IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 59,140
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this brief the symbol "R" will be used to refer to the pages of the record on appeal. The symbol "A" will refer to the pages of the supplemental record on appeal filed on July 21, 1980. The symbol "B" will refer to the pages of the second supplemental record on appeal filed on September 22, 1980.

STATEMENT OF THE CASE

The defendant, Gregory Mills, was charged by indictment filed on June 20, 1979, with the offenses of first degree felony murder (while in the course of a burglary) of James Wright, burglary, aggravated battery of James Wright, and possession of a firearm by a convicted felon. (R483-485) On June 26, 1979, Gregory Mills entered a plea of not guilty to the charges. (R529)

Defense counsel filed numerous pre-trial motions, including a motion to dismiss the indictment, a motion to declare the death penalty unconstitutional, and a motion to sequester jurors. (R536,543,545,548,556,558,563,592) The court reserved ruling on the motion to sequester (B11), and denied the other motions. (B10,16-17,18) In response to other defense motions, the state filed a statement of aggravating circumstances and a list of agreements between the state and certain witnesses. (R565,590,601,604,608) A motion to suppress the testimony of these state witnesses because of their deals with the state was denied. (R174,610,612) The trial court granted Mills' motion to suppress the swab test of the defendant's hands, which test was involuntarily seized from Mills prior to his arrest and without probable cause. (R487,614,616)

Trial by jury on Counts I, II, and III commenced on August 16, 1979, before the Honorable J. William Woodson, Judge of the Circuit Court of the Eighteenth Judicial Circuit,

in and for Seminole County, Florida. (R615)[1/] Following the denials of Mills' motions for a judgment of acquittal, the jury found the defendant guilty of first degree felony murder, burglary, and aggravated battery. (R616,619-621) The court adjudicated the defendant guilty of all three charges and scheduled the penalty phase of the trial for Monday, August 20, 1979. (R616)

On August 20, 1979, following the presentation of additional testimony, the jury recommended that Mills receive a sentence of life imprisonment for the murder conviction. (R622,623) A motion for new trial was denied on August 30, 1979. (R488,496;B1,7)

On April 18, 1980, following a pre-sentence investigation, the trial court overruled the jury's life recommendation and sentenced Mills to death. (R638-643,655-666) The court also sentenced Mills to ten years on the burglary conviction, and five years on the aggravated battery charge, the sentences to run concurrently. (R638,644-645)

The original notice of appeal to the Fifth District Court of Appeal was filed on August 31, 1979, prior to the defendant's sentence of death. (R489) Following the death sentence a new notice of appeal to this court was filed on April 23, 1980, and the Fifth District Court of Appeal transferred the prior appeal to this Court on May 28, 1980. (R667,940) This appeal follows.

[1/] Trial on Count IV was scheduled for September 24, 1979, and was later nolle prossed. (R496,632; B13-14)

STATEMENT OF THE FACTS

In the early morning hours of May 25, 1979, James Wright was awakened by a noise in his house. (R3-5) Mr. Wright went into the Florida room and encountered an intruder. (R5) The intruder shot Mr. Wright in the side at close range with a shotgun. (R6) Mrs. Margaret Wright, coming to her husband's aid, observed through the window a single tall, thin black man with a light colored hat run across the yard to a bicycle under an oak tree. (R6-7,10,11-12,15,39) Mrs. Wright walked her husband to bed, called a doctor, and notified the police. (R7) Mr. Wright died from a massive hemorrhage as a result of the gunshot wound. (R22)

Police immediately conducted a "dragnet" of the area, looking for anyone on a bicycle. (R169-170) Lieutenant Russell, on his way to the scene of the burglary, stopped and detained Vincent Ashley, a tall, slender black male who was wearing a light colored hat and riding a bicycle. (R29-30,33,39-40) Ashley's clothing was sweaty. (R33)

The police also observed a bicycle parked outside the emergency room of Sanford's Memorial Hospital. (R44-45,344) Upon inquiring as to the owner of the bicycle, Mills, who had been seeking treatment for a severe toothache and headache, identified himself to police as the owner of the bicycle. (R343-344) The defendant was detained, driven to the scene of the burglary, and taken to the police station. (R45-46,344-346)

At the police station, the police questioned Ashley and the defendant separately and conducted a gunshot residue test on each. (R293-294,378-380) Ashley repeatedly told police that he had merely been out exercising. (R255,266-267) Ashley and Mills were released from custody at dawn. (R47,145-149,346) Upon returning the defendant to his house, the police spoke with Sylvester Davis, the defendant's houseguest, as to Mills' whereabouts that night. (R105,145-150,346-347,368-369)

On May 27, 1979, Viola Mae Stafford, Davis' girlfriend who also had been a houseguest of the defendant, was arrested for shoplifting at a convenience store. (R58,117,122-123,139) [The defendant's sister-in-law had turned in Stafford to the police. (R139-140)] In exchange for the dropping of this charge, Stafford and Davis led the police to some hidden shotgun shells which were of the type used in the Wright homicide. (R48-50,62-63,117-118,122-127) Davis was later arrested for a burglary and a grand theft. (R118-120,601) In exchange for the dropping of these charges, he told police that the defendant had confided that he had "shot some cracker," that he had disposed of the shotgun, that he was going to have his sister pick up the rifle from his hidden location, and that he needed Davis' help in disposing of the shotgun shells. (R105-112,118-120,122,131-133,601) Davis also indicated that he had seen Mills with a shotgun in his possession on the night of the burglary-homicide and that, the following morning, Mills had asked Davis to tell police that the defendant had gone to the

hospital that night. (R100-101,104-105,136) Davis denied that it had been Ashley who had had the shotgun and had asked Davis to help him. (RR137-138)

Gloria Robinson, an employee of the sewer department of Sanford, discovered a discarded shotgun in some bushes while working the morning after the incident. (R75-77) She notified the police, who arrived a short time later. (R78) Mrs. Robinson also observed a car driven by Vivian Mills (the defendant's sister) ride slowly by the scene of the uncovered shotgun. (R81-83) Vivian Mills testified (by deposition to perpetuate testimony) for the state that she had driven by the scene and was curious concerning the commotion. (R177-178,183-185) Vivian Mills testified that she was merely returning home from downtown, and denied that her brother had asked her to drive to the location to retrieve a rifle. (R177-178,181,188)

Vincent Ashley, who was redetained and requestioned concerning the offense, heard of Davis' story to the police while Ashley was in custody, and decided to change his version in exchange for complete immunity for the instant offenses and for any and all burglaries and robberies which he had committed over a span of several months. (R261-262,278-283,285-289,608-609) At trial, Ashley testified that he had accompanied Mills on bicycles to the victim's house to commit a burglary. (R242-246) According to Ashley, the defendant was carrying the shotgun. (R242-243) After the two entered the house through a window, James Wright awoke. (R247-250) Ashley testified that he saw Wright and

ran from the house without notifying the defendant. (R250) After he was outside, Ashley heard a shot and saw the defendant exit the house, still holding the shotgun. (R251-252) According to Ashley, he and Mills ran together to their bicycles and rode off in different directions. (R253,266) Mrs. Wright had testified, however, that she only observed one person run from the house to one bicycle. (R7,11-12)

After Ashley was initially detained, police conducted a gunshot residue test of his hands. (R293-294) The results of the test, which were negative, were admitted during the state's case-in-chief at trial over the defendant's objections. (R304-305,333)

Gregory Mills testified at trial that after work (which involved stocking metal shelves in a convenience store cooler), he went to a couple of bars alone and then returned home because of a toothache and headache. (R338-343,351-361) After trying unsuccessfully to sleep, Mills got up and rode his bicycle to a nearby hospital to obtain some medication for his tooth and head. (R343-344,362-364) He had been at the hospital for approximately twenty minutes before the police detained him. (R344,365) Mills denied any involvement in the burglary or homicide. (R348,350,371-372,374-375) He also denied shooting a gun on the night in question. (R348-349)

