contended on post-conviction that his attorney, Rousen, had been ineffective.[128] The state countered that Rousen had failed to investigate defenses only because the apparently mentally ill defendant was uncooperative.

> Rousen testified below that at the guilt phase of trial, Rose insisted on presenting the defense that he was innocent and was not present at the scene of the murder. Against Rousen's advise, Rose would not allow counsel to pursue other defenses such as insanity or intoxication. According to Rousen, Rose did not change his posture at the penalty phase. "When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." Rousen testified that once the case reached the penalty phase, he tried to raise issues of insanity, intoxication, and lack of specific intent to the extent possible while still maintaining Rose's innocence. Given the limitations placed on him by Rose, Rousen made reasonable

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123. *Id.* at S338.

124. *Id.* at S339 (concurring opinion joined by Justice Kogan). The trial court employed this procedure in Klokoc v. State, 589 So. 2d 219, 220 (Fla. 1991).

125. *Pettit*, 591 So. 2d at 620.

126. *Klokoc*, 589 So. 2d at 219; *Koon*, 17 Fla. L. Weekly S337 (June 4, 1992).

127. *See, e.g.*, Rose v. State, 17 Fla. L. Weekly S393 (June 25, 1992).

128. [illegible] Fla. L. Weekly at S393.

> tactical decisions with respect to the presentation of mitigating evidence.[129]

The *Rose* court quoted *Mitchell v. Kemp*[130] for the proposition that Rose's actions barred a claim of ineffectiveness.[131] An examination of *Mitchell* reveals that the *Rose* court took that quote out of context. The *Mitchell* court actually stated:

> When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made. Nonetheless, "[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one's client to the realities of his case are cornerstones of effective assistance of counsel." The new Fifth Circuit has held that although a capital defendant's stated desire not to use character witnesses does not negate the duty to investigate, it limits the scope of the investigation required.[132]

Further, the Eleventh Circuit has recognized elsewhere that failure to investigate cannot be blamed on the client.[133]

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129. *Id.* (citing Jones v. State, 528 So. 2d 1171, 1175 (Fla. 1988) (where guilt-phase defense was that defendant was innocent, counsel made reasonable tactical decision in not calling psychiatrist to testify at penalty phase that defendant was paranoid where counsel concluded that the testimony would destroy the defense's credibility with the jury and would not harmonize with other mitigating evidence)).

130. Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987).

131. *Id.* at S394.

132. *Mitchell*, 762 F.2d at 889-90 (citations omitted).

133. Thompson v. Wainwright, 787 F.2d 1447, 1451-52 (11th Cir. 1986):

> Although Thompson's directions may have limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially disturbing in this case where Solomon himself believed that Thompson had mental difficulties. An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment. *See* CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (Fla. Stat. Ann. 1983). We conclude that Solomon's failure to conduct any investigation of Thompson's background fell outside the scope of reasonably professional assistance.

Thompson, 787 F.2d at 1451-52; Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983), *cert. denied*, 469 U.S. 1029 (1984).

> Martin's instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyers' failure to investigate the intoxication defense. It is

B. *Waiver of Counsel at Sentencing*

In *Pettit*, the court held that the defendant could not waive his right to counsel on appeal, but upheld his waiver of counsel at sentencing.[134] The ostensible reason for the waiver was the same in both instances: the defendant wanted to be sentenced to death because he suffered from Huntington's chorea, a degenerative disease.[135]

Although a defendant has the constitutional right to self-representation at least in trial court proceedings,[136] it is not always clear what constitutes an invocation of this right. In *Watts v. State*,[137] the court held that there was not an "unequivocal request" for self-representation where the retarded defendant expressed dissatisfaction with his attorneys (he said they had not been to see him at jail) and asked that another attorney be appointed.[138]

In *Waterhouse v. State*,[139] another defendant, Robert Brian Waterhouse, was dissatisfied with counsel. Waterhouse's attorney refused his demand for presentation of "a lingering doubt defense" in lieu of mitigation at resentencing.[140] The lawyer was not shy about bringing this matter to the court's attention. According to the Florida Supreme Court, Waterhouse's attorney "protected the record to make clear that Waterhouse desired to present such a defense."[141] Additionally, there were various discussions on the record, made with the prosecutor present, about defense strategy and Waterhouse's unhappiness with his lawyer. Thus, the attorney's nice sense

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undisputed that the attorney never discussed that option with him. Unconcealed jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice. "[M]eaningful discussion with one's client" is one of the "cornerstones of effective assistance of counsel."

Martin, 711 F.2d at 1280 (quoting Gaines v. Hooper, 575 F.2d 1147, 1149-50 (5th Cir. 1990)); *see* Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991) (relying on *Thompson*, 787 F.2d 1447 (11th Cir. 1986)); *see also, e.g.*, Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (counsel improperly failed to investigate defense theory after obtaining written waiver from defendant).

134. *Pettit*, 591 So. 2d at 618.

135. *Id.* at 621.

136. *See* Faretta v. California, 422 U.S. 806 (1975); Cappetta v. State, 204 So. 2d 913 (Fla. 1967).

137. 593 So. 2d 198 (Fla. 1992).

138. *Watts*, 593 So. 2d at 199. Defense counsel explained that Mr. Watts' complaints arose from the fact that he did not understand what occurred during his meetings with counsel. Nevertheless, the trial court found Mr. Watts competent. *Id.* at 202.

139. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992).

140. *Id.* at 1011.

141. *Id.*

of ethics prevented him from obeying his client's wishes to argue "lingering doubt," prevented him from disobeying his client's wishes by presenting mitigation, and required him to air matters of defense strategy in open court.

When it came time for final argument to the jury, a dispute arose as to whether the attorney or the defendant would address the jury, and the court pressed Waterhouse to decide whether he wanted counsel to present the argument. Saying he did not want counsel to make the argument, Waterhouse made the final argument himself. Relying on *Fitzpatrick v. Wainwright*,[142] the supreme court held that, under the circumstances, the requirements of *Faretta* were met, notwithstanding that there was no formal "*Faretta* hearing."[143]

C. *Conflict of Interest*

Waterhouse also raised a claim that the dispute between himself and counsel constituted a conflict of interest. The supreme court disposed of this argument as follows:

> Although a conflict of interest may be present where counsel's interests are inconsistent with those of his client, there was no such conflict here. It is apparent from the record that counsel's interest was in presenting the best possible case for Waterhouse. Any conflict between them was attributable solely to Waterhouse's own contumacious behavior and not to any competing interest of his counsel.[144]

The court took no note of authorities which would indicate, for Sixth Amendment purposes, that a breakdown in the attorney-client relationship constitutes a conflict of interest.[145]

In another case, the court dealt with a conflict arising from a prior representation.[146] The *Castro* court ordered a new trial for Edward Castro because the trial court refused to disqualify the local state attorney's office from the case in the face of the defendant's claim of conflict of interest. The conflict arose when Tatti, who had represented Castro at his first trial but was later hired by the state attorney, spoke with the attorney prosecuting

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142. 800 F.2d 1057 (11th Cir. 1986).

143. *Waterhouse*, 596 So. 2d at 1064 (before allowing self-representation, trial court must advise defendant of perils of self-representation and obtain knowing and intelligent waiver of right to counsel).

144. 596 So. 2d 1008, 1015 (Fla. 1992).

145. *See* United States v. Walker, 915 F.2d 480, 483-85 (9th Cir. 1990) (citing cases).

146. Castro v. State, 597 So. 2d 259 (Fla. 1992).

Castro about motions filed by the defendant's new attorney. The trial court accepted, but the supreme court rejected, the state's contention that there was no conflict because Tatti and the prosecutor "merely discussed legal authorities."[147] "A lawyer's ethical obligations to former clients generally requires disqualification of the lawyer's entire law firm where any potential for conflict arises," the court wrote, adding that the "judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate impropriety, but even the appearance of impropriety as well."[148] Significantly absent from the court's discussion was any mention of *Webb v. State*[149] and *Bouie v. State*,[150] in which the court had found no violation of the Sixth Amendment where the defense attorneys cross-examined state witnesses whom they had previously represented.[151]

In *Brown v. State*,[152] the court held that the trial court had failed to conduct an evidentiary hearing on Larry Brown's post-conviction claim, since his attorney had a conflict of interest in cross-examining the state's chief witness, a former client.

In *Breedlove v. Singletary*,[153] the court held that McArthur Breedlove was not barred from raising a claim of ineffective assistance of trial counsel on a successor post-conviction motion, where the same trial counsel had represented him on the first post-conviction. The court reasoned that counsel on the first post-conviction motion "was unable to assert a claim of ineffective assistance of trial counsel," so that the court would "choose to overlook the procedural default."[154]

D. *Rights to Counsel*

In effect, there are two rights to counsel at play in the criminal law. The United States Supreme Court has recognized a Fifth Amendment right

147. *Id.* at 260.
148. *Id.*
149. 433 So. 2d 496 (Fla. 1983).
150. 559 So. 2d 1113 (Fla. 1990).
151. *Compare Webb*, 433 So. 2d at 496, *and Bouie*, 559 So. 2d at 1113, *with* Wheat v. United States, 486 U.S. 153 (1988) (attorney is "ethically unable" to cross-examine prior client who testifies for government); Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir.1987), *cert. denied*, 488 U.S. 934 (1988) ("An attorney who cross-examines a former client inherently encounters divided loyalties."); *and* United States v. Moscony, 927 F.2d 742, 750 (3d Cir. 1991) (holding similar to that reached in *Lightbourne*).
152. 596 So. 2d 1026 (Fla. 1992).
153. 595 So. 2d 8 (Fla. 1992).
154. *Id.* at 11.

to deal with the police through counsel and a Sixth Amendment right to counsel with respect to criminal proceedings.[155] The Sixth Amendment right does not attach until "adversary judicial proceedings" have begun.[156] It is not always clear what constitutes the commencement of "adversary judicial proceedings." In *Coleman v. Alabama*,[157] the Court held that the right to counsel attached at a preliminary hearing roughly analogous to a Florida first appearance hearing.[158] In *Moran v. Burbine*,[159] however, the Court strongly suggested that the right does not attach until after formal charges have been filed. In *Keen v. State*,[160] the court relied on *Moran* in writing that the right does not attach until formal charges are filed. Adding to the confusion is rule 3.111(a), Florida Rules of Criminal Procedure, which provides that the right to appointment of counsel attaches "when [a person] is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest."

The court took these matters up in the non-capital case of *Traylor v. State*,[161] ruling that under article 1, section 16 (right to counsel in criminal proceedings) and section 2 (equal protection) of the state constitution, the right to appointed counsel attaches "as provided in rule 3.111(c)," which is to say, when the defendant is formally charged or "as soon as feasible after custodial restraint, or at first appearance."[162] The court opined that "[a]s a general rule, assignment of counsel is feasible by the time of booking."[163] Furthermore, in *Owen v. State*,[164] a capital case, the court wrote that a first appearance hearing constitutes the commencement of "adversary judicial proceedings" for purposes of the Sixth Amendment right to counsel.[165] The court disapproved of *Keen* on this point.[166]

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155. *See* McNeil v. Wisconsin, 111 S. Ct. 2204 (1991) (invocation of Sixth Amendment right to counsel did not constitute invocation of Fifth Amendment right to counsel for *Miranda* purposes).
156. United States v. Gouveia, 467 U.S. 180, 192 (1984).
157. 399 U.S. 1 (1970).
158. FLA. R. CRIM. P. 3.131.
159. 475 U.S. 412, 431 (1986).
160. 504 So. 2d 396, 400 (Fla. 1987).
161. 596 So. 2d 957 (Fla. 1992).
162. *Id.* at 970 (footnotes omitted).
163. *Id.* at 970 n.38; *see* FLA. R. CRIM. P. 3.111(c).
164. 596 So. 2d 985 (Fla. 1992).
165. *Id.* at 987-89.
166. *Id.* at 990.

