IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 62,184

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

In this brief, the following symbols will be used to designate the record on appeal:

R = The initial record on appeal

RR = The supplemental record on appeal filed on April 6, 1983, dealing with the reconstruction of the record.

A = The supplemental record on appeal filed on November 4, 1982, consisting of an affidavit of the court reporter.

B = The supplemental record on appeal filed on October 20, 1982, consisting of exhibits filed at the motion to suppress.

STATEMENT OF THE CASE

The defendant was arrested on July 23, 1981, for the offenses of the first degree murder of John Eubanks and the first degree murder of Walton Robert Farmer. (R 1778) The state's petition to recall the grand jury, with service to Attorney Steven Richey as the defendant's lawyer, was filed on July 29, 1981. (R 1788)

On August 4, 1981, the defendant was charged by indictment with two counts of first degree murder. (R 1789) On August 10, 1981, the defendant filed a written plea of not guilty to the charges. (R 1795) Pursuant to defendant's motion, venue was changed to Hillsborough County. (R 1836, 1903-1930, 1938)

Defense counsel filed a motion to suppress the defendant's statements and a motion to suppress physical evidence. (R 1827, 1896, 1942-1944, 19531960, 1967-1978) Following a hearing, the trial court denied the motions to suppress. (R 1996, 2917-2919) However, following jury selection, but prior to the trial testimony, the court reversed its ruling as to the confession, granting the defendant's motion to suppress the defendant's statements and ruling that said statements were involuntary and were not freely made. (R 595, 2005a) The court still denied the motion to suppress the physical evidence obtained following the confession, ruling that "the evidence that came as a result did not depend upon the statements, it was found elsewhere." (R 596)

Although no notice of intent by the state to present evidence of collateral crimes or bad acts was filed by the prosecution [as required by Section 90.404 (2)(b)1, Florida Statutes (1981)], the defendant filed a motion in limine to preclude the state from offering evidence concerning grand theft of cattle from the victim. (R 1984-1986) Defense counsel also objected to said evidence at trial, which objection was overruled. (R 702)

A trial by jury commenced on November 16, 1981. At trial, the defendant took the stand and testified. (R 1395-1447) Prior to his testimony, the state indicated that they would question the defendant concerning the cattle thefts, a crime with which the defendant was not charged. (R 1387-1392) Defense counsel stated that he would advise the defendant to exercise his Fifth Amendment rights to these questions. (R 1387-1392) Notwithstanding this discussion, the prosecutor questioned the defendant in the jury's presence about the cattle theft, and the defendant was forced to exercise his right to silence in front of the jury. (R 1458-1460, 1467-1469, 1476, 1480-1481, 1482, 1483)

During closing arguments of the prosecutor, defense counsel objected and moved for a mistrial. (R 1641-1642) The court cautioned the prosecutor, but the motion for mistrial was denied. (R 1642)

The jury found the defendant guilty of both counts of first degree murder, as charged. (R 2007, 2010) The court adjudicated the defendant guilty of the offenses. (R 2008-2009)

Following the presentation of additional evidence in the penalty phase of the trial, the jury recommended that the defendant be sentenced to life imprisonment as to Count I (with no vote tally indicated), and recommended by a vote of ten-to-two that the defendant be sentenced to death for Count II. (R 2015, 2016) A pre-sentence investigation was ordered. (R 2019)

Motions for new trial, for directed verdict, and for arrest of judgment were filed and denied. (R 2020-2021, 2022-2025, 2026-2029, 2928, 2934, 2940) The pre-sentence investigation was filed, with an attachment of twenty-five letters by the defendant's relatives and acquaintances (including a judge, a court clerk, a state senator, law enforcement personnel, county councilmen, and a pastor) all speaking on the defendant's behalf, and an attachment of

petitions signed by 133 persons of the community asking for life sentences for the defendant. (R 2030-2087)