On rebuttal, and over defense counsel's objections,

the state introduced into evidence the results of a gunshot residue test conducted on Mills.[2/] (R376-380,383) The results of the test read slightly higher than normal (.05 and .07 micrograms of antimony on the defendant's hands, where .01 to .02 micrograms are considered normal), but much less than the .2 micrograms finding necessary to conclusively indicate that a gun had been fired. (R384,386-392)

At trial, the defendant's Assistant Public Defender attempted to cross-examine Vincent Ashley as to previous statements which Ashley had made concerning his actions on the night in question. (R269-270) These statement had been made to a public defender investigator while the public defender's office represented Ashley on robbery and probation violation charges. (R269-270) The state objected to the cross-examination on the basis of the attorney-client privilege. (R270-271) Despite Ashley's initial willingness to waive the attorney-client privilege, the state insisted that Ashley's current attorney be contacted to confer with Ashley prior to Ashley answering the questions. (R271-273) The court then recessed for the state to have Ashley's attorney consult with Ashley. (R271,273) Following this consultation, Ashley asserted the attorney-client privilege, and the defendant was precluded from delving into Ashley's prior statements made to the public defender investigator. (R273-275)

[2/] The gunshot residue test had been suppressed during the state's case-in-chief, the court ruling that it was illegally obtained without probable cause and exigent circumstances since the defendant had been detained solely because of the "dragnet" for people on bicycles. (R163-174)

At the penalty phase of the trial, the state introduced testimony and a certified copy of a judgment against the defendant for aggravated assault. (The defendant had been convicted of running a police officer off of the road during a chase). (A29,49-52) The state also introduced testimony indicating that Mills was serving the probationary/parole portion of a split sentence for the aggravated assault conviction at the time of the incident. (A26-27,53-56)

At the penalty phase, Mills' grandfather and sister testified that the defendant, age 22, had been only ten years old when his father was murdered. (A66-67,72-73) Greg's mother had, as a result, been forced to go to work as a farm laborer and the defendant was raised by his older sister. (A67-68,73-4) Mills, who grew up in this poor, broken family, dropped out of school after the seventh grade. (A68-70,74-75) After Mills was convicted of the aggravated assault, he successfully obtained a G.E.D. and started taking college courses in the correctional center. (A74) Upon his release from prison, Mills was gainfully employed in a position in which he handled money, he was a good worker, he had his own house and a bank account, and he was trying to straighten out his life. (A58-60,75-78)

ARGUMENT

POINT I

THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION WHERE THERE EXISTED A CONFLICT OF INTEREST SINCE THE DEFENDANT'S COUNSEL HAD REPRESENTED THE STATE'S KEY WITNESS AND HAD ACCESS TO PRIOR, IMPEACHING STATEMENTS.

Shortly after Vincent Ashley's arrest for the instant charges and robbery and probation charges, the public defender's office was appointed and a public defender investigator spoke with Ashley concerning the Wright burglary-homicide. (R269-270) The same public defender's office was also appointed to represent Gregory Mills. (R526) Private counsel was later appointed to represent Ashley. (R270-271) At Mills' trial, Ashley was called to testify against the defendant. (R238) His testimony was extremely damaging to Mills since it was the sole direct testimony placing Mills at the scene of the crime. (R242-253) (The victim's wife only saw one man running from the house, a description of which matched Ashley. [R6-7, 10-12, 15, 29-30,33,39-40]) Ashley's testimony was contradictory to the defendant's testimony. (R348,350,371-375)

In cross-examining Vincent Ashley, the assistant public defender questioned him concerning statements made

to a Mr. Scarpello (the public defender investigator) while the public defender's office represented Ashley, apparently in an attempt to impeach Ashley with prior inconsistent statements. (R269-270) The state's objection to the testimony on the basis of attorney-client privileged communications was sustained after Ashley's current attorney advised Ashley to exercise the privilege. (R271-275)

As this Court has recently stated in Foster v. State, ____ So.2d ____, 1980 FLW 309 (Fla. Sup. Ct. Case No. 50,393, decided 6/19/80, reh. den. 9/26/80), the sixth amendment right to the assistance of counsel contemplates legal representation that is effective and unimpaired by the existence of conflicting interests being represented by a single attorney. Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942); Baker v. State, 202 So.2d 563 (Fla. 1967). This conflict exists in equal measure where counsel has previously represented a person who is now testifying against a current client, where impeaching information is known to the attorney by the prior representation. In Olds v. State, 302 So.2d 787 (Fla. 4th DCA 1974), cert. denied 312 So.2d 743 (Fla. 1975), while recognizing that there is no per se conflict in having previously represented a state's witness who is now testifying against a current client, the court nevertheless stated that a conflict of interests is clearly present where potentially impeaching information had been received by the attorney during the prior representation of the now adverse witness:

> Finally, on this account, we recognize on the other hand that there may well be instances where matters reach an impasse, leaving no alternative but to relieve the Public Defender in a trial in order to afford the accused a fair trial and at the same time accord a witness the attorney-client confidentiality. Where the witness had privately given the Public Defender damaging information which he would be required to elicit in the instant trial, it would obviously be a conflict which would not be countenanced. Olds v. State, supra at 792. (emphasis added)

See also Florida Code of Professional Responsibility, DR 5-105 (B); ABA Comm. on Professional Ethics, Informal Opinion, No. 1322 (1976).

Since Ashley, the public defender's former client, and Mills were both suspects in the instant crimes, there was the strong probability of a conflict between their interests at the time the court appointed the public defender's office to represent them. This conflict became more substantial and apparent to the assistant public defender at the time he learned that the state might use Ashley's testimony. The conflict was revealed to the court through an objection concerning Ashley's deposition, (R270-271) and was again revealed to the court when Ashley gave his damaging testimony and the problems concerning prior attorney-client statements were reopened. (R269-271) See Foster v. State, supra.

As this Court has held in Foster v. State, supra:

> The state argues that reversal cannot be ordered on this ground since there was no defense objection to representation or motion for separate representation. To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error. Holloway v. Arkansas, 435 U.S. 475 (1978). Even in the absence of an objection or motion below, however, where actual conflict of interest or prejudice to the appellant is shown, the court's action in making the joint appointment and allowing the joint representation to continue is reversible error. See Belton v. State, 217 So.2d 97 (Fla. 1968). As the United States Supreme Court said in Glasser, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.... The trial court should protect the right of an accused to have the assistance of counsel." 315 U.S. at 71.
>
> We hold that the appellant was denied his right to the effective assistance of counsel by the joint representation of the appellant and a state witness by the same court-appointed attorney. The judgment and sentences are vacated and the case is remanded for a new trial.

Similarly, Mills was denied his right to the effective assistance of counsel because of the obvious conflict of interests. A new trial is necessitated with the appointment of private counsel.

POINT II

THE TRIAL COURT ERRED IN PRECLUDING IMPEACHMENT OF THE STATE'S KEY WITNESS BY A PRIOR STATEMENT IN VIOLATION OF THE DEFENDANT'S RIGHT OF CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

During the defendant's cross examination of Vincent Ashley, defense counsel, in an obvious attempt to impeach Ashley, asked him if he had ever spoken with a Mr. Scarpello concerning the incident. (R269-270) Following the state's objection, Mills was precluded from delving into these prior statements. (R270-275)

The trial court's curtailment of defense inquiry into matters regarding prior impeaching statements of a witness constituted a deprivation of his absolute and fundamental right to cross-examine a witness against him, as guaranteed by the sixth amendment of the federal constitution. Coco v. State, 62 So.2d 892 (Fla. 1953). See also §90.608(1), Fla. Stat. (1979). This is especially true here in a capital case, where this crucial witness' testimony condemned the appellant to die in the electric chair. Coxwell v. State, 361 So.2d 148 (Fla. 1978).