IV. APPELLATE REVIEW

"How can you go through an analysis without analyzing anything?"[167] "[T]here is a sense in which the court did not review Parker's sentence at all."[168] Florida appellate review of death sentences has raised many questions.[169] At various times, the court has concluded that its prior practices were erroneous,[170] and members of the court have from time to time spoken of the court's practice in rather harsh terms.[171] Although section 921.141 of the Florida Statutes has existed for twenty years, fundamental questions remain concerning appellate review.

A. *Effect of the Error*

The primary question in determining whether a sentencing phase error was harmless is whether the court should only look at the effect of the error on the trial judge's sentencing decision, or must the court also look to the effect of the sentencing error on the jury.

There are cases in which the error could not have affected the jury. For example, when the judge improperly weighs evidence which the jury was unaware of, harmless error analysis focuses only on the effect the error

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167. Transcript of Oral Argument, Sochor v. Florida, 112 S. Ct. 2114, (No. 91-5843) (1992), at 36-37 (Souter, J.).

168. Parker v. Dugger, 111 S. Ct. 731, 739 (1991).

169. *See* Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991) (Tjoflat, C.J., concurring); Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263 (1986).

170. *See* Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989) (stating that court's previous treatment of override sentences was incorrect); Farinas v. State, 569 So. 2d 425 (Fla. 1990) (disapproving prior line of cases regarding coldness circumstance); Rogers v. State, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988) (condemning prior applications of coldness circumstance).

171. *See* Kennedy v. Singletary, 599 So. 2d 991 (Fla. 1992) (Kogan, J., specially concurring) (stating that recent decisions of United States Supreme Court "call into question the methods the [Supreme Court of Florida] used in [Mr. Kennedy's] direct appeal"); Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991) (Kogan, J., specially concurring) (terming "highly suspect" court's prior treatment of nonstatutory mitigating evidence, and writing that court had "changed the rules retroactively," and that its prior cases "reveal a serious injustice" and had "disingenuously" misstated the law); Stewart v. State, 549 So. 2d 171 (Fla. 1989) (Barkett, J., dissenting) (the "terrible fact situation" in a previous case had resulted in an improper "loosening" of the statutory requirement that the sentencing order be entered at the time of sentencing).

had on the judge.[172] However, the more common situation involves the error infecting both the jury and non-jury parts of the sentencing procedure.

The supreme court has never come to terms with this issue; sometimes it looks to the effect of the error on the jury,[173] sometimes it looks only to the effect on the judge.[174] Other times the court looks at the effect on both.[175] The court seems to have forgotten about the "*Elledge* rule."[176]

Commonly, the prosecutor urges the jury to consider an aggravating circumstance, the judge instructs the jury on the circumstance, and the judge places it in the sentencing order, yet the supreme court finds that the evidence does not support the circumstance. Justice Kogan has set out the argument that, in such a case, harmless error analysis must include a consideration of the effect that the use of the circumstance would have had on the jury:

> Second, and more importantly, in *Kennedy*, the Court completely neglected to analyze the impact of the trial court's instructions on the penalty phase jury. This appellate omission is serious because, under Florida law, the jury's recommendation of life or death carries great weight and must be accepted by the trial court unless virtually no reasonable person could concur. Thus, in a practical sense, a Florida penalty phase jury shares discretion with the trial court in determining the sentence, because the trial court can reject the jury's determination only in a very narrow class of cases. If the jury is instructed or

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172. Dailey v. State, 594 So. 2d 254 (Fla. 1991) (judge wrongly considered evidence he had heard in co-defendant's trial); Delap v. Dugger, 440 So. 2d 1242 (Fla. 1983), *cert. denied*, 467 U.S. 1264 (1984); *cf.* Cochran v. State, 547 So. 2d 928 (Fla. 1989) (error to override life verdict on basis of evidence of which jury was unaware).

173. *See, e.g.*, Omelus v. State, 584 So. 2d 563 (Fla. 1991) ("We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence."); Stewart v. State, 558 So. 2d 416 (Fla. 1990); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.").

174. *See, e.g.*, Wickham v. State, 593 So. 2d 191 (Fla. 1991); Santos v. State, 591 So. 2d 160 (Fla. 1991); Capehart v. State, 583 So. 2d 1009 (Fla. 1991) (decided same day as *Omelus*), *cert. denied*, 112 S. Ct. 955 (1992); Young v. State, 579 So. 2d 721 (Fla. 1991).

175. *See, e.g.*, Herring v. State, 580 So. 2d 135 (Fla. 1991); Hill v. State, 515 So. 2d 176 (Fla. 1987).

176. Elledge v. State, 346 So. 2d 998 (Fla. 1977), *cert. denied*, 459 U.S. 981 (1982) (where trial court has at least impliedly considered nonstatutory mitigating circumstances, trial court's use of improper aggravating circumstance requires new jury sentencing proceedings).

> harangued on factors that could not exist as a matter of law—as happened here—then the thumb remains firmly pressed on "death's side of the scale." [177]

The Supreme Court confronted, but did not decide, this issue in *Sochor v. Florida*.[178] Dennis Sochor strangled a woman who resisted his efforts to rape her. The trial court instructed the jury on the coldness factor, as well as three others.[179] Finding all four aggravating circumstances, the trial court upheld a death sentence recommendation from the jury.[180] Although, the state supreme court found that the trial court had erred in finding the coldness circumstance, it affirmed the death sentence.[181] The Supreme Court reversed, finding that the state court erred by affirming without either reweighing the sentencing circumstances or conducting a harmless error analysis[182] as required by *Clemons v. Mississippi*.[183] But the Court stopped short of deciding whether the harmless error analysis must consider the effect of the improper circumstance on the jury's decision-making.

Justice Souter, writing for the Court, held that Sochor had failed to show that the presentation of the coldness factor to the jury violated the Eighth Amendment because, the evidence being insufficient to support it, and the jury not having rendered a special verdict finding it, the Court would not presume that the jury had employed the circumstance.[184] The Court did hold, however, that the trial court's finding of the factor violated the Eighth Amendment, so that appellate reweighing or harmless error analysis was required.[185] Recognizing that the state court does not reweigh circumstances on appeal,[186] the Court held that the state court's proportionality analysis, with respect to Sochor's sentence, did not constitute a harmless error analysis which would satisfy the Eighth Amendment.[187] The Court concluded that, to affirm the sentence, the state court would have

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177. Kennedy v. Singletary, 599 So. 2d 991, 994 (Fla. 1992) (Kogan, J., concurring) (quoting Stringer v. Black, 112 S. Ct. 1130, 1137 (1992)).
178. 112 S. Ct. 2114 (1992).
179. *Id.* at 2118.
180. *Id.*
181. *Id.*
182. *Id.* at 2123.
183. 494 U.S. 738 (1990).
184. *Sochor*, 112 S. Ct. at 2122.
185. *Id.* at 2123.
186. *See* Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).
187. *Id.*

to determine that the trial court's use of the coldness factor did not "contribute" to the sentence obtained.[188] The Court did not elaborate on what sort of harmless error analysis would be necessary, except by reference to prior harmless error cases.[189]

In her concurrence, Justice O'Connor wrote that harmless error analysis would have to entail a detailed explanation based on the record, rather than a "cryptic" one-sentence conclusion that the error was harmless.[190] Concurring in part and dissenting in part, Justice Stevens (joined by Justice Blackmun) wrote that the harmless error analysis must include consideration of the error in instructing the jury on the coldness circumstance.[191]

Espinosa v. Florida,[192] clarifies matters. There, the Court summarily rejected the state's argument that a vague jury instruction on the heinousness factor did not render the defendant's death sentence suspect because the judge is the ultimate sentencer in Florida.[193] Noting that the Florida judge must place great weight on the penalty verdict, the Court reasoned that a defect in the penalty verdict procedure must indirectly affect the judge's sentencing decision.[194] The Court concluded: "We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."[195]

Consequently, *Espinosa* implies that, because errors affecting the jury indirectly affect the judge, harmless error analysis must include determination of the effect of the error on the penalty verdict. Accordingly, a judge's finding of no mitigation must be set aside, and the appellate court must examine the entire record of mitigation presented to the jury.

B. *The Cryptic Harmless Error Analysis*

Generally, the court's harmless error analysis is hard to follow. *Yates* teaches that a detailed analysis is necessary before a court may say that a

188. *Id.*

189. *Id.*; *see* Chapman v. California, 386 U.S. 18, 24 (1967); Yates v. Evatt, 111 S. Ct. 1884, 1893-94 (1991).

190. *Sochor*, 112 S. Ct. at 2123-24; *see also* Clemons v. Mississippi, 494 U.S. 738, 753 (1990).

191. *Id.* at 2130.

192. 112 S. Ct. 2926 (1992).

193. *Id.* at 2928.

194. *Id.*

195. *Id.* at 2929.

constitutional error did not "contribute" to the ultimate result.[196] *Sochor* teaches that *Yates* applies where a capital sentencing factor has been misapplied.[197] *Clemons* teaches that a "cryptic" holding of harmless error is insufficient.[198]

However, the Florida Supreme Court frequently makes findings of harmless error without applying the detailed analysis required by the United States Supreme Court.[199] Usually, the court's harmless error analysis is often limited to a few "cryptic" sentences: "We do not believe that the erroneous consideration of the aggravating factor that the murder was especially heinous, atrocious, or cruel prejudicially affected the weighing process. Therefore, the error was harmless beyond a reasonable doubt."[200]

In another case, the court concluded:

> The elimination of this aggravating circumstance does not eliminate any facts and circumstances that could appropriately be considered in the sentencing process in imposing the death penalty. Given the record and the other established aggravating circumstances, we find that the elimination of this circumstance would not have changed the sentence imposed in this case.[201]

In still yet another case, the Florida Supreme Court summarily concluded:

> Based on our examination of the record, however, we conclude that use of this evidence was harmless error. Given the nature and extent of other evidence in aggravation presented to the jury we conclude that its recommendation would have been unchanged. We similarly conclude that the trial court's sentence would have been the same because the aggravating circumstance concerning prior conviction of a violent felony was adequately supported by Owen's conviction for attempted first-degree murder in a third case.[202]

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196. 111 S. Ct. at 1897.

197. 112 S. Ct. at 2122-23.

198. 494 U.S. at 753.

199. Nor, for that matter, the test required by State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986) ("The test must be conscientiously applied and the reasoning of the court set forth for the guidance for all concerned and for the benefit of further appellate review.").