The fundamental right to confrontation includes the opportunity to cross-examine witnesses affording the jury the occasion to weigh the demeanor and veracity of the

witness. Davis v. Alaska, 415 U.S. 308 (1974); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Coco v. State, supra; Baker v. State, 150 So.2d 729 (Fla. 3d DCA 1963).

In Davis v. Alaska, supra, the Supreme Court of the United States held that the right to cross-examination includes as its essential ingredient the right to impeach one's accusers by showing bias, impartiality, and by discrediting the witness:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner had traditionally been allowed to impeach, i.e., discredit, the witness. 415 U.S. at 316. (emphasis added)

In the instant case, the witness sought to be impeached on cross-examination was Vincent Ashley, the prosecution's key witness. It was Ashley, and Ashley alone, who testified that Mills had committed the acts for which he was charged. Clearly, the opportunity to cross-examine and impeach this witness was essential to the defense. His credibility was the "linch-pin of the Government's case." Levin v. Katzenbach, 363 F.2d 287, 292 (D.C. Cir. 1966). The state's case would "stand or fall on the jury's belief of disbelief" of his testimony. Naupe v. Illinois, 360 U.S.

264, 269 (1959). Any infringement upon the opportunity to effectively cross-examine this key prosecution witness would constitute "error of the first magnitude." See Davis v. Alaska, 415 U.S. at 318. Questioning concerning the prior statements to the investigator was a proper and vital line of inquiry which was highly relevant to Ashley's credibility and veracity, and which the defendant should have been allowed to reveal to the jury:

> [T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Davis v. Alaska, 415 U.S. at 318.

The trial court erred by curtailing such inquiry.

The failure of the defense attorney to proffer for the record the anticipated answer and the relevancy of such inquiry is not fatal to the case. In Coxwell v. State, 361 So.2d 148, 151-152 (Fla. 1978), this Court reversed despite the lack of a proffer. Similarly, in Brown v. State, 362 So.2d 437 (Fla. 4th DCA 1978), defense counsel failed to make a proffer of the evidence which he was prohibited to elicit. The court held that, while desirable to proffer the evidence, where the relevancy was obvious from the question, the proffer is unnecessary to preserve the point for appellate review. Moreover, defense counsel was precluded from making a proffer by the nature of the court's ruling (attorney-client privilege).

The attorney-client privilege is not a bar to the impeachment sought to be revealed because of the unique

circumstances present here. First of all, the attorney-client privilege is not absolute. Sepler v. State, 191 So.2d 588 (Fla. 3d DCA 1966); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). The privilege may be outweighed by public interest in the administration of justice in certain circumstances:

> The question presented by this case is a close one, and requires a balancing of the interests, on the one hand as to the attorney and client in their right to the protection of the privilege, and on the other hand in the public and the state for the proper administration of law and justice. Sepler v. State, supra at 590.

See also Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977). In Sepler and Baird, supra, the courts held that the public interest in justice must yield to the attorney-client privilege where disclosure of the communications would result in the prosecution of the client. Sepler v. State, supra at 590-591.

But here, where Ashley had been given transactional and use immunity concerning the matters to be revealed by the inquiry, the sole reason for withholding the disclosure is not present. No privilege should prevent the disclosure of the attorney-client discussions because of this immunity conferred upon Ashley by the state. This situation is directly analogous to the fifth amendment privilege against self-incrimination. Where immunity from prosecution is granted a witness, he is not entitled to claim the privilege against self-incrimination since the witness could no longer be prosecuted and the testimony could not be used against him.

Holland v. State, 345 So.2d 802 (Fla. 4th DCA 1977). Similarly, the need for preservation of the attorney-client privilege would dissipate where the disclosed statements could not be used against the witness, who was immune from prosecution. Surely, then, the public and state interest for the proper administration of law and justice demands the attorney-client privilege to give way, where there is no longer any need for non-disclosure. The appellant can conceive of no greater need for the proper administration of justice than where an innocent defendant may go to his execution because of the unnecessary and mechanical reliance on the attorney-client privilege.

Additionally, if a lawyer acts as an attorney for two or more persons who have a common interest, neither of those clients may assert the privilege relating to communications with the lawyer in a subsequent action when the clients are adverse parties. §90.502(4)(e), Fla. Stat. (1979); Ehrhardt, Florida Evidence, §502.5, pp. 120-121 (West Publ. Co. 1977).[3/]

Defense counsel was improperly limited in the fundamental right to cross-examination of the state's key

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3/ Thus, the privilege in the Code is narrower than that in the prior case law of Dominquez v. Citizens Bank & Trust Co., 62 Fla. 148, 56 So. 682 (1911); and Ogden v. Groves, 241 So.2d 756 (Fla. 1st DCA 1970), which did protect private conversations with attorneys of multiple clients.

witness, on whose testimony the state's case would stand or fall. This infringement constitutes error of the first magnitude, requiring reversal and a new trial.

POINT III

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY AND EVIDENCE OF GUNSHOT RESIDUE TESTS WHICH TESTS WERE NOT SHOWN TO BE RELIABLE, WERE USED TO IMPROPERLY BOLSTER THE TESTIMONY OF A STATE'S WITNESS, AND WERE NOT CONCLUSIVE.

A. The Gunshot Residue Tests Were Not Shown To Be Reliable And Hence The Results Were Inadmissible.

The general rule regarding the admission of scientific evidence is that to be admissible, the reliability of the tests and results thereof must be recognized and accepted by scientists or that the demonstration shall have passed from the stage of experimentation and uncertainty to that of reasonable demonstrability. Kaminsky v. State, 63 So.2d 339 (Fla. 1953); Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA 1968). In Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the leading case on admissibility of scientific evidence, the court, in excluding evidence of the systolic blood pressure deception test, ruled:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

> We think the...test has not yet gained such standing and recognition among...authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made. Frye v. United States, supra at 1014.

In the instant case concerning the gunshot residue test, the state failed to establish the requisite reliability and recognition of this field. The state's own witness admitted that there existed numerous factors which could effect the test results. (R305-306) He stated that a person did not have to shoot or handle a gun for the results to be positive. Most people walking the streets have some traces of antimony (which is the element tested for). (R388-392) The state's gunshot residue witness also testified that contact with certain metals, e.g., lead, could produce results similar to that obtained from people who had shot a firearm. (R392-393,395-396)

Also effecting the test results are the facts that the antimony particles can be wiped off and that the particles dissipate over a period of time. (R312-313) In State v. Howell, 524 S.W. 2d 11 (Mo. 1975), a case dealing with fourth amendment rights and the taking of the swabs, the Missouri court, in discussing the issue of exigency, stated:

> It is noted that in order for a gun residue test to produce any valid results--positive or negative--it probably must be done promptly as the residue on one's hands will probably disappear in the normal course of living or by being rubbed off of the hand. We say "probably" because this is a matter about which the court is not certain.

In the present case there was testimony concerning a two-hour delay in taking the test of Ashley, during which time Ashley was rubbing his hands on the grips of his bicycle and could have wiped his sweaty hands onto his clothing. (R312-313) The police did not test Ashley's clothing or the grips of his bicycle for any antimony residue. (R309,313) Thus, the accuracy of the test in the instant case was not sufficiently established by the state. All of the variables that effect the accuracy of the test have not been accounted for and explained.

Additionally, the state has failed to affirmatively show the qualifications of the police officer who took the swabs from the hands of Ashley and Mills and that the swabs were properly taken and free from contamination. Reversal is thus required notwithstanding the lack of any impropriety in the analysis of the samples taken. See State v. Bender, 382 So.2d 697, 699 (Fla. 1980); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979); State v. Wills, 359 So.2d 566 (Fla. 2d DCA 1978); State v. Miller, 64 N.J. Super. 262, 165 A.2d 829 (1960) (cases dealing with the administration of

breathylizer tests and the qualifications of the officer administering the test).

Scientific experiments are helpful and often crucial in the investigation of crime. However, the potential for confusion and prejudice in the minds of the jurors is great. Where, as in the instant case, the reliability of the test and the qualifications of the police officer taking the test samples was not affirmatively shown by the state, the defendant's objections to the admission of the test results should have been sustained. See Chatom v. State, 348 So.2d 828 (Ala. Cr. App. 1976) [reversed for lack of an objection at the trial court level at 348 So.2d 838 (Ala. 1977) and 348 So.2d 843 (Ala. Cr. App. 1977).]

The defendant's conviction, based on this scientific evidence, cannot stand. A new trial is required.

B. The Court Improperly Admitted The Gunshot Residue Test Results Of Ashley In The State's Case In Chief And Of The Defendant In Rebuttal Where The Results Which Merely Bolstered Ashley's Testimony Were Inconclusive.

In the state's case in chief, after the court had ruled that the defendant's gunshot residue test results were inadmissible, the court allowed into evidence the results of the gunshot residue test of Vincent Ashley, the state's key witness. (R304-305,333) The results of the test, which were negative, merely bolstered Ashley's credibility to the prejudice of the defendant.

Additionally, in rebuttal, after the defendant had denied shooting a gun on the night in question, the state introduced inconclusive gunshot residue test results. (R376-380,383-384,386-392) The results were slightly higher than normal, but were far below the amount necessary to be conclusive. (R384,386-392)

The situation regarding the unreliable, inconclusive test results is governed by the Florida Evidence Code, Section 90.403, Florida Statutes (1979), which provides that inconclusive, confusing, and misleading evidence of the nature involved here shall not be admitted into evidence:

> 90.403 Exclusion on grounds of prejudice or confusion.--Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Because of the unreliable (see Point III A, supra) and inconclusive (see R386-388) nature of the gunshot residue

test in the instant case, the introduction of this evidence clearly tended "in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence...." Perper v. Edell, 44 So.2d 78, 80 (Fla. 1950). When the risk of confusion from inconclusive evidence is so great as to upset the balance of advantage, the evidence should be excluded. Shepard v. United States, 290 U.S. 96 (1933).

The testimony that Mills' gunshot residue test results were somewhat higher than is normally expected and that Ashley test was negative contained the seeds of undue prejudice to the defendant, even though the test results of the defendant's hands were inconclusive and insufficient to show that he had fired a gun. As this Court held in Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1932):

> The chief object in introducing evidence is to secure a rational ascertainment of facts; therefore facts should not be submitted to the jury, unless they are logically relevant to the issues. A fact in a cause must be both logically and legally relevant, for even logical relevancy does not in all cases render proposed evidence admissible. A fact which, in connection with other facts, renders probable the existence of a fact in issue, should still be rejected, where, under the circumstances of the case, it is essentially misleading or too remote. 139 So. at 890. (emphasis added)

See also Rumsey v. Manning, 335 So.2d 25 (Fla. 2d DCA 1976); Crawford v. State, 321 So.2d 559 (Fla. 4th DCA 1975). In

the case at bar, the admission of the evidence was prejudicial to the defendant, in that, although inconclusive, it invited speculation into probabilities by the jury. A new trial is necessary.

C. Testimony And Evidence Concerning The Illegally-Obtained Gunshot Residue Swabs Of The Defendant's Hands And The Results Of The Residue Test Were Improperly Admitted In Rebuttal.

The trial court granted Mills' motion to suppress the swab test of the defendant's hands, which test, the court ruled, was involuntarily seized from Mills prior to his arrest and without probable cause. (R487,614,616) Following Mills' testimony in which he denied any participation in the shooting, the trial court allowed the state in rebuttal, over defense objections, to present the gunshot residue test results of the defendant's hands to the jury. (R376-380, 383) In so doing, the court relied on cases cited by the state, including Dornau v. State, 306 So.2d 167 (Fla. 2d DCA 1975). A careful reading of Dornau, and an analysis of the test results reveals that the trial court committed reversible error in violation of the defendant's rights under the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

It is true that Dornau v. State, supra, does state that even under the Florida Constitution, illegally seized evidence may still be used for impeachment purposes where it affirmatively appears (from the illegally obtained and correctly suppressed evidence) that the defendant has committed perjury on the stand. However, Dornau continues by holding that the illegally seized evidence may not be admitted in rebuttal if it does "not really rebut or contradict anything

to which the defendant had previously testified." Dornau v. State, supra at 170. See also Agnello v. United States, 269 U.S. 20 (1925).

In the instant case, because of the admitted inconclusive results of the defendant's gunshot residue test (R386-388; see Point III A and B, supra), these results do "not really rebut" or conclusively "contradict anything to which the defendant had previously testified." The evidence of the tests was therefore incompetent as rebuttal testimony and should have remained excluded from the trial. The judgments and sentences must be reversed with directions to exclude the improper evidence.

POINT IV

THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS THE INDICTMENT AND IN ADJUDICATING THE DEFENDANT GUILTY OF THE OFFENSES WHERE THE INDICTMENT FAILED TO PROPERLY AND ADEQUATELY CHARGE THE OFFENSES OF BURGLARY AND FELONY MURDER.

The indictment alleges that the defendant:

COUNT I

* * *

did unlawfully kill a human being, JAMES A. WRIGHT, by shooting said JAMES A WRIGHT with a shotgun, and said killing was perpetrated by said GREGORY MILLS while engaged in the perpetration of, or in the attempt to perpetrate, burglary, to-wit: by entering or remaining in a structure, to-wit: a dwelling, located in the vicinity of 445 Elliott Street, Sanford, the property of JAMES A. WRIGHT or MARGARET Z. WRIGHT, as owner or custodian, with the intent to commit any offense therein, to-wit: theft, assault, battery or any other offense prohibited by Florida Law, contrary to Florida Statute 782.04(1).

COUNT II

* * *

did unlawfully enter or remain in a structure, to-wit: a dwelling, in the vicinity of 445 Elliott Street, Sanford, the property of JAMES A WRIGHT or MARGARET Z. WRIGHT, as owner of custodian, with the intent to commit an offense therein, to-wit: theft, assault, battery or any other

> offense prohibited by Florida Law, and in the course of committing said offense, said GREGORY MILLS did make an assault upon JAMES A. WRIGHT or was armed, or did arm himself within such structure, with a dangerous weapon, and during the commission of said offense, said GREGORY MILLS had in his possession a firearm as defined in Florida Statutes 790.011(6), contrary to sections 810.02(1), 810.02(2)(a), 810.02(2)(b), and 775.087(2)(b), Florida Statutes. (R483-484)

The defendant filed a motion to dismiss the indictment for failing to fully apprise him of the crime with which he was being charged. (R556-557) The court's denial of the motion to dismiss (B18) violates the Accusation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 15(a) of the Florida Constitution.

The gravamen of the offense of burglary is the nonconsensual entry of a structure or conveyance with the intent to commit an offense therein. §810.02(1), Fla. Stat. (1979); Dowis v. State, 326 So.2d 195 (Fla. 4th DCA 1976). Furthermore, the intent required by statute is an essential element to be charged in the indictment or information. Dowis v. State, supra.

Based upon this rationale, the Fourth District Court of Appeal has recently held that the charging document must allege that the entry was made with the intent to commit a specific offense therein. In Lee v. State, 385 So.2d 1149, 1150 (Fla. 4th DCA 1980), the court ruled:

> We hold that an information purporting to charge the crime of burglary without alleging the entry was made with intent to commit a specific offense is subject to a motion to dismiss. This is so because burglary is the entering (or remaining inside) a structure without permission and with intent to commit a specific crime. The charging document must allege the intent with which the defendant entered in order to properly charge the crime of burglary.