200. Watts v. State, 593 So. 2d 199, 204 (Fla. 1992).

201. Happ v. State, 596 So. 2d 991, 997 (Fla. 1992).

202. Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). The evidence improperly admitted was that Mr. Owen had brutally murdered a young baby-sitter. *Cf.* Johnson v. Mississippi, 486 U.S. 578, 590 (1988) (state court "plainly justified" in declining to apply harmless error

In *Waterhouse v. State*,[203] the court reduced its analysis to essentially one sentence: "Nevertheless, we find beyond a reasonable doubt that the elimination of these two aggravating factors would not have resulted in a life sentence in light of the remaining valid aggravating circumstances and the lack of mitigating circumstances."[204]

Shortly after the Supreme Court handed down *Sochor*, the state court again mingled proportionality and harmless error in *Coleman v. State*.[205] The court struck one of five aggravating circumstances found by the trial court (i.e., the prevent arrest aggravator), but found that the death sentence was proportionate to the crimes.[206] The court then wrote: "We reach this conclusion, even though we have struck one of the aggravators found by the trial court, because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four remaining aggravators. Any error was harmless."[207]

C. *Mitigation and Appellate Review*

Another question pertains to appellate review of findings respecting mitigation. As noted in the penultimate section of this article, the supreme court's decisions do not show a consistent pattern. Particularly confounding is the court's application of retroactivity principles.

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analysis to jury's improper consideration of collateral murder committed by defendant).

203. 596 So. 2d 1008 (Fla. 1992).

204. *Id.* at 1017 (footnote omitted); *see also* Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Bassett v. State, 449 So. 2d 803, 808 (Fla. 1984).

205. 17 Fla. L. Weekly S375, S377 (June 25, 1992).

206. *Id.* at S376. The defendant, Coleman, brutally murdered four people who had stolen money and drugs from him. *Id.* at S375. Coleman tied the victims up with electrical cords, raped two of the female victims, and then slashed and shot the five prisoners—one of which survived after being left with her throat slashed three times and having been shot in the head. *Id.* at S375-76.

207. *Id.* at S377 (citing Holton v. State, 573 So. 2d 284 (Fla. 1990), *cert. denied*, 111 S. Ct. 2275 (1991); Bassett v. State, 449 So. 2d 803 (Fla. 1984)). The harmless error analysis in *Holton* was three sentences long. 573 So. 2d at 292. The analysis in *Bassett* was only four sentences long. 449 So. 2d at 808. The court wrote in *Bassett* that "'we can know' that the result of the weighing process would not have been different had the one impermissible factor not been considered." Later, the court was less sure, remanding to the trial court for a new sentencing hearing before a new jury. Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989). Bassett was eventually sentenced to life imprisonment. *See also* State v. Bassett, 557 So. 2d 76, 77 (Fla. 5th Dist. Ct. App. 1990).

Rogers v. State,[208] provides that the trial court must consider and weigh all mitigating matters in the record proffered by the defendant.[209] *Campbell v. State*,[210] reiterates the requirements of *Rogers*.[211] *Nibert v. State*,[212] repeats the requirement as stated in *Campbell* and *Rogers*.[213]

Since the court applied *Campbell* in *Nibert*,[214] there would seem to be no problem in applying *Campbell* to other cases pending on direct appeal at the same time. However, in *Gilliam v. State*,[215] the court refused to apply *Campbell* because the order sentencing Burley Gilliam to death was entered before *Campbell* was decided.[216] The court stated that *Campbell* was but an "evolutionary refinement" not subject to retroactive application under *Witt v. State*.[217] *Witt* involved retroactive application of decisions to *post-conviction* proceedings, and *Gilliam* gives no clue as to why its bar should apply to a case pending on direct review. Of course, the sentencing order in *Nibert* was also entered before *Campbell* was decided, but *Gilliam* makes no mention of *Nibert*. In *Cook v. State*,[218] decided the same month as *Gilliam*, the court did apply *Campbell*.[219] Such arbitrary application of retroactivity principles gives rise to serious equal protection issues.[220]

Cases decided during the survey period add to the confusion. In *Dailey v. State*,[221] reversing the death sentence on other grounds, the Florida Supreme Court suggested that the trial court follow *Campbell* on remand,[222] and noted that the requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court.[223] In *Henry v. State*,[224] the court relied on *Gilliam* in

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208. 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).
209. *Id.* at 534 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).
210. 571 So. 2d 415 (Fla. 1990).
211. *Id.* at 419.
212. 574 So. 2d 1059 (Fla. 1990).
213. *Id.* at 1061-62.
214. *Nibert*, 574 So. 2d at 1061.
215. 582 So. 2d 610 (Fla. 1991).
216. *Id.* at 612.
217. *Id.*; *see Witt*, 387 So. 2d 922, 929 (Fla. 1990).
218. 581 So. 2d 141 (Fla. 1991).
219. *Id.* at 144.
220. *See* Myers v. Ylst, 897 F.2d 417, 420 (9th Cir. 1990); Griffith v. Kentucky, 479 U.S. 314, 322-23, 327-28 (1987).
221. 594 So. 2d 254 (Fla. 1991).
222. *Id.* at 259.
223. *Id.* (citing Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma 455 U.S. (1982)).
224. 586 So. 2d 1033 (Fla. 1991), *cert. granted and vacated*, 112 S. Ct. 3021 (1992).

refusing to apply *Campbell*.[225] In *Santos v. State*,[226] the court applied *Campbell*, stating that *Campbell* was but a continuation of *Rogers*.[227] The court noted: "The requirements announced in *Rogers* and continued in *Campbell* were underscored by the recent opinion of the United States Supreme Court . . . ."[228] In *Maxwell v. State*,[229] the court applied *Nibert* retroactively in a *post-conviction* case.[230]

Similarly, the court has refused to apply *Parker v. Dugger*,[231] itself a post-conviction case, retroactively to a successor post-conviction case. In *Francis v. Barton*,[232] the court wrote that *Parker* and like cases were "evolutionary refinements, rather than major constitutional changes, in the law and do not require retroactive application in postconviction proceedings."[233] The court apparently forgot about this "evolutionary refinement" analysis in *Santos v. State*.[234]

D. *Proportionality Cases*

Proportionality cases are also a source of some controversy. In *Fitzpatrick v. State*,[235] the Supreme Court of Florida found the jury's recommendation of the death sentence disproportionate.[236] The court relied on life verdict cases in making its proportionality analysis.[237] In *Hitchcock v. State*,[238] the court declined to use life verdict cases when conducting a proportionality analysis in its consideration of the death penalty recommended by the jury.[239]

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225. *Id.* at 1037 n.12.
226. 591 So. 2d 160 (Fla. 1991).
227. *Id.* at 164.
228. *Id.* (citing Parker v. Dugger, 111 S. Ct. 731 (1991)).
229. No. 77138, 1992 WL 140994, at *1 (Fla. June 25, 1992).
230. *Id.*; *see Nibert*, 574 So. 2d 1059, 1062 (Fla. 1990).
231. 111 S. Ct 731 (1991).
232. 581 So. 2d 583 (Fla.), *cert. denied*, 111 S. Ct. 2879 (1991).
233. *Id.* at 584.
234. 591 So. 2d 160 (Fla. 1991).
235. 527 So. 2d 809 (Fla. 1988).
236. *Id.* at 811.
237. *Id.*
238. 578 So. 2d 685 (Fla. 1990).
239. *Id.* at 693.
The cases Hitchcock relies on are distinguishable, being primarily jury override cases. *See, e.g.*, Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Welty v. State, 402 So. 2d 1159 (Fla. 1981). For cases dealing with domestic disputes, see Garron v. State, 528 So. 2d 353 (Fla. 1988); Wilson v. State, 493 So. 2d 1019

Cases decided during the survey period show some confusion on this point. In *Watts v. State*,[240] the Supreme Court of Florida rejected Tony Watts' argument that his death sentence was disproportionate when compared to the life sentence ordered in *Cochran v. State*, writing that his reliance on that case was "misplaced because *Cochran* was an override of a jury recommendation of life imprisonment which involved a wholly different legal principle."[241] Justice Kogan wrote in dissent that Mr. Watts' sentence was disproportionate in light of *Cochran*, noting that the court had relied on life verdict cases in its proportionality analysis in *Fitzpatrick*.[242] In *Coleman v. State*,[243] a case involving a life recommendation, the court relied on death recommendation cases in rejecting Michael Coleman's argument that his death sentence was disproportionate.

V. THE GUILT VERDICT

The Supreme Court of Florida has rejected the argument that, in capital cases, the trial court must submit to the jury special verdicts specifying whether the defendant is guilty of first degree murder by premeditated design or first degree felony murder. The case law derives from *Brown v. State*,[244] where the court wrote:

> We also disagree with Brown's argument that the jury should have been provided with special verdict forms which would have indicated whether the first-degree murder conviction was based upon premeditated murder or felony murder. Neither constitutional principles nor rules of law or procedure require such special verdicts in capital cases. The sentencing and reviewing courts can determine that a defendant may not constitutionally receive the death penalty where that defendant "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take

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(Fla. 1986). For cases with few valid aggravating circumstances and considerable mitigating evidence, see Songer v. State, 544 So. 2d 1010 (Fla. 1989).

240. 593 So. 2d 198 (Fla. 1992).

241. *Id.* at 205.

242. *Id.* at 206.

243. 17 Fla. L. Weekly S375 (Fla. June 25, 1992).

244. 473 So. 2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038 (1985), *rev'd in part*, 596 So. 2d 1026 (Fla. 1992) (reversing the denial of post-conviction relief). Two earlier cases, James v. State, 453 So. 2d 786 (Fla. 1984) and Alvord v. State, 322 So. 2d 533 (Fla. 1975), which are sometimes mentioned in the case law, dealt with separate issues involving the penalty verdict.

place or that lethal force will be employed." The special jury verdict requested by Brown would not have resolved this question.[245]

Thus, the thrust of Mr. Brown's argument apparently was that the *Enmund* finding must be made by the jury in a special verdict.[246] The court has also rejected an argument that the lack of a special verdict as to the theory of guilt violated the defendant's right to a unanimous verdict.[247] Notwithstanding this body of case law, several questions remain open.

The first question pertains to the double jeopardy implications of the guilt verdict. In *Delap v. Dugger*,[248] the court held that the Double Jeopardy Clause barred application of the felony murder circumstance at Mr. Delap's retrial, where the trial court had found the evidence insufficient to support a felony murder conviction at the first trial.[249] It would seem to follow from *Delap* that where the jury has rejected a felony murder theory, then it would violate the Double Jeopardy Clause to apply the felony murder circumstance. Similarly, it would be improper to use the "cold, calculated, and premeditated"[250] circumstance where the jury has rejected a theory of murder by premeditated design.