The state failed to properly charge the crimes of burglary and the felony murder (which included as the underlying felony the defective burglary charge). As in Lee, supra, the defendant was never apprised of the specific intent which the State intended to prove. (As an illustration of this, see the confusion occurring during the penalty phase on whether the defendant had been charged with and convicted of committing the burglary and murder for the purpose of pecuniary gain. [A11-14])

Accordingly, the judgments and sentences for the felony-murder and burglary must be reversed and the case remanded with instructions to dismiss the indictment.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE VERDICTS WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE SINCE THE SOLE EVIDENCE AGAINST THE DEFENDANT WAS TOTALLY UNRELIABLE AND UNWORTHY OF BELIEF.

In Tibbs v. State, 337 So.2d 788 (Fla. 1976), this Court recognized its duty to review the weight of the evidence and the credibility of witnesses in a case in which the death penalty is imposed:

> We recognize that the resolution of factual issues in a criminal trial is peculiarly within the province of a jury, but in this case a man's life has been placed in jeopardy and the Florida Legislature has directed that we review the "entire record." Our obligation now is no less than it was when Odie McNeil was sentenced to life imprisonment in 1932 and this Court said:
>
> > "Human liberty should not be forfeited by a conviction under evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt....And where the evidence of identity of the accused as being the guilty party is not satisfactory to the appellate court, a new trial will be granted. Nims v. State, [70 Fla. 530, 70 So. 565] supra.
>
> * * *
>
> When such evidence [to support the verdict rendered] is not substantial in character, this court is committed to the rule that a conviction will be reversed....where the evidence relied on is not satisfactory to establish

> the identity of an accused as a participant in the crime of which he has been found guilty." McNeil v. State, 104 Fla. 360, 139 So. 791, 792 (1932).
>
> Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction. Tibbs v. State, supra at 791.

The evidence relied on in the instant case is not substantial in character. The sole direct evidence against Gregory Mills was the testimony of Vincent Ashley. Ashley admitted that he was involved in the burglary and felony-murder, but claimed that his participation was minor. It is submitted that his testimony is unreliable and, especially in light of the other evidence, totally unworthy of belief. A conviction based for the most part on such testimony must be reversed.

Since the principal evidence against Mills came from a co-perpetrator of the crimes, this Court must begin with a study of the legal rules governing its reliability. The testimony of an accomplice must always be considered with great caution, subject to the strictest of scrutiny. Lee v. State, 115 Fla. 30, 155 So. 123 (1934). The testimony of an accomplice is sufficient to support a conviction only if, in light of this strict scrutiny, it still establishes guilt beyond a reasonable doubt. Dupree v. State, 195 So. 2d 1 (Fla.2d DCA 1967).

In the instant case, therefore, Ashley's testimony must be strictly scrutinized. Ashley obviously had an enormous interest in the outcome of Mills' case. It was because of his apparent usefulness to the state in getting Mills convicted that Ashley was not only able to avoid possible death in the electric chair for the felony murder, but was able to finagle a deal for total immunity from the instant charges. Ashley also negotiated for complete immunity for any and all burglaries and robberies which he committed over a span of several months. (R262,278-283,285-289,608-609) It is submitted that Ashley fabricated his testimony to save himself. Greg Mills received death, plus concurrent ten and five year sentences; Ashley did not even receive a slap on the wrist. Similarly, the indirect evidence provided by Sylvester Davis must be considered in light of the benefits he received. In exchange for his story, the state dropped his burglary and theft charges (R118-120,601) and the charges of his girlfriend. (R48-50,62-63,117-118,122-127,601) The girlfriend also received a sum of money from the state. (R601-602) It is also conceivable that Davis reported that it was Mills who had admitted to an offense rather than Ashley because of Davis' friendship with Ashley. (R116, 138,259) Ashley and Davis even laughed about it outside of the courtroom on a prior occasion. (R116,138) As a result, this testimony should be suspect.

The testimony of Ashley also does not bear the indicia of a truthful narration of the facts, especially in light of the other evidence. See Lee v. State, 155 So.

at 129. Mrs. Wright, rushing to her husband's aid, looked out of her window and observed one man running from the house to a bicycle moments after the shooting. (R6-7,10,11-12,15) The description she gave the police did not match Mills, but rather it perfectly fit Vincent Ashley. (R29-30,33,39-40) This eyewitness account contradicts Ashley's story that he had already run from the house prior to the shooting, and was waiting for the defendant, who supposedly ran from the house immediately after the shotgun blast. (R250-253,266) Additional contradictory evidence would have been forthcoming but for the court's curtailment of defense counsel's cross-examination of Ashley. (See Point II, supra.)

Because of the foregoing, the evidence was, as a matter of law, totally unreliable. Without the suspect testimony, which must be rejected by this Court, the evidence can establish, at most, a mere suspicion of guilt, which obviously cannot warrant a finding of guilt beyond a reasonable doubt. Tibbs v. State, supra; McNeil v. State, 104 Fla. 360, 139 So. 791 (1932); Boswer v. State, 265 So.2d 55 (Fla. 3d DCA 1972); Davis v. State, 216 So.2d 28 (Fla. 3d DCA 1968).

The conviction, resting entirely on testimony which is unreliable and unworthy of belief, is contrary to the weight of the evidence, and is insufficient on which to base a conviction and a sentence of death. This Court must reverse.

POINT VI

THE TRIAL COURT ERRED IN CONVICTING THE DEFENDANT OF BOTH FELONY MURDER AND THE UNDERLYING FELONY OF BURGLARY AND IN CONVICTING THE DEFENDANT OF BOTH THE BURGLARY AND THE AGGRAVATED BATTERY WHERE THE AGGRAVATED BATTERY WAS ALLEGEDLY THE CRIME WHICH THE DEFENDANT HAD THE INTENT TO COMMIT INSIDE THE DWELLING, IN VIOLATION OF THE FEDERAL AND FLORIDA CONSTITUTIONAL DOUBLE JEOPARDY PROVISIONS.

Mills was charged and convicted of felony murder with the underlying felony being a burglary, of burglary with the intent to commit one of several offenses therein (see Point IV, supra) including aggravated battery, and of aggravated battery. (R483-485,616) Since this Court's opinion in State v. Pinder, 375 So.2d 836 (Fla. 1979), the law is clear that a defendant may not be convicted of both felony murder and the underlying felony. See also Mahaun v. State, 377 So.2d 1158 (Fla. 1979). This is so because where one crime is an element of a greater crime, to convict the defendant of both would violate the double jeopardy clause. Mahaun v. State, supra; State v. Pinder, supra. Therefore, the defendant's conviction for burglary must be vacated.

Similarly, the conviction of aggravated battery is unconstitutional. In McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980), the court held that the defendant could not be convicted of both burglary with an assault therein and

sexual battery where "the finding that appellant committed a sexual battery was indispensible..." to the burglary conviction. McRae, supra at 293.

If, as alleged by the state, the defendant burglarized the house with the intent to commit a battery (again, see Point IV, supra), then the aggravated battery was indispensable to the burglary conviction. Moreover, to carry it one step further, since the burglary was an element of the felony murder, and the aggravated battery was an element of the burglary, then the aggravated battery was an element of the felony murder. The defendant can therefore be convicted of only the greatest offense; the two other convictions must be vacated.

POINT VII

THE TRIAL COURT ERRED IN ADJUDICATING THE DEFENDANT GUILTY OF BOTH MURDER AND AGGRAVATED BATTERY WHERE THE AGGRAVATED BATTERY WAS A LESSER OFFENSE OF THE MURDER, IN VIOLATION OF THE DOUBLE JEOPARDY PROVISIONS.

It is obvious that the aggravated battery charge on James Wright by a single shotgun blast is a lesser-included offense of the felony murder of James Wright by the same single shotgun blast. See Lewis v. State, 377 So.2d 640, 645 (Fla. 1979) Where, however, there is no dispute that the victim is indeed deceased, this Court held in Lewis, supra at 645, that no jury instruction on the lesser offense of aggravated battery should be given. Therefore, it goes almost without saying that the state cannot charge (where there is no dispute as to the victim's death), nor the jury be permitted to return and verdict, nor the judge be allowed to adjudicate a defendant with the lesser offense of aggravated battery and the major offense of first degree murder. See also State v. Pinder, 375 So.2d 836 (Fla. 1979); Point VI, supra. The defendant's conviction for aggravated battery must be vacated.

POINT VIII

APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND THEREBY VIOLATES THE STATUTE AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

The trial court overruled the jury's life recommendation and sentenced Gregory Mills to die for the felony murder conviction. (R622,623,638-643) In so doing, the court found six aggravating circumstances: (1) the murder was committed while the defendant was under the sentence of imprisonment; (2) the defendant had previously been convicted a violent felony, to-wit aggravated assault; (3) the defendant knowingly created a great risk of death to many persons, i.e.the victim's wife; (4) the murder was committed during the course of a burglary; (5) the murder was committed for pecuniary gain; and (6) the murder was especially heinous, atrocious, or cruel. (R639-640) The trial court ruled that all of the mitigating circumstances were negated. (R641-642)

The sentence of death imposed upon Gregory Mills must be vacated. The court, in overruling the jury, found improper aggravating circumstances, considered non-statutory aggravating evidence, and failed to consider highly relevant and appropriate mitigating factors. A proper weighing of these circumstances, especially in light of the jury's

recommendation of life imprisonment, should have resulted in a life sentence.

B. The Jury's Life Recommendation

The critical role of the jury's advisory sentencing verdict in determining the appropriateness of the death sentence has long been recognized by this Court. Lamadline v. State, 303 So.2d 17 (Fla. 1974). The standards governing the imposition of the death sentence over a jury's recommendation of life imprisonment have now become axiomatic. That life recommendation carries great, if not controlling, weight; the decisions of this Court have strictly followed that standards. See, e.g., Williams v. State, 386 So.2d 538 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Tedder v. State, 322 So.2d 908 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975); Taylor v. State, 294 So.2d 648 (Fla. 1974). The standards for overruling the jury have not been met in the present case. There was no "clear and convincing" reason, Tedder v. State, supra at 910, no "compelling reason," Burch v. State, 343 So.2d 831, 834 (Fla. 1977), and no "reasonable basis," Malloy v. State, supra at 1193, for rejecting the jury's life recommendation.

The input of the advisory sentencing jury is an integral part of the scheme of checks and balances provided by the Legislature in Section 921.141. Messer v. State, 330 So.2d 137, 142 (Fla. 1976). Early on, this Court

recognized that the advisory opinion of the sentencing jury could, in some instances, be a critical factor in determining whether or not the death penalty should be imposed. Lamadline v. State, supra.

In Tedder v. State, supra, this Court articulated the standard to be applied when it reviews a death sentence imposed notwithstanding a jury recommendation of life imprisonment:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Tedder v. State, supra at 910. (emphasis added)

This Court in Tedder held that, even though the trial court had found no mitigating circumstances, under the facts and circumstances of that case there was no reason to override the jury's recommendation. This result was obtained even though the defendant had allowed the victim to languish without assistance or the ability to obtain assistance. Thus, the Court apparently recognized that the jury must have considered and weighed the aggravating and mitigating circumstances and found sufficient of the latter to recommend life imprisonment.

In Provence v. State, 337 So.2d 783 (Fla. 1976), this Court, applying the Tedder standard, concluded that reasonable persons could differ with the death sentence

imposed by the trial court in that case and concurred with the jury's recommendation of a life sentence.[4/]

In the sentencing phase of the instant case, following the state's presentation of a prior crime and split sentence of imprisonment and probation thereon, the defense tendered testimony and argument to show several mitigating circumstances. (See subsection C, infra.) After due deliberation, a majority of the jury recommended that the court impose a sentence of life imprisonment upon Gregory Mills. (R622-623) No less than seven reasonable jurors considered the facts of this case and voted to recommend that a life sentence be imposed.

In Chambers v. State, 339 So.2d 204 (Fla. 1976), a sentence of death was reversed despite the trial court's findings of one aggravating circumstance and no mitigating circumstances. The victim was beaten to death and died as a result of cerebral and brain stem contusion. The victim was bruised all over the head and legs, her face was unrecognizable, and she had several internal injuries. These factors notwithstanding, this Court found the imposition of the death penalty unwarranted and determined that the jury's recommendation was appropriate. Justice England, specially concurring for three members of the Court, amplified the reasons for reversing the death sentence. In light of the

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[4/] Indeed, as the Fifth Circuit Court of Appeals noted in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case."

respective functions of the judge and jury in death penalty cases, the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason.

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given the opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice....[B]oth our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists. Chambers v. State, supra at 208-209 (England, Adkins, and Sundberg, JJ., concurring specially).

In Buckrem v. State, 355 So.2d 111 (Fla. 1978), this Court again reversed a death sentence imposed over the jury's life recommendation where the defendant had punched and then shotgunned the victim's boyfriend, almost severing his arm. The defendant then turned and shot the victim at point blank range. This Court found as mitigating against the above facts that the defendant was drinking, had a previous altercation with the victim's boyfriend, had no previous criminal activity and was gainfully employed. On those facts, this Court unanimously held there was insufficient reason in the record to override the jury's advisory sentence.

Also, in Brown v. State, 367 So.2d 616, 625 (Fla. 1979) this Court found that the death penalty was "not so

clearly directed by the sentencing evidence" to permit rejection of the jury's verdict, where the judge had found two aggravating and no mitigating circumstances and the victim had been beaten with boards and fists during the course of the robbery. Two death sentences imposed over life recommendations were reversed in Malloy v. State, supra, because this Court found that a "reasonable basis" existed for the jury's life verdicts. Malloy v. State, supra at 1193.

Finally, in the recent case, Neary v. State, 384 So.2d 881 (Fla. 1980), the trial court found three aggravating and no mitigating factors. In reviewing the death sentence, this Court reiterated the principles enunciated in Tedder:

> It is our duty to examine the record in this case and determine whether there are clear and convincing facts that warrant the imposition of the death penalty over jury's recommendation of life imprisonment. Neary, supra at 885.

The victim had been raped and strangled during a robbery. Against these facts this Court found that the defendant's youth, the co-defendant's dismissal in a motion for a directed verdict, the defendant's confession which showed the co-defendant may have played a significant role, and the fact that the defendant was a slow learner, needed help to stay in school, grew up without a father, and was reared by his mother and another woman were factors that influenced the jury in its life recommendation. On these facts, the Court

held that the jury's recommendation should have been accepted by the trial court.

On the record before this Court, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended the sentence of life imprisonment in the instant case. In the present case the trial court found six aggravating and no mitigating circumstances. The sentencing judge relied on improper and unsupported aggravating circumstances. (See subsection D, infra.) At most, the findings of such factors in aggravation were questionable. As such, these factual disputes have been resolved by the jury's advisory verdict.[5/] Moreover, the sentencing judge ignored strong and material factors in mitigation. (see subsection C, infra.) Therefore, there exists no compelling reason under the facts of the case sub judice that would justify the imposition of death sentences over the jury's recommendations. Burch v. State, supra. See also Buckrem v. State, supra; McCaskill v. State, supra.

5/ Consequently, the sentencing judge's rejection of the jury's advisory verdict of life imprisonment and imposition of the ultimate punishment constitutes double jeopardy, cruel and/or unusual punishment, deprivation of Appellant's right to trial by jury and due process of law established by U.S. Const. Amend., V, VI, VIII, XIV and by Fla. Const. Art. I, §§ 9, 16, 22. We recognize this Court rejected this claim in Douglas v. State, 373 So.2d 895 (Fla. 1979) and will not further develop this point herein.