In *Schad v. Arizona*,[251] the Court ruled that, based on the facts of the case, the Due Process Clause did not require special verdicts as to the theory of first degree murder accepted by the jury.[252] The Court specifically did not consider the effect of a lack of a special verdict on the penalty determination.[253] The plurality wrote at footnote nine, "[m]oreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision whether or not to impose the death penalty . . . goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction."[254] At footnote four of his dissent, Justice White

245. 473 So. 2d at 1265 (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)).
246. *Id.*
247. *See* Young v. State, 579 So. 2d 721 (Fla. 1991); Haliburton v. State, 561 So. 2d 248 (Fla. 1990).
248. 890 F.2d 285 (11th Cir. 1989).
249. *Id.* at 317.
250. FLA. STAT. § 921.141(5)(i) (1991).
251. 111 S. Ct. 2491 (1991).
252. *Id.* at 2504.
253. *Id.*
254. *Id.*

noted that "the disparate intent requirements of premeditated murder and felony murder have life-or-death consequences at sentencing."[255]

A case decided during the survey period indicates the important sentencing implications of a special penalty verdict. In *Breedlove v. Singletary*,[256] the jury found McArthur Breedlove guilty of first degree murder and he was sentenced to death.[257] He asserted on post conviction that his trial attorney had incompetently failed to develop mitigating evidence. The state countered that Mr. Breedlove had failed to show that the new evidence would have affected the sentencing decision. The supreme court rejected the state's argument:

> The State primarily argues that Breedlove has failed to demonstrate that any prejudice resulted even if his counsel was ineffective. However, it must be remembered that Breedlove's victim died from a single stab wound inflicted during the course of a burglary and that Breedlove acquired the weapon only after entering the house. The State conceded at the trial that this was a case of felony murder rather than premeditated murder. *A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated.* In the final analysis, we do not believe that the issue of ineffectiveness during the penalty phase can be resolved without an evidentiary hearing.[258]

Another issue pertains to the Jury Clause of the Florida Constitution. In *State v. Overfelt*,[259] the court wrote:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to

255. *Id.* at 2511 n.4; *see also* U.S. v. McNeese, 901 F.2d 585, 605-06 (7th Cir. 1990) (approving use of special verdicts where information sought is relevant to sentencing).
256. 595 So. 2d 8 (Fla. 1992).
257. *Id.* at 9.
258. *Id.* at 12 (emphasis added).
259. 457 So. 2d 1385 (Fla. 1984).

a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.[260]

The supreme court has not considered whether the Jury Clause analysis in *Overfelt* applies to capital sentencing.

VI. The Penalty Verdict

In recent years, the court has seldom affirmed override sentences,[261] and during the survey period it greatly enhanced the power of the life verdict, and, for double jeopardy purposes, accorded a life verdict the finality usually associated with verdicts of not guilty, as in *Wright v. State*.[262] Mac Ray Wright was convicted of first degree murder on evidence showing that he broke into his lover's house and shot her several times in the presence of their children as she tried to flee.[263] Although the jury recommended life imprisonment, the trial court imposed a death sentence.[264] The Florida Supreme Court reversed Mr. Wright's convictions for various reasons,[265] and reversed the death sentence under *Tedder v. State*.[266] It then went on to hold that the state constitution's Double Jeopardy Clause forbade the state from obtaining a death sentence on retrial.[267]

VII. "Victim Impact" Evidence and Argument

Section 921.141, Florida Statutes, sets forth those factors which may be presented to a jury in support of the prosecution's request for a

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260. *Id.* at 1387.

261. From 1986 through the end of the survey period, the court upheld only seven override sentences. For a general discussion of the jury's historical role in capital sentencing in Florida and statistics regarding override sentences see Michael Mello, *The Jurisdiction to do Justice: Florida's Jury Override and the State Constitution*, 18 Fla. St. U. L. Rev. 923 (1991).

262. 586 So. 2d 1024 (Fla. 1991).

263. *Id.* at 1026-27.

264. *Id.* at 1027.

265. *Id.* at 1029.

266. *Id.* at 1301; *see also Tedder*, 322 So. 2d 908, 910 (Fla. 1975) (improper to override life verdict unless facts suggesting death sentence are so clear and convincing that virtually no reasonable person could differ).

267. *Wright*, 586 So. 2d at 1032.

> recommendation of death. The suffering of the survivors is not relevant to any of the factors listed. The purpose of the death penalty statute as now drafted is to insulate its application from emotionalism and caprice. This Court has long condemned prosecutorial arguments which appeal to emotion rather than to reason. I can think of few arguments which are more calculated to arouse an intense emotional response in a jury than the graphic portrayal of the survivors' bereavement. I can imagine no set of facts on which this would be proper argument.[268]

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on the subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.[269]

Thus, the line is drawn. To what extent does state law, as set out by Justice Ehrlich, forbid the use of the evidence discussed in *Payne*? The supreme court has given no clear answer.

In *Payne*, the defendant murdered a woman and her pre-school daughter and attempted to murder her pre-school son. The prosecutor presented evidence and argument concerning the effect of the killing on the boy and on the woman's parents. The prosecutor focused on the incidents of the children's lives that would never occur because of the murders (the girl would never go to high school, would never be taken to the prom, would never play with her brother again; the boy would never be kissed by his mother or play with his sister or watch cartoons with her).[270] Overruling recent precedents,[271] the Supreme Court held that such evidence and argument did not violate the Eighth Amendment.[272]

In *Taylor v. State*,[273] decided the same day as *Payne*, the Supreme Court of Florida held improper an argument that was somewhat similar to the Tennessee prosecutor's argument.[274] In *Taylor*, the prosecutor argued

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268. Bush v. State, 461 So. 2d 936, 942 (Fla. 1984) (Ehrlich, J., concurring) (citations omitted).

269. Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (citations omitted).

270. *Id.* at 2603.

271. Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989).

272. *Payne*, 111 S. Ct. at 2609-11.

273. 583 So. 2d 323 (Fla. 1991).

274. *Id.* at 330.

to the jury that the defendant should be sentenced to death because, even in prison, he could laugh, cry, eat, read, and otherwise engage in life's activities, whereas the decedent could no longer do those things.[275] The court relied on its prior decision in *Jackson v. State*,[276] in which it wrote:

> We agree with Jackson's argument that the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations.[277]

During the survey period, the court generally dealt with victim impact evidence issues with terse statements that the error, if any, was harmless.[278] But in *Hodges v. State*,[279] the court explicitly discussed *Payne* and *Taylor*, differentiating between an argument that goes to the effect of the killing on the decedent's survivors and an argument that goes to the decedent's own loss of the power to enjoy life.[280] On appeal from his death sentence, George Hodges argued that testimony regarding the decedent's prosecution of him for indecent exposure and of his attempt to dissuade her from doing so, the decedent's sister breaking down in tears while testifying, and the prosecutor's final argument all violated *Booth v. Maryland*[281] and *South Carolina v. Gathers*.[282] Noting that *Payne* had overruled those cases, the supreme court rejected Mr. Hodges' arguments without discussion of whether state law allowed the use of victim impact evidence.[283] But it went on to hold that the prosecutor violated the

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275. *Id.* at 329.

276. 522 So. 2d 802 (Fla.), *cert. denied*, 488 U.S. 871 (1988).

277. *Taylor*, 583 So. 2d at 329, (quoting Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988)).

278. *See* Mann v. State, 603 So. 2d 1141 (Fla. 1992); Owen v. State, 596 So. 2d 985 (Fla. 1992) (trial judge stated he did not rely on victim impact statements in reaching sentencing decision); Watts v. State, 593 So. 2d 199 (Fla. 1992) (prosecutor argued in guilt phase that victim's wife's life would never be the same; error harmless as to guilt, defendant did not raise issue as to penalty); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Davis v. State, 586 So. 2d 1038 (Fla. 1991) (decedent's daughter asked judge to impose death sentence; error harmless), *vacated*, 112 S. Ct. 3021 (1992); Young v. State, 579 So. 2d 721 (Fla. 1991).

279. 595 So. 2d 929 (Fla. 1992).

280. *Id.* at 933.

281. 482 U.S. 496 (1987).

282. 490 U.S. 805 (1989).

283. Hodges v. State, 595 So. 2d 929, 933 (Fla. 1992).

teachings of *Taylor* and *Jackson* in arguing that the defendant could enjoy life's pleasures in prison, whereas the decedent could not.[284]

Coleman v. State,[285] involved a "reverse *Payne*" issue. Michael Coleman, a drug dealer who had killed persons who had stolen drugs and money from him, contended that the background of the victims mitigated his sentence.[286] The trial court determined that this and other factors advanced by Mr. Coleman "had not been established by the evidence or did not mitigate the enormity of Coleman's crimes."[287] The supreme court did not address this issue in affirming the death sentence, but one supposes that *Payne* authorizes defense argument and evidence vilifying the decedent. Finally, it is noteworthy that the Legislature has added the following to Florida Statute section 921.141, effective July 1, 1992:

> (7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, and the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.[288]

Although the statute makes such evidence admissible for the purposes of *Payne* it does not say how the evidence fits into the weighing of aggravating and mitigating circumstances. The Supreme Court has held that weighing states, such as Florida, must define their aggravating circumstances with some degree of precision.[289] Constitutional error occurs when the sentencer in a weighing state considers an improper or ill-defined aggravating circumstance.[290] One would be hard put to show that "the victim's

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284. *Id.* at 933-34.

285. 17 Fla. L. Weekly S375 (Fla. June 25, 1992).

286. *Id.* at 376; *cf.* Pardo v. State, 563 So. 2d 77 (1990) (former police officer claimed that murders of drug dealers were justified; no discussion of whether this could constitute mitigating circumstance).

287. *Coleman*, 17 Fla. L. Weekly at S376.

288. 1992 Fla. Sess. Law Serv. 92-81, § 1, 630 (West) (to be codified at FLA. STAT. § 921.141(7)).

289. *See* Stringer v. Black, 112 S. Ct. 1130, 1136 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988).

290. *See Stringer*, 112 S. Ct. at 1137 (discussing Barclay v. Florida, 463 U.S. 939 (1983)).

uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"[291] was a well-defined aggravating circumstance, and, in any event, section 921.141(7) does not make it into an aggravating circumstance. Thus, although the statute may be constitutional under *Payne* it may yet be unconstitutional under *Stringer v. Black* and like cases.

VIII. AVOIDING ARREST[292]

Except where the defendant has killed a law enforcement officer, this circumstance applies only where there is "strong proof of the defendant's motive [and it is] clearly shown that the dominant or only motive for the murder was the elimination of the witness. [The Florida Supreme Court has] also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest."[293] Notwithstanding these straightforward principles, the supreme court continues to have difficulty in explaining how the circumstance does or does not apply in cases involving rather similar facts.

In *Espinosa v. State*,[294] the evidence showed that Henry Espinosa and Mauricio Beltran-Lopez fought with Bernardo Rodriguez at the latter's home. In the struggle, they killed Mr. Rodriguez, and as a result, were convicted of second degree murder for his death.[295] They were also convicted of first degree murder and sentenced to death for the murder of Mrs. Rodriguez.[296] They then tried to murder the couple's daughter, Odanis. The Florida Supreme Court upheld application of the (5)(e) circumstance:

> We also find that the trial court had sufficient evidence to find that Teresa's murder was committed to avoid arrest since she could identify the defendants and had pleaded with them to leave, promising not to call the police, and since the defendants attempted to stab Odanis to death after she had seen them in the kitchen. The attempted murder of

291. FLA. STAT. § 921.141(7) (Supp 1992).

292. "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." FLA. STAT. § 921.141(5)(e) (1991).

293. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988) (citations omitted). The court has not explicated the difference between "strong proof" and "proof beyond a reasonable doubt."

294. 589 So. 2d 887 (Fla. 1991), *rev'd*, 112 S. Ct. 2926 (1992).

295. *Id.* at 889.

296. *Id.*

> Odanis can properly be considered in support of this aggravating factor since it was relevant to the defendants' intent during the same criminal episode.[297]

The court cited no cases in this discussion, and one can only speculate as to the distinction between *Espinosa* and the rather similar case of *Garron v. State*.[298]

Somewhat difficult to reconcile are decisions regarding use of the circumstance where the defendant has killed the decedent after committing a felony. In *Dailey v. State*,[299] the evidence was that James Dailey raped, stabbed, strangled and drowned a fourteen-year-old girl. The Florida Supreme Court disapproved application of the (5)(e) circumstance, although the only apparent motive for the murder was to cover up the rape, since others had seen Mr. Dailey with the girl.[300]

Similarly, the court disapproved use of the circumstance in *Geralds v. State*[301] and *Jackson v. State*.[302] In *Geralds*, the defendant tied a woman up and then killed her during the course of a burglary of her home.[303] Although the only apparent motive for the killing was to cover up the burglary, since the woman knew Mr. Geralds, the court speculated that perhaps the defendant killed the woman while she tried to escape, and struck the circumstance.[304]

Jackson involved the deaths of three adults and two pre-schoolchildren. The adults died of gunshot wounds and the children died of smoke inhalation when the car containing all the bodies was set on fire.[305] A co-defendant testified for the state that Mr. Jackson committed the murders.[306] In addition, Mr. Jackson's estranged wife testified that both Mr. Jackson and the co-defendant put the victims into a car, after which she heard "popping sounds."[307] She further testified that the co-defendant returned, urging Mr.

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297. *Id.* at 894.
298. 528 So. 2d 353 (Fla. 1988) (improper to apply circumstance where defendant shot step-daughter while she was telephoning police to report murder of her mother).
299. 594 So. 2d 254 (Fla. 1991).
300. *Id.* at 259.
301. 601 So. 2d 1157 (Fla. 1992).
302. 599 So. 2d 103 (Fla. 1992).
303. *Geralds*, 601 So. 2d at 1158.
304. *Id.* at 1163.
305. *Jackson*, 599 So. 2d at 106.
306. *Id.*
307. *Id.*

Jackson to hurry, after which she then heard an explosion.[308] Mr. Jackson denied involvement in the homicides.[309] Relying on *Perry*, the supreme court took exception to the trial court's finding that the (5)(e) circumstance "may well apply" to the children's murders.[310]

Seemingly contrary to these cases is *Henry v. State*.[311] Robert Henry, a store employee, tied up one co-worker and bludgeoned another before killing both of them during the course of a robbery.[312] The Florida Supreme Court upheld use of the (5)(e) circumstance:

> Henry disabled both of the victims, one by tying her up and the other by a blow to the head, and could have effected the robbery without killing them. The victims knew Henry, however, and, even though one survived long enough to identify him, the evidence supports finding that Henry intended to eliminate these witnesses to prevent arrest.[313]

Additionally, in *Preston v. State*,[314] the defendant, after robbing a convenience store, took the store clerk to a remote location and stabbed her to death.[315] The court approved use of the circumstance on resentencing, notwithstanding that the circumstance had not been found at the original sentencing proceeding.[316] After rejecting Mr. Preston's double jeopardy argument, the court wrote on the merits:

> We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was abducted from the scene of the crime and transported to a different location where he or she was then killed. The only reasonable inference to be drawn from the facts of this case is that Preston kidnapped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime.[317]

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308. *Id.*
309. *Id.*
310. *Jackson*, 599 So. 2d at 109. "There is no direct evidence of Jackson's motive for killing the two children, and the circumstantial evidence was insufficient to prove that Jackson killed the children to eliminate them as witnesses." *Id.*
311. 586 So. 2d 1033 (Fla. 1991), *vacated*, 112 S. Ct. 3021 (1992).
312. *Id.* at 1035.
313. *Id.* at 1038.
314. 17 Fla. L. Weekly S252 (April 16, 1992).
315. *Id.*
316. *Id.* at S254.
317. *Id.* (citations omitted); *see also* Durocher v. State, 596 So. 2d 997 (Fla. 1992) (circumstance upheld where defendant said he killed store clerk because "that way the police

IX. COLD, CALCULATED AND PREMEDITATED[318]

Trial courts misapply this circumstance more frequently than any other.[319] Perhaps this is because the Florida Supreme Court has never been very clear about the outer reaches of the circumstance. It has written that the circumstance "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive."[320] The court has added to this fuzzy definition the requirement that the "calculated" element entails "a careful plan or prearranged design to kill . . . ."[321] However, trial courts have gotten little direction from this refinement.

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could not pin [the robbery] on me"); *cf.* Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) (defendant, who raped, bludgeoned, stabbed and drowned a woman, told police that he killed the woman in berserk frenzy; error to apply avoid arrest circumstance).

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

319. During the survey period, the circumstance was struck eleven times: Thompson v. State, 17 Fla. L. Weekly S342 (June 4, 1992); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Gore v. State, 599 So. 2d 978 (Fla. 1992); Happ v. State, 596 So. 2d 991 (Fla. 1992); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Dailey v. State, 594 So. 2d 254 (Fla. 1991); Santos v. State, 591 So. 2d 160 (Fla. 1991); Bedford v. State, 589 So. 2d 245 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991). The court affirmed application of the circumstance in fifteen cases: Corbett v. State, 602 So. 2d 1240 (Fla. 1992); Maharaj v. State, 597 So. 2d 786 (Fla. 1992); Owen v. State, 596 So. 2d 985 (Fla. 1992); Durocher v. State, 596 So. 2d 997 (Fla. 1992); Wike v. State, 596 So. 2d 1020 (Fla. 1992); Hodges v. State, 595 So. 2d 929 (Fla. 1992); Dougan v. State, 595 So. 2d 1 (Fla. 1992); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991); Wickham v. State, 593 So. 2d 191 (Fla. 1991), *cert. denied*, 112 S. Ct. 3003 (1992). Gaskin v. State, 591 So. 2d 917 (Fla. 1991), *vacated*, 112 S. Ct. 3022 (1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Cruse v. State, 588 So. 2d 983 (Fla. 1991); Sireci v. State, 587 So. 2d 450 (Fla. 1991); Henry v. State, 586 So. 2d 1033 (Fla. 1991), *vacated*, 112 S. Ct. 3021 (1992); Davis v. State, 586 So. 2d 1038 (Fla. 1991), *vacated*, 112 S. Ct. 3021 (1992). Thus the trial courts misapplied the circumstance in over 40% of the survey period cases.

Such "confusion in lower courts is evidence of vagueness which violates due process." Hermanson v. State, 604 So. 2d 775, 780 (Fla. 1992) (citing United States v. Cardiff, 344 U.S. 174 (1952)).

320. *See, e.g.*, McCray v. State, 416 So. 2d 804, 807 (Fla. 1982).

321. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

A. *Felony Murder Errors*

Errors often arise when the murder occurs during the course of a well-planned felony. *Gore v. State*[322] and *Geralds v. State*[323] include some instructive analysis. In *Gore*, the defendant took a woman to a remote area where he raped and killed her.[324] Disapproving application of the (5)(i) circumstance, the court wrote:

> To establish the heightened premeditation necessary for a finding of this aggravating factor, the evidence must show that the defendant had "a careful plan or prearranged design *to kill.*" Here, the evidence established that Gore carefully planned to gain Roark's trust, that he kidnapped her and took her to an isolated area, and that he ultimately killed her. However, given the lack of evidence of the circumstances surrounding the murder itself, it is possible that this murder was the result of a robbery or sexual assault that got out of hand, or that Roark attempted to escape from Gore, perhaps during a sexual assault, and he spontaneously caught her and killed her. There is no evidence that Gore formulated a calculated plan to kill Susan Roark. We therefore conclude that the State has failed to establish the existence of this aggravating circumstance beyond a reasonable doubt.[325]

In *Geralds*, the defendant tied a woman up during the course of a burglary and then beat and stabbed her to death. Reversing the trial court's use of the (5)(i) circumstance, the court wrote:

> The State contends that the evidence at trial established more than simple premeditation. The State argues that Geralds planned the crime for a week after interrogating the Pettibone children in the mall; Geralds ascertained when family members would be present in the house; Geralds brought gloves, a change of clothes, and plastic ties with him to the house; Geralds left his car at a location away from the house so that no one would see it or identify it later; Geralds bound and stabbed his victim.
>
> Geralds argues that this evidence establishes, at best, an unplanned killing in the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of

322. 599 So. 2d 978 (Fla. 1992).
323. 601 So. 2d 1157 (Fla. 1992).
324. *Jackson*, 599 So. 2d at 986.
325. *Id.* (citations omitted).

heightened premeditation. Geralds argues, first, that he allegedly gained information about the family's schedule to *avoid* contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned; third, there was evidence of a struggle prior to the killing; and fourth, the knife was a weapon of opportunity from the kitchen rather than one brought to the scene.

Thus, although one hypothesis could support premeditated murder, another cohesive reasonable hypothesis is that Geralds tied the victim's wrists in order to interrogate her regarding the location of money which was hidden in the house. However, after she refused to reveal the location, Geralds became enraged and killed her in sudden anger. Alternatively, the victim could have struggled to escape and been killed during the struggle.

In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. Consequently, the trial court erred in finding this aggravating circumstance.[326]

Likewise, in *Jackson v. State*,[327] the court rejected application of the circumstance to the murders of two pre-schoolers who died of smoke inhalation when the defendant set afire a car containing them and the bodies of three murdered adults.[328] The court found no premeditated intent to be present when "[t]here [was] no reason to conclude that, even if Jackson did intend to burn the children alive, this decision was anything but an afterthought."[329] On the other hand, the court upheld the circumstance where a robber killed a store clerk as an afterthought.[330] The analysis in *Durocher v. State* focussed on the defendant's efforts to cover up the crime by wiping off his fingerprints and locking the doors before leaving. In other cases, more elaborate cover-ups have not prevented the court from striking the circumstance.[331]

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326. 601 So. 2d at 1163-64 (emphasis added).
327. 599 So. 2d 103 (Fla. 1992).
328. *Id.* at 109.
329. *Id.*
330. *See* Durocher v. State, 596 So. 2d 997, 1001 (Fla. 1992) ("I was going to rob the man but after thinking about it I decided it would probably be better to go ahead and kill him then that way the police could not pin it on me.").
331. *See, e.g.*, Bedford v. State, 589 So. 2d 245 (Fla. 1991).

The court was less inclined to speculate in the defendant's favor in *Henry v. State*, when it upheld the circumstance where a store employee disabled and then murdered two fellow workers during a robbery.[332] The court distinguished this case in that:

> [T]he evidence also supports finding the murders to have been cold, calculated, and premeditated and heinous, atrocious, or cruel. Henry lured Harris into the restroom and persuaded her to let him tie her up and blindfold her under the guise of protecting her from the robbers. After hitting Thermidor in the head and stealing the money, he left, but then returned with a liquid accelerant which he poured on her and lit while she begged him not to. Only after setting Thermidor on fire did he return to Harris and do the same to her.[333]

B. *Domestic Dispute Errors*

Another area of misapplication involves murders arising from ongoing domestic disputes, which invariably involve histories of threats. Several years ago, the court approved application of the circumstance in a domestic murder committed by George Porter, Jr.[334] The sketchy evidence set out in the opinion shows that after making death threats, Mr. Porter went to the home of his estranged lover, Evelyn Williams, and murdered her and her gentleman friend. The court struck the heinousness circumstance because the evidence was "consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful."[335] Nevertheless, it found no error in application of the (5)(i) circumstance finding "that the murder was committed in a cold, calculated, and premeditated manner without any moral or legal justification."[336] The court stated:

> This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's

332. 586 So. 2d 1033 (Fla. 1991); *cf.* Way v. State, 496 So. 2d 126 (Fla. 1986); Hooper v. State, 476 So. 2d 1253 (Fla. 1985).
333. *Henry*, 586 So. 2d at 1038.
334. Porter v. State, 564 So. 2d 1060 (Fla. 1990).
335. *Id.* at 1063.
336. *Id.*

> motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance.[337]