This Court, in reviewing the propriety of the death sentence, must weigh heavily the advisory opinions of the jury. Lamadline v. State, supra. The evidence in the instant case can certainly be reasonably interpreted to favor mitigation; under such circumstances the trial judge cannot override the jury's recommendations of life. Thompson v. State, 328 So.2d 1, 5 (Fla. 1976). The trial court erred in doing so. Tedder v. State, supra.

Moreover, a reading of the sentencing transcript and the trial court's written findings in support of the death sentence makes it clear that the trial court, although recognizing that the jury had recommended life, completely disregarded that recommendation without stating any specific reasons for doing so, contrary to the Tedder standard. Furthermore, the trial judge manifestly overlooked and failed to consider and refute the non-statutory mitigating factors established by Mills, in contravention of Lockett v. Ohio, 438 U.S. 586 (1978), and Songer v. State, 365 So.2d 696 (Fla. 1978). (See subsection C, infra.)

Moreover, the prosecutor and trial judge are not constitutionally permitted to circumvent the Tedder standards by reserving additional evidence for the judge alone, after the jury's life recommendation, as was done in the present case. (R911-920,931-932) In Presnell v. Georgia, 439 U.S. 14 (1978), the Court held that fundamental principles of procedural fairness (due process of law) apply with no less

force at the penalty phase of trial in a capital case than they do in the guilt-determining phase of any criminal trial. See also Gardner v. Florida, 430 U.S. 349 (1977), and Green v. Georgia, 422 U.S. 95 (1979). Pursuant to Presnell, the defendant believes that as a matter of due process he is entitled to have the existence and validity of aggravating circumstances determined as they were placed before his jury. Any other conclusion which would open the door for a post-jury determination of aggravating circumstances would not only deprive the appellant of due process but would also deny him his right to trial by jury. Post-jury determination of aggravating circumstances would correlatively destroy the trifurcated sentencing procedures which were, in great measure, the basis for the conclusion that capital punishment was constitutionally permissible. State v. Dixon, 283 So.2d 1 (Fla. 1973) and Proffitt v. Florida, 428 U.S. 242 (1976). The capital sentencing process under Section 921.141, Florida Statutes, creates a system of checks and balances which requires that the jury's advisory function not be distorted, lest the whole statutory scheme be distorted. Messer v. State, supra; Miller v. State, 332 So.2d 65 (Fla. 1976); and Cooper v. State, 336 So.2d 1133 (Fla. 1976). The point is well made, again by Justice England in his concurring opinion in Chambers v. State, supra at 208:

> In Tedder v. State, 322 So.2d 908 (Fla. 1975), we emphasized the weight to be given jury recommendations in capital cases and held that a death penalty is inappropriate following a jury recommendation of life imprisonment unless the facts suggesting death were so clear and convincing that virtually no reasonable person could differ. The considerations underlying that decision were further explained in Cooper v. State, 336 So.2d 1133 (Fla. 1976), a case involving a jury recommendation of death. There we elaborated on the respective functions of the judge and jury in death penalty cases, explaining that the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason. Our directive there may not be distorted by the omission of any aggravating or mitigating circumstance (absent acquiescence by all parties) was a calculated step to insure that a jury and judge could never reach differing conclusions on a sentence as a result of misunderstanding the law or applying different standards to the peculiar facts before them.

Therefore, the trial court cannot (and did not) justify his actions of overruling the jury. The jury's life recommendation must be reinstated.

C. Mitigating Factors, Not Found By The Trial Court, Were Present.

Evidence of statutory and non-statutory mitigating circumstances presented during both the trial and sentencing proceedings provided numerous factors which could have influenced the jury in its recommendation for life imprisonment. A review of these factors demonstrates that there can be no "compelling" reason to overrule the jury's recommendation.

This evidence included but is not limited to, the following factors.

Appellant lacked a significant history of prior criminal activity. §921.141(6)(a), Fla. Stat. (1979). This Court has construed this circumstance as follows:

> As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance. State v. Dixon, 283 So.2d 1, 9 (1973).

See also Cook v. State, 369 So.2d 1251, 1257 (Ala. 1979). The crux of this mitigating factor is the word "significant." See State v. Dixon, supra at 10; Cook v State, supra. In the present case, the state introduced evidence of only one prior conviction, that of an aggravated assault wherein a police officer giving chase to the defendant was run off of the road. (A29,49-52) This Court has found that having only one prior conviction constitutes no significant history of prior criminal activity. Lewis v. State, 377 So.2d 640, 646-647 (Fla. 1980).

The state's representations to the judge at sentencing and the hearsay pre-sentence investigation concerning juvenile acts allegedly committed by the defendant will not negate this mitigating circumstance. The negation of a mitigating circumstance must be proven beyond a reasonable doubt. See Mullaney v. Wilbur, 421 U.S. 685 (1975). Evidence was never presented by the prosecution to the jury regarding

any other prior criminal activity (See Point VIII B, supra.) The state has failed to negate this mitigating factor.

Another factor to be found in mitigation is the defendant's age. The legislative purpose behind this mitigating circumstance is to provide for consideration of the age of the defendant "...whether youthful, middle aged or aged -- in mitigation of the commission of an aggravated capital crime." State v. Dixon, supra at 10. In the present case, Gregory Mills was twenty-two at the time of the crime. (A66-67,72-73) This Court has recognized youthful age in mitigation in Mikenas v. State, 367 So.2d 606 (Fla. 1978); and Hoy v. State, 353 So.2d 826 (Fla. 1977). Both cases involved defendants the same age as Gregory Mills. Moreover, in King v. State, ____ So.2d ____, 1980 FLW 239 (Fla. Sup. Ct. Case No. 52,185, decided 5/8/80); and in Hallman v. State, 305 So.2d 180 (Fla. 1974), this Court found age twenty-three as a mitigating circumstance. Thus, the age of Mills is certainly established as a mitigating factor.

Additionally, the role of Vincent Ashley in the perpetration of the offense is evidence in mitigation. Ashley received complete immunity for his trial testimony at the defendant's trial. His credibility and role in the offense were certainly at issue. (See Point V, supra.) Although Ashley testified that the defendant was with him and committed the shooting, his testimony is extremely suspect since the only person the victim's wife saw running from the house was Ashley. (R6-7,10,11-12,15,29-30,33,39-44) Certainly, such

testimony was relevant in mitigation. See Malloy v. State, 382 So.2d 1190 (Fla. 1979), wherein this Court held that the jury's action in recommending life imprisonment for the defendant was reasonable because of conflict in evidence as to who was the actual perpetrator and because of the plea bargains of the defendant's accomplices.

Additional factors calling for Gregory Mills to live include the clear showing that he was seriously trying to better himself. He had sought and obtained gainful employment which included handling money; he had a house of his own and his own bank account. (A58-60,75-78) See Buckrem v. State, 355 So.2d 111 (Fla. 1978), wherein similar factors were deemed mitigating circumstances. Moreover, Gregory Mills was trying to overcome his tough family and personal life. Mills grew up without a father, who was murdered when Greg was ten years old. (A66-67,72-73) He was then reared in this poor family environment by his older sister when his mother had to take employment as a farm laborer, which kept her away from home for most of the day, seven days a week. (R67-68,73-74) In Neary v. State, 384 So.2d 881 (Fla. 1980), evidence of this type was considered in mitigation, justifying a reversal of the death sentence. Mills also had problems with his schooling, having dropped out of school after the seventh grade. (A68-70,74-75) See Neary v. State, supra. However, after Mills' conviction for aggravated assault, Gregory successfully obtained a G.E.D. and was taking college courses in the correctional center.