The court has not followed *Porter*. In *Douglas v. State*,[338] the court disapproved application of the circumstance on resentencing in a case involving an emotional triangle. The Florida Supreme Court did so notwithstanding the fact that Howard Virgil Lee Douglas removed the decedent and his wife to a remote location, making clear his intent to kill one or both of them, and forced them to engage in sex before killing the man, and notwithstanding the fact that the court had previously ruled that the killing had occurred in a "cold, and calculated manner."[339] The court wrote: "The passion evidenced in this case, the relationship between the parties, and the circumstances leading up to the murder, negate the trial court's finding that this murder was committed in a 'cold, calculated, and premeditated manner without any pretense of moral or legal justification.'"[340]

During the survey period, the court followed *Douglas* in striking the circumstance in *Santos v. State*.[341] The evidence there was that Carlos Santos, after threatening his lover and purchasing a firearm, murdered her and their twenty-two month-old daughter after chasing them down the street.[342] Citing *Douglas*, the court wrote: "However, the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation."[343] It said of *Douglas*:

> Our opinion in *Douglas*, however, rested on our conclusion that the killing arose from violent emotions brought on by the defendant's hatred and jealousy associated with the love triangle. In other words, the murder in *Douglas* was a classic crime of heated passion. It was not "cold" even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection . . . only mad acts prompted by wild emotion.[344]

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337. *Id.* at 1064.
338. 575 So. 2d 165 (Fla. 1991).
339. *Id.* at 166-67 n.1 (citing Douglas v. State, 328 So. 2d 18, 22 (Fla.), *cert. denied*, 429 U.S. 871 (1976)).
340. *Douglas*, 575 So. 2d at 167 & n.1.
341. 591 So. 2d 160 (Fla. 1991).
342. *Id.* at 161.
343. *Id.* at 162; *cf.* Klokoc v. State, 589 So. 2d 219 (Fla. 1991).
344. *Santos*, 591 So. 2d at 163.

The court wrote further that the evidence tended "to negate any inference that his acts were accomplished through 'cold' deliberation."[345] The court followed *Santos* in *Richardson v. State*.[346] Tommy Richardson returned to the home of his estranged lover two days after threatening to kill her. He left a shotgun outside and went to the door. He forced himself inside when the woman cracked the door open, and he then produced a knife. The woman (who was drunk) advanced upon him, following him outside. He went back to the shotgun, and shot her dead as she approached him. In striking the (5)(i) circumstance, the court wrote: "While there is sufficient evidence to show calculation on Richardson's part, the record clearly establishes that the present murder was not 'cold.'"[347] After discussing *Santos*, the court concluded:

> Richardson's actions were spawned by an ongoing dispute with his girlfriend, one that involved an obvious intensity of emotion. The eye witnesses even testified that Richardson appeared angry, crazy, or mean when he shot Newton. Accordingly, the element of coldness, i.e., calm and cool reflection, is not present here. The factor of cold, calculated premeditation is not permissible.[348]

Thus, *Santos* and *Richardson* recognize the "coldness" element as separate from the "calculation" element. Although the court has in the past indicated that the state need only show "heightened premeditation," the calculation element, it has now made clear that the murder must also be the product of calm and cool reflection.

C. *Pretense of Moral and Legal Justification*

The court has written regarding the "pretense of moral or legal justification" exception to the circumstance:

> Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed "without any pretense of moral or legal justification" . . . . The state must prove this last element beyond a reasonable doubt, in addition to the other elements of this particular aggravating factor.
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> . . . .

345. *Id.*
346. 604 So. 2d 1107 (Fla. 1992).
347. *Id.* at S242.
348. *Id.*

> Our decisions in the past have established general contours for the meaning of the word "pretense" as it applies to capital sentencing. For instance, we have held that a "pretense" of moral or legal justification existed where the defendant consistently had made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony.
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> . . . .
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> On the other hand, we have upheld the trial court's finding that no pretense existed where the defendant's statements were wholly irreconcilable with the facts of the murder. Thus, we have upheld a finding that no pretense existed where the accused said the victim intended to kill him over a $15.00 debt, but where the evidence showed that the victim had never been violent or threatening and had been attacked by surprise and stabbed repeatedly.
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> . . . .
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> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.[349]

The court did nothing to clarify the meaning of this element during the survey period. For example, Michael Coleman and Timothy Robinson were drug dealers who murdered persons who had stolen their safe containing drugs and money.[350] Although this evidence would seem to show a pretense of justification under *Banda v. State*, Mr. Coleman's attorney did not challenge the application of the circumstance.[351] Mr. Robinson's attorney apparently did challenge it on unspecified grounds, but the court stated only that the circumstance was "fully supported by the record."[352]

Moreover, in *Klokoc v. State*,[353] the defendant also challenged the circumstance, claiming that there was a pretense of justification where he killed his daughter as a way of getting back at his wife. The trial court found that the evidence showed "a heightened premeditation on the part of [the] defendant as to constitute this slaying a dispassionate and calm

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349. Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), *cert. denied*, 489 U.S. 1087 (1989) (citations and footnotes omitted).

350. *See* Coleman v. State, 17 Fla. L. Weekly S375 (June 25, 1992); Robinson v. State, 17 Fla. L. Weekly, S389 (June 25, 1992).

351. *Coleman*, 17 Fla. L. Weekly at S375.

352. *Robinson*, 17 Fla. L. Weekly at S390.

353. 589 So. 2d 219 (Fla. 1991).

execution of the victim to achieve emotional gain for [the] defendant in knowing he had and would hurt his estranged wife, the mother of the victim, when she would become aware of this tragedy."[354] The supreme court rejected the claimed pretense of justification claim without discussion. Apparently no argument was made that the circumstance could not apply because of the emotional and domestic turmoil present in the case so that the killing was not "cold," and the supreme court did not reach that issue.[355]

X. HEINOUSNESS[356]

The United States Supreme Court's decisions in *Espinosa v. Florida*[357] and *Sochor v. Florida*,[358] settled some questions regarding this circumstance, but opened others. Some historical review is necessary prior to discussion of these cases.

In *State v. Dixon*,[359] the state court defined the circumstance as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.[360]

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354. *Id.* at 221.

355. Notwithstanding the trial court's finding that the murder was "a dispassionate and calm execution," the supreme court found that the trial court failed to consider in mitigation the defendant's mental state: "While this record reflects that this murder occurred when Klokoc was not in a heightened rage, it is unrefuted in this record that he was under extreme emotional distress." *Id.* at 222.

356. FLA. STAT. § 921.141(5)(h) (1991) ("The capital felony was especially heinous, atrocious, or cruel.").

357. 112 S. Ct. 2926 (1992).

358. 112 S. Ct. 2114 (1992).

359. 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

360. *Id.* at 9.

Thereafter, in *Proffitt v. Florida*,[361] the Supreme Court stated concerning the heinousness circumstance:

> [The Supreme Court of Florida] has recognized that while it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.[362]

Notwithstanding that *Proffitt* did not approve the entire *State v. Dixon* definitions, the state courts continued to use standard jury instructions which did not expressly limit the circumstance as required by *Proffitt*. Indeed, the state court considered the "conscienceless . . . pitiless . . . unnecessarily torturous" language to be surplusage. It adopted the following jury instructions of 1975, which give no hint of the *Proffitt* limitation: "that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel; 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others, pitiless."[363]

In 1981, the court went further still and adopted standard jury instructions eschewing even these definitions.[364] In *Pope v. State*, the Florida Supreme Court approved the 1981 instruction "as a definitive statement of the law," and specifically disapproved of the "conscienceless or pitiless" phrase on the ground that it improperly focused on the "mindset of the murderer," thus leading to improper application of the circumstance.[365] On the same ground, it disapproved of the "utter indifference to, or enjoyment

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361. 428 U.S. 242 (1976).

362. *Id.* at 255-56 (citations omitted).

363. Pope v. State, 441 So. 2d 1073, 1077 (Fla. 1984); *see also* Shell v. Mississippi, 111 S. Ct. 313 (1990) (the court ruled that a virtually identical jury instruction was unconstitutionally vague in violation of the Eighth Amendment); STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 78 (Fla. 1975).

364. *Pope*, 441 So. 2d at 1078 ("The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel."); *see also* FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 21 (1981).

365. 441 So. 2d 1077.

of, the suffering of others; pitiless" portion of the definition of "cruel" in the 1975 instruction.[366] In endorsing the 1981 instruction the court wrote: "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue."[367] Thus, the supreme court eliminated the construction that had made the circumstance constitutional under *Proffitt*.

Thereafter, the court repeatedly refused to declare the *Pope* instruction unconstitutional. For example, in *Smalley v. State*,[368] the supreme court denied a challenge to the instruction on the ground that the defendant had not raised the issue in the trial court, but then wrote that the circumstance is constitutional because the court consistently followed the *State v. Dixon* and *Proffitt* limitations.[369] Thus, the court avoided the jury instruction issue on the ground of procedural default, but went on to assert that the circumstance was constitutional as construed in *State v. Dixon*.[370] The court apparently forgot that in *Pope* it had read *State v. Dixon* out of the statute and jury instructions. Since *Smalley* did not purport to deal with the question of the constitutionality of the jury instruction, it would have seemed that another case would have to deal with that issue. However, in subsequent cases, the supreme court stated that *Smalley* had disposed of the issue.[371] Accordingly, the Florida Supreme Court, in *Espinosa v. State*,[372] affirmed Henry Espinosa's death sentence: "We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of *Smalley v. State* . . . ."[373]

In the meantime, the court adopted the following jury instruction in place of the *Pope* instruction:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter

366. *Id.*

367. *Id.* at 1078.

368. 546 So. 2d 720 (Fla. 1989).

369. *Id.* at 722. The court simply ignored *Pope* and like cases.

370. *Id.* Close below the surface of *Smalley* is the notion that accurate penalty phase jury instructions are not necessary because the trial judge will apply the "correct" construction of the circumstance.

371. *See, e.g.*, Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990); Brown v. State, 565 So. 2d 304 (Fla. 1990).

372. 589 So. 2d 887 (Fla. 1991), *vacated*, 112 S. Ct. 2926 (1992).

373. *Espinosa*, 589 So. 2d at 894; *see* Smalley v. State, 546 So. 2d 720 (Fla. 1989).

> indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.[374]

Henry Jose Espinosa and Mauricio Beltran-Lopez shot and stabbed a man, dragged his wife into a bedroom where they suffocated and stabbed her, and then they stabbed the couple's daughter, who survived. They were convicted of first degree murder in the woman's death, second degree murder in the man's death, and attempted murder for the assault on the child. Both received death sentences for the murder of the woman.[375] The trial court used the *Pope* heinousness instruction in the penalty proceedings. On certiorari review of the affirmance of Mr. Espinosa's death sentence, the Supreme Court summarily reversed, specifically rejecting the state's argument that, under *Smalley*, the judge is the sentencer so that an improper jury instruction does not affect the sentencing determination. The Court found the jury instruction unconstitutionally vague and concluded: "We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."[376]

Further, in *Schor v. Florida*,[377] Dennis Sochor, the defendant, strangled a woman who had refused to have sex with him. He argued to the Supreme Court that the application of the circumstance in his case violated the Eighth Amendment because the standard jury instruction was unconstitutionally vague and the trial court failed to use a proper narrowing construction in finding the circumstance.[378] The Court held that, because the state court had ruled the issue defaulted, it could not reach the jury instruction. As to the application of the circumstance by the trial court, Justice Souter wrote for the Court that, because the state court has uniformly applied the circumstance to strangulations, Mr. Sochor had no cause to complain that the circumstance was ill-defined.[379] In reaching this result, however, the

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374. *In re* Standard Jury Instructions Criminal Cases—No. 90-1, 579 So. 2d 75 (Fla. 1991). For an extensive discussion of this instruction and its history, *see* CUMFER, *supra* note 34, at 18.