All of these non-statutory factors which the trial court failed to consider or rebut in his factual findings, together with the appropriate statutory mitigating circumstances support the jury's life recommendation and call for the reduction of the defendant's sentence to life imprisonment.

D. The Trial Judge Considered Inappropriate Aggravating Circumstances.

The first aggravating circumstance found by the sentencing judge was that the offense was committed while the defendant was under the sentence of imprisonment. §921.141(5)(a), Fla. Stat. (1979). The finding of the circumstance was arbitrary and erroneous for two reasons. First, the testimony presented at the penalty phase that the defendant was on parole at the time of the offense and therefore was under "sentence," see Aldridge v. State, 351 So.2d 942 (Fla. 1977), was erroneous. The defendant was sentenced on June 25, 1976, to three years imprisonment less 113 days credit for time served, to be followed by two years probation. (R625-626) A calculation of the times involved, less the credit for time served, indicates that the defendant was to be released from the "sentence of imprisonment" portion on his conviction on March 4, 1979. Therefore, on May 25, 1979, when the incident involved herein occurred, Mills was only on probation. It is well settled that probation is not a "sentence of imprisonment," but rather an alternative to sentencing. See e.g. State v. Jones, 327 So.2d 18 (Fla. 1976). Therefore, the defendant, being merely on probation, was not under sentence as contemplated in Section 921.141(5)(a), Florida Statutes (1979). See also Ford v. State, 374 So.2d 496, 500 n. 1, 501-502 (Fla. 1979), wherein the Court, at

least sub silentio, rejected a finding of this aggravating circumstance where the defendant was on probation.

Secondly, if this Court holds that the defendant was under a sentence of imprisonment, the clear statutory language indicates that this aggravating factor was designed to apply only where the defendant's status of imprisonment is causally connected to the offense. State v. Dixon, supra at 9. Specifically, the obvious intent is to deter the killing of correctional officers in the course of or in the attempt to avoid capture after an escape, or to deter prison killings. In the instant case, there is no causal connection between the offense and the defendant's alleged status of imprisonment and therefore this circumstance was improperly applied by the sentencing judge.

Absent a causal connection between the offense and appellant's alleged status of imprisonment, application of this circumstance serves only to cumulate another aggravating factor, that appellant was previously convicted of a felony involving the use or threat of violence to the person. §921.141(5)(b), Fla. Stat. (1979). Consequently, application of the aggravating factor that the defendant was under a sentence of imprisonment is tantamount to punishing him twice for the same conduct and is thus improper. Cf. Provence v. State, 337 So.2d 783 (Fla. 1976).

The next aggravating factor found by the judge was that the defendant had been previously convicted of a

felony involving the use or threat of violence. While it is admitted that the defendant had been convicted of aggravated assault, the nature of this prior offense should be considered in minimizing the weight it should be given. This examination of the specifics is mandated by the need for particularized consideration of relevant aspects of a defendant's character and record. See Woodson v. North Carolina, 438 U.S. 280, 305 (1976); Lockett v. Ohio, 428 U.S. 586, 605 (1978). In the case at bar, the prior aggravated assault being considered in aggravation did not involve a knife, gun, or other weapon of that sort. The charges were brought about as the result of Mills running a police officer off of the road. (A29,49-52) Therefore, this aggravating circumstance should be given only little weight.

The defendant was also found to have "knowingly created a great risk of death to many persons" where the victim's wife was present in the home (although in a different room) and "could have easily been hit by some of the blast of the shotgun." (R640) This aggravating factor must obviously fall. This circumstance has been held to not be present where only a small number of people are present. Kampff v. State, 371 So.2d 1007, 1009-1010 (Fla. 1979). Thus, since only the victim's wife was present (and she was not even in the same room), there was no risk to "many" people. See also Lewis v. State, 377 So.2d 640 (Fla. 1979). Additionally, "great risk" means not a mere possibility, as

is the case here, but rather a likelihood or high probability Kampff, supra at 1009. The fact that the victim's wife was in a different room and that, according to the trial judge, there existed only a possibility of her being hit negates this aggravating factor. Moreover, there is no showing that whoever did the shooting in the instant case knew that someone other than the victim was present in the house. Therefore, the "knowingly" aspect is not satisfied either.

The aggravating factor of "during the commission of the burglary" must also fall. The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion, and so would violate Furman v. Georgia, 408 U.S. 238 (1972). Stated differently, appellant has received the death penalty primarily because the offense involved burglary-murder; thus, if upheld in the present case, the death sentence would be automatic for felony-murder. However, there are no guidelines provided by the statute for determining which felony-murder cases receive the death sentence and which do not. Certainly, all felony-murder cases do not, and constitutionally cannot, mandate the death sentence -- a mandatory death sentence would be invalid. E.g. Woodson v. North Carolina, supra. To uphold

a death sentence because it involved a robbery-murder would leave judges and juries with unfettered, unchannelled discretion, would provide no meaningful basis for distinguishing between those cases which receive the ultimate penalty and those that receive life, and would thus render the Florida Statute arbitrary and capricious as applied. Cf. Proffitt vs. Florida, 428 U.S. 242 (1976).

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E. 2d 551 (N. C. 1979). The Cherry court found that the death penalty in a felony murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Thus, this aggravating factor cannot stand. (See also Point IV, supra, wherein the sufficiency of the burglary charge is questioned, and Point VI, supra, and the cases cited therein for a double jeopardy claim concerning the felony murder and the underlying burglary.)

The trial court also found that the murder was committed for pecuniary gain. Initially, it is contended that the state failed to present any evidence of an intent of pecuniary gain surrounding the burglary and murder. Additionally, if as stated by the trial court, the burglary was for pecuniary gain (R640), then this aggravating factor

would merge with circumstance (d) -- during the course of a burglary. Provence v. State, 337 So.2d 783 (Fla. 1976).

The final aggravating circumstance found by the trial court was that the murder was especially heinous, atrocious, or cruel. The facts sub judice fail to support this finding. This Court defined this aggravating circumstance in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

> 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.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes especially heinous, atrocious or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d at 9.

Following the above definition, those cases where death occurs without prior physical or mental torture do not warrant this aggravating circumstance. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Cooper v. State, 336

So.2d 1133 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976). The facts sub judice fail to support a finding of this circumstance. A burglary victim was shot once. In Fleming v. State, 374 So.2d 954 (Fla. 1979), this Court rejected a finding of heinous, atrocious, or cruel where the victim died from a single shot.

The facts stated by the judge to support this finding cannot be approved. The judge simply recites the fact that this shooting occurred during the course of a burglary. First, this would obviously be an improper doubling with finding (d). See Provence v. State, supra. Additionally, a shooting of this type without additional facts would not meet the standards enunciated in State v. Dixon, supra. Thus, if this finding is approved there would be no principled way to distinguish this case in which the death penalty is imposed from cases in which it is not. See Godfrey v. Georgia, ____ U.S. ____, 64 L.Ed.2d 398 (1980).

Accordingly, Mills' death sentence was based in substantial part on improper and unsupported aggravated factors. In addition, the sentencing judge ignored the strong and material mitigating factors. These errors are not harmless; the judge utilized these erroneous findings to override a jury recommendation of life.

There is no "compelling reason" for rejecting the jurors' recommendation. Gregory Mills' death sentence must be vacated and remanded for entry of a life sentence.

POINT IX

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL IN ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statue and thus detailed briefing would be futile. However, appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, supra.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, ____ So.2d ____, 1980 FLW 397, 401 (England, concurring) (Fla. Sup. Ct. Case No. 58,329, decided 7/24/80).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, and limitations on consideration of and weight given to mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133,

1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the appellant requests that this Honorable Court reverse the judgments and sentences, and remand for the appropriate relief requested in each point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 14th day of October, 1980, to: Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida and Mr. Gregory Mills, Inmate No. 053673, Florida State Prison, P. O. Box 747, Starke, Florida 32091.

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