375. Mr. Beltran Lopez's death sentence was affirmed at 583 So. 2d 1030 (Fla. 1991), *vacated*, 112 S. Ct. 3021 (1992).

376. 112 S. Ct. at 2929.

377. 112 S. Ct. 2114 (1992).

378. *Id.* at 2118-19.

379. *Id.* at 2121.

Court recognized that, in non-strangulation circumstances, the state court had been inconsistent in defining the circumstance:

> Sochor contends, however, that the State Supreme Court's post-*Proffitt* cases have not adhered to *Dixon*'s limitation as stated in *Proffitt*, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the *Dixon* language we approved in *Proffitt*, but has on occasion continued to invoke the entire *Dixon* statement quoted above, perhaps thinking that *Proffitt* approved it all.[380]

Espinosa and *Sochor* leave open questions regarding the 1991 jury instruction and the overall definition of the circumstance. The 1991 instruction incorporates the *State v. Dixon* definitions disapproved in *Shell* and *Sochor*, but does refer to the "conscienceless . . . pitiless . . . unnecessarily torturous" limitation approved in *Proffitt*. Thus, the question remains whether the new instruction is constitutional.

Another open question is the constitutionality of the circumstance itself when applied to non-strangulation cases. The *Sochor* decision strongly indicates that the state court's abandonment of the strict *Proffitt* definition will make the circumstance unconstitutional in such cases.[381] Cases involving death by gunshot will almost surely be affected. The cases in this area continue to be a muddle. Consider the following four cases:

> Wickham came out of a hiding place nearby and pointed a gun at Fleming. Fleming then turned and attempted to walk back to his car, but Wickham shot him once in the back. The impact spun Fleming around, and Wickham then shot Fleming again high in the chest. While Fleming pled for his life, Wickham shot the victim twice in the head.[382]

> Through a window he saw the Sturmfels sitting in their den. After circling the house a number of times, Gaskin shot Mr. Sturmfels twice through the window. As Mrs. Sturmfels rose to leave the room, Gaskin shot her and then shot Mr. Sturmfels a third time. Mrs. Sturmfels

380. 112 S. Ct. at 2121 (citing Porter v. State, 564 So. 2d 1060 (Fla. 1990), *cert. denied*, 111 S. Ct. 1024 (1991); Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989), *cert. denied*, 494 U.S. 1090 (1990); Lucas v. State, 376 So. 2d 1149, 1153 (Fla. 1979)).

381. *See Schor*, 112 S. Ct. at 2121.

382. Wickham v. State, 593 So. 2d 191, 192-93 (Fla. 1991), *cert. denied*, 112 S. Ct. 3003 (1992).

crawled into the hallway, and Gaskin pursued her around the house until he saw her through the door and shot her again. Gaskin then pulled out a screen, broke the window, and entered the home. He fired one more bullet into each of the Sturmfels' heads and covered the bodies with blankets. Gaskin then went through the house taking lamps, video cassette recorders, some cash, and jewelry.[383]

At around 11-11:30 p.m. on June 10, Wright tried to use his key to enter Ashe's house. When he could not get in, Wright went to a window and pushed out a screen. He called for Ashe's children to let him in, but they didn't respond. Finally, he knocked down the back door and the kitchen door, entered the house, and started shooting and cursing. Ashe, struck by the bullets, fell outside the house as she tried to flee. Ashe died of bleeding caused by four gunshot wounds, three of which could have been fatal.[384]

After shooting Derrick Moo Young, Maharaj questioned Duane Moo Young [Derrick's son] regarding the money. During this time, Derrick Moo Young crawled out the door and into the hallway. Maharaj shot him and pulled him back into the room. Shortly thereafter, Duane Moo Young broke loose and hurled himself at Maharaj, but Butler held him back. Then Maharaj took Duane Moo Young to the second floor of the suite where he questioned him again. Later, Butler heard one shot. Maharaj came downstairs and both he and Butler left the room. They both waited in the car in front of the hotel for Dames.[385]

The supreme court upheld application of the heinousness circumstance to the murder of Mrs. Sturmfels,[386] but found error in its application to the murders of Mr. Fleming,[387] Ms. Ashe,[388] and Duane Moo Young.[389] One would be hard put to explain how her murder differed from the others, and the court offered no explanation. Justice Barkett, the author of *Gaskin*, hedged her bets by applying an abuse of discretion standard in affirming the circumstance and writing that "even if this aggravating circumstance had not been found, we are persuaded that the trial court would have nevertheless

383. Gaskin v. State, 591 So. 2d 917, 918 (Fla. 1991), *vacated*, 112 S. Ct. 3022 (1992).
384. Wright v. State, 586 So. 2d 1024, 1026 (Fla. 1991).
385. Maharaj v. State, 597 So. 2d 786, 787 (Fla. 1992).
386. *Gaskin*, 591 So. 2d at 917.
387. *Wickman*, 593 So. 2d at 193-94.
388. *Wright*, 586 So. 2d at 1031.
389. *Maharaj*, 597 So. 2d at 791-92.

imposed the death penalty, as it did for the death of Mr. Sturmfels in the absence of this aggravating circumstance."[390]

In striking application of the circumstance in shooting cases, the court frequently opines that the state has failed to show that the defendant had a torturous intent.[391] However, in *Pope*, a gunshot case, the court wrote "nor is the defendant's mindset ever in issue."[392] Additionally, in *Hitchcock v. State*,[393] a strangulation case, the court stated that the defendant's intent was irrelevant. Thus, it remains to be seen whether the court will impose the "torturous intent" requirement in all non-strangulation cases.

XI. MITIGATION

"We have held that in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence."[394]

> 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 . . . .[395]

"Moreover . . . the trial court is under an obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory."[396] "Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."[397] "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion

390. 591 So. 2d at 921.

391. *See, e.g.*, Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990), *cert. denied*, 111 S. Ct. 1024 (1991); *Santos*, 591 So. 2d at 160 ; McKinney v. State, 579 So. 2d 80 (Fla. 1991).

392. 441 So. 2d at 1078.

393. 578 So. 2d 685, 692 (Fla. 1990), *vacated*, 112 S. Ct. 3020 (1992).

394. Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) (internal quotation marks omitted).

395. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (footnotes and citations omitted).

396. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

397. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

of the penalty phase."[398] "[E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process . . . The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor."[399]

Given these principles, one would imagine that it would be a rare case in which the trial court could legally find no mitigation. Yet the supreme court frequently lets findings of no mitigation pass with little or no comment,[400] and ambiguity remains regarding the finding and weighing of mitigation.

Rogers v. State[401] established rules to rationalize the procedure for finding and weighing mitigation. Noting that a finding of no mitigation may mean any of several different things,[402] the court set out a three-part procedure for finding and weighing aggravation.[403] First, the trial court "is to consider whether the facts alleged in mitigation are supported by the evidence." Second, it "*must* determine whether the established facts . . . may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Third it "*must* determine whether they are of sufficient weight to counterbalance the aggravating factors."[404] Notwithstanding these principles, both the trial courts and the supreme court continue to take a slapdash approach to mitigation.

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398. Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), *cert. denied*, 112 S. Ct. 3003 (1992).

399. Maxwell v. State, 17 Fla. L. Weekly S396 (Fla. June 25, 1992).

400. Cases during the survey period: Ragsdale v. State, 17 Fla. L. Weekly S174 (1992); Thompson v. State, 17 Fla. L. Weekly S342 (1992); Pace v. State, 596 So. 2d 1034 (Fla. 1992); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Dailey v. State, 594 So. 2d 254 (Fla. 1991) (sentence reversed on other grounds); Maqueira v. State, 588 So. 2d 221 (Fla. 1991); Davis v. State, 586 So. 2d 1038 (Fla. 1991), *vacated*, 112 S. Ct. 3021 (1992).

401. 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

402. *Id.* at 534.

> (1) that the evidence urged in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved.

Id.

403. *Id.*

404. *Id.*

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A. *Ambiguity in the Findings*

It is not at all clear what the court considers to be a "finding" of a mitigating circumstance as opposed to "consideration" of a mitigating circumstance. In *Owen v. State*,[405] the court noted that the trial court

> considered the following claims made by the defense: Owen's mother died when he was very young, his alcoholic father committed suicide a year later; Owen and his brother were shuffled from one foster home to another until his brother finally ran away and left him; Owen was sexually and otherwise abused in the foster homes; Owen's mind "snapped" during the murder; he had enlisted twice in the army and aspired to be a policeman.[406]

Did this "consideration" constitute a finding as required by *Campbell*, or a cursory dismissal of the "claims?" The court did not say.[407]

B. *Ambiguity in the Weighing*

Another question pertains to trial court statements that the mitigating evidence does not outweigh the aggravating circumstances. The court disapproved such a bare finding in *Santos v. State*.[408] There, the trial court

> found no *statutory* mitigating factors. He specifically stated that there was no evidence that Santos was under the influence of extreme mental or emotional disturbance or that Santos could not appreciate the

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405. 596 So. 2d 985 (Fla. 1992).

406. *Id.* at 987 n.2. As to the mitigating effect of these matters, see, for example, Aldridge v. Dugger, 925 F.2d 1320, 1330 (11th Cir.1991) (impoverished and unstable upbringing; father died when defendant was very young; service in military) (citing Florida cases); Henry v. State, 586 So. 2d 1033 (Fla. 1991) (service in Marine Corps), *vacated on other grounds*, 112 S. Ct. 3021 (1992); Castro v. State, 547 So. 2d 111 (Fla. 1989) (defendant abused as a child); Freeman v. State, 547 So. 2d 125 (Fla. 1989). At least some of the mitigating factors (those pertaining to the deaths of his parents) in Mr. Owen's case were unrefuted.

407. *See also* Gore v. State, 599 So. 2d 978, 987 (Fla. 1992) ("In mitigation, the judge considered evidence of Gore's poor childhood and antisocial personality, concluding that this was insufficient mitigation to outweigh the aggravating circumstances."); Wike v. State, 596 So. 2d 1020, 1023 (Fla. 1992) (trial judge apparently found one mitigating circumstance and stated that he had "carefully considered other possible mitigating factors;" sentence vacated on other grounds).

408. 591 So. 2d 160 (Fla. 1991).

criminality of his conduct or conform his conduct to the requirements of the law. The trial court then stated that it had reviewed the *nonstatutory* mitigating factors and found that they "do not outweigh the aggravating circumstances in this case." The court did not state what these factors might be.[409]

Finding that the trial court had improperly applied two aggravating circumstances (heinousness and coldness), and that the record "suggest[ed]" two statutory mitigating circumstances (the two specifically rejected by the trial court) and one nonstatutory mitigating circumstance ("that Santos lived in an abusive environment as a child"), the court remanded for resentencing under *Rogers*.[410]

The court reached a similar result in *Dailey v. State*,[411] in which there was a unanimous death recommendation from the jury and the defendant requested that he be sentenced to death.[412] The supreme court found error because, after discussing the statutory and non-statutory mitigating evidence in its sentencing order, the trial court wrote: "This Court does not consider any of the factors presented by the Defendant to mitigate this crime."[413] The supreme court held that the trial court had improperly given "no weight at all" to the mitigating circumstances.[414]

The court was not so strict in *Dougan v. State*,[415] finding no error where, after considering the mitigating evidence,[416] "the trial court held that, on this record, the evidence did not mitigate the penalty." Finding no violation of *Rogers*, the court reasoned that the trial court had implicitly decided that the evidence did not constitute mitigation.

C. *Ignoring Mitigating Evidence*

What is the remedy when the trial court simply ignores mitigating evidence? The supreme court may ignore the oversight, may affirm the

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409. *Id.* at 162 (citation omitted).
410. *Id.* at 164.
411. 594 So. 2d 254 (Fla. 1991).
412. *Id.* at 256.
413. *Id.* at 259.
414. *Id.*
415. 595 So. 2d 1 (Fla. 1992).
416. *Id.* at 5. Concerning Mr. Dougan's "civil rights activities, his community social, health, and welfare work, his family and personal background, his codefendants' lesser sentences, and the racial unrest at the time of this murder." *Id.* As to the mitigating effect of such evidence, see *Maxwell v. State*, 603 So. 2d 490, 491 (Fla. 1992); *Campbell*, 571 So. 2d at 415 and, of course, *Santos*, 591 So. 2d at 160 (abusive childhood environment).

sentence notwithstanding the error, or may remand for resentencing. The court took the ostrich approach in *Maharaj v. State*,[417] where the trial court found in mitigation only that Krishna Maharaj had no significant history of prior criminal activity, apparently rejecting the following evidence:

> Maharaj presented character witnesses including: (1) a congressman, who testified concerning Maharaj's character for truthfulness, honesty, and nonviolence; (2) his civil lawyer, who testified that he was hired to litigate the claims against Derrick Moo Young and that these claims had a substantial chance of prevailing prior to the victims' deaths; (3) a retired judge from Trinidad, who testified that he had known Maharaj for forty years, that he was not a violent person, and that he was an individual who donated money to charitable causes; and (4) a doctor from Trinidad, who stated that he had known Maharaj for over forty years and knew that he was not prone to violence.[418]

In affirming the death sentence, the court made no comment on the trial court's failure to consider this rather spectacular mitigating evidence.

In *Wickham*, on the other hand, the court applied a truncated harmless error analysis where the trial court had erred in failing to find mitigating circumstances.[419] The court stated: "Clearly, the evidence regarding Wickham's abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia, and all related matters, should have been found and weighed by the trial court."[420] Nevertheless, the court affirmed the death sentence "in light of the very strong case for aggravation," notwithstanding that the trial court had erroneously employed the heinousness circumstance.[421]

Pace v. State[422] takes a similar approach. The supreme court's entire discussion of the death sentence was:

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417. 597 So. 2d 786 (Fla. 1992).

418. *Id.* at 789. The court has elsewhere ruled that the following constitute nonstatutory mitigating circumstances as a matter of law: 1) contribution to community or society, Campbell v. State, 571 So. 2d 415, 420 n.4 (Fla. 1990); 2) charitable or humanitarian deeds, *Id.*; 3) nonviolent character, Bedford v. State, 589 So. 2d 245 (Fla. 1991); 4) Potential for rehabilitation. Carter v. State, 560 So. 2d 1166 (Fla. 1990).

419. *Wickham*, 593 So. 2d at 194.

420. *Id.*

421. The trial court had found six aggravating circumstances and nothing in mitigation.

422. 596 So. 2d 1034 (Fla. 1992).

> Turning to the penalty, we hold that the aggravating circumstances of previous convictions of felony involving violence, committed while on parole, and committed while engaged in a robbery are all supported beyond a reasonable doubt. The trial judge found no statutory mitigating circumstances and, after reviewing the nonstatutory mitigating evidence, concluded that none of the suggested mitigating factors had been established. Considering the totality of the circumstances, we conclude that the record supports the trial judge's conclusion. Even if one or more nonstatutory mitigating factors were wrongfully rejected, we are persuaded beyond a reasonable doubt that the weight thereof was so insignificant that the trial judge would have imposed death. Because the aggravating circumstances outweigh any nonstatutory mitigating evidence, death is the appropriate penalty.[423]

The court did not say what the mitigation was.[424] Three justices dissented from the affirmance of the sentence, but without opinion.[425] The only case during the survey period in which the appellant received relief on direct appeal for the trial court's failure to consider mitigation was *Santos*.[426]

D. *Nonstatutory Mitigating Circumstances*

The supreme court is of two minds as to what constitutes a nonstatutory mitigating circumstance. In *Campbell*, the court wrote that it is a question of law as to whether a "proposed factor" constitutes a mitigating circumstance, and that the trial court must find all mitigating circumstances established by the evidence.[427] But in other cases, it has committed the

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423. *Id.* at 1035-36 (citations omitted). In all, the court's opinion was but eight paragraphs long.

424. *Cf. Santos*, 591 So. 2d at 160 (reversing sentence where trial court said it had reviewed nonstatutory mitigating factors, but did not state what these factors might be).

425. *Wickham* and *Pace* seem to involve appellate reweighing of the aggravating and mitigating circumstances, a practice which the supreme court eschewed in Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981); *see also, e.g.*, Hudson v. State, 538 So. 2d 829, 831 (Fla.), *cert. denied*, 110 S. Ct. 212 (1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances."); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985) ("As a reviewing Court, we do not reweigh the evidence.").

426. 591 So. 2d at 160. Resentencing was ordered in several post-conviction cases during the survey period for *Hitchcock* error.

427. *Campbell*, 571 So. 2d at 419.

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finding of mitigation to the court's discretion.[428] Cases during the survey period show similar confusion.

Sims v. State[429] and *Maxwell v. State*,[430] post-conviction cases decided two weeks apart, reached completely opposite results concerning the same "proposed factor." *Sims* involved a murder during a drug store robbery. Terry Sims' fellow robbers turned state's evidence and claimed that Mr. Sims fired the fatal shot. On post-conviction, Mr. Sims contended that constitutional error occurred because the lenient treatment of the co-defendants was not considered in mitigation.[431] The court rejected this argument without citation: "We specifically reject Sims' argument that his codefendant's lesser sentences constituted a mitigating factor, since the evidence shows that Sims was the triggerman."[432] *Maxwell* involved a murder during a robbery at a golf course. Like Mr. Sims, Chester Maxwell claimed error because of failure to consider mitigating evidence, including the greater lenience accorded his non-triggerman co-defendant.[433] This time the court agreed with the defendant, Mr. Maxwell, analogizing his situation with that of the appellant in *O'Callaghan v. State*,[434] and ordered new sentencing proceedings.[435]

E. *Mental Mitigating Circumstances*

Especially obscure is the court's treatment of mental mitigating circumstances. In *Cheshire*, the court held that the trial court had erred in limiting its consideration to the statutory mitigating factor of "extreme" mental disturbance:[436]

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428. *See, e.g.*, King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990) ("Deciding whether mitigating circumstances have been established is within a trial court's discretion.").

429. 602 So. 2d 1253 (Fla. 1992).

430. 603 So. 2d 490 (Fla. 1992).

431. *Sims*, 602 So. 2d at 1257.

432. *Id.*

433. *Maxwell*, 603 So. 2d at 492. "The evidence at trial disclosed that Maxwell actually shot the victim during the course of a robbery, but he was assisted by a knife-wielding accomplice named Dale Griffin. Griffin and Maxwell were tried together, but Griffin received only a life sentence." *Id.*

434. 542 So. 2d 1324 (Fla. 1989). "The facts of *O'Callaghan* were similar in that Mr. O'Callaghan was the actual triggerman who shot the victim, but was assisted by other perpetrators who did not receive a death sentence." *Maxwell*, 603 So. 2d at 492.

435. *Id.*

436. 568 So. 2d at 912. "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." FLA. STAT. § 921.141(6)-(f) (1991); *see also id.* § 921.141(6)(f) ("The capacity of the defendant to appreciate the

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say . . . . Any other rule would render Florida's death penalty statute unconstitutional.[437]

Nevertheless, sentencing orders usually consider only the statutory mental circumstances. In *Valle v. State*,[438] the trial court rejected the defendant's evidence of extreme disturbance at the time of the crime. However, the court made no mention of the nonstatutory circumstance of less than extreme disturbance and stated, "[t]he mere fact that the judge made no further reference to Valle's mental state at the time of the crime does not mean that the court gave it no consideration."[439] In *Thompson v. State*,[440] the court upheld the death sentence of William Lee Thompson on resentencing under somewhat similar circumstances. The court stated:

> The trial judge expressly rejected, in detail, each of the mitigating circumstances, including that Thompson lacked the capacity to appreciate the criminality of his conduct. The trial judge noted in this regard that, although Thompson's IQ score was in the dull-normal range, there was evidence that Thompson functioned on a higher level. The trial judge concluded that "the aggravating factors in this case far outweigh[ed] any possible mitigating circumstances."[441]

Although the exceptionally brutal facts of the murder were such as to lead to the conclusion that Mr. Thompson was seriously disturbed at the time of the offense, neither the appellate court nor the trial court mentioned this mitigating circumstance.

Trial courts sometimes apply competence or legal insanity standards in rejecting mental mitigating circumstances. This approach makes little sense (had the defendant been legally insane or mentally incompetent, he would not have been found guilty), and the supreme court disapproved such

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criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.").

437. *Cheshire*, 568 So. 2d at 912 (citations omitted).
438. 581 So. 2d 40, 48-49 (Fla. 1991).
439. *Id.* at 49.
440. 17 Fla. L. Weekly S342 (June 4, 1992).
441. *Id.* at S343.

standards in *Mines v. State*.[442] Nevertheless, in *Sochor v. State*,[443] the court affirmed Dennis Sochor's death sentence where the trial court used a standard of mental competence in rejecting mental mitigation.[444] The court held that "[w]hile the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor."[445] The court did not mention what standard, if any, the trial court used.

In *Ponticelli v. State*,[446] another case dealing with a defendant's assertion of mitigating emotional factors, the court wrote:

> Next, we reject Ponticelli's contention that it was error to allow the state to elicit Dr. Mill's opinion that Ponticelli had the ability to differentiate between right and wrong and to understand the consequences of his actions. While this testimony is clearly relevant to a determination of a defendant's sanity, it is also relevant in determining whether mitigating circumstances exist under section 921.141(6)(b) (the defendant was under the influence of extreme mental or emotional disturbance), or section 921.141(6)(f) (defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired). Further, while the trial court below referred to the "*M'Naghten* criteria" in rejecting these mitigating factors, it specifically considered these mental mitigating factors in its sentencing order and used *M'Naghten* criteria as but one consideration leading to their rejection unlike the courts in *Ferguson v. State* . . . and *Mines v. State* . . . .[447]

The court did not say what criteria other than the *M'Naghten* standard the trial court used.

XII. Final Note

As noted in the foregoing discussion, there are many capital crimes issues which will continue to be hotly argued in the years to come. *Espinosa* has the potential of affecting a broad class of capital sentencing

442. 390 So. 2d 332, 336-37 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981).
443. 580 So. 2d 595 (Fla. 1991), *vacated*, 112 S. Ct. 2114 (1992).
444. *Id.* at 598.
445. *Id.* at 604.
446. 593 So. 2d 483 (Fla. 1991).
447. *Id.* at 490 (citations omitted).

issues, and the state court's treatement of mitigation continues to be a puzzle.