At the sentencing hearing, defense counsel sought to present additional testimony by law enforcement personnel concerning the defendant's model behavior in jail both during and after the trial. (R 2941-2945) Following the state's objection, the court refused to allow the defendant to present such evidence. (R 2945-2948) Defense counsel also proffered to the court a purported plea offer from the state wherein the defendant could plead guilty to one count of first degree murder with a life sentence and one count of second degree murder, which offer was rejected by the defendant. (R 294902952) The state objected to the proffer, indicating that, although some plea negotiations were discussed, no formal written plea offer was ever made by the state. (R 2950)

The trial court, rejecting the jury recommendation of life imprisonment as to Count I, sentenced the defendant to two, consecutive death sentences. (R 2088-2110, 2111-2115) In the findings of fact, the trial judge indicated that he was overruling the jury's life recommendation as to Count I because the vote for life was seven-to-five [which vote does not appear anyplace on the record], which the court considered to be relatively weak. (R 2008, 2110) The trial judge noted that he also considered the strength of the death recommendation for Count II in imposing the death sentence as to that count. (R 2089, 2090)

In its findings of fact as to Count I, (the murder of John Eubanks -- to which the jury recommended life imprisonment) the court found as aggravating circumstances: (1) the murder was committed for financial gain; (2) the murder was especially wicked, attrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. As a mitigating circumstance, the trial court found that

the defendant had no significant history of prior criminal activity. (R 2089-2090, 2092-2101)

As to Count II (the murder of Walton Robert Farmer), the trial court found as aggravating circumstances that: (1) at the time of the conviction of the defendant for the murder of Farmer, the defendant had previously been convicted of the murder of John Eubanks[1/]; (2) the murder of Farmer was committed for financial gain; (3) the murder of Farmer was especially wicked, attrocious, or cruel; and (4) the murder of Farmer was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court rejected all mitigating circumstances, including that of no significant history or prior criminal activity because of the conviction for the murder of Eubanks. (R 2090-2092, 2101-2109)

As to both counts, the trial court further noted that the defendant failed to prove any other aspect of his character to be considered in mitigation. (R 2089-2090, 2091-2092, 2101, 2109) In so doing the trial court rejected the attachments to the pre-sentence investigation which P.S.I., according to the court, "reported the void of any such competent or believable information." (R 2102, 2109) The trial court also noted that it had not considered in aggravation any additional evidence other than that presented before the jury at trial. (R 2088)

Defense counsel objected to the findings of fact, specifically noting that the vote of the jury on the life recommendation as to Count I was not a matter of record and hence defense counsel was not able to determine the accuracy of the information nor to rebut it. (R 2128-2135)

1/ In its conclusion of the findings, the trial court does not list this aggravating circumstance as to Count II, but rather lists it as to Count I. (R 2109-2110)

Notice of appeal was filed on June 8, 1982. (R 2120) Upon review of the record on appeal filed with this Court, the defendant noted that a transcription of the prosecutor's argument to the jury during the penalty phase of the trial was missing. This Court granted leave to supplement the record with the transcript, whereupon the court reporter stated that, due to a malfunction of the recording equipment at trial, the transcript was not available. (A 5-6) Following defense counsel's motion for a new penalty phase, this Court ordered the parties to reconstruct the record, with one Justice dissenting. Following the filing of defense affidavits that a full accurate reconstruction was not possible and defendant's partial proposed reconstruction, the state submitted what it purported to be a verbatim reconstruction of the penalty phase argument. (RR 38-53, 60-74) The trial court denied defendant's motions for an evidentiary hearing on the reconstruction, for leave to hire an expert dealing with memory and the inaccuracy of a reconstruction of events, and to certify the inability to reconstruct the record. (RR 24, 77-131) The trial court, although conducting an in camera review of the prosecutor's notes utilized at trial and utilized to reconstruct the record, and although including said notes in the record, denied the defendant's motion for production of notes to the defendant for use at the lower court level. (RR 8-9, 24-25, 75-76, 150-161) The defendant also filed an objection to the state's purported statement of the proceedings. (R 80-83)

The trial court overruled the objection, rejected the contents of the defendant's partial reconstruction of the record along with the attached affidavits, and adopted the state's purported reconstruction as "a reasonable reconstruction of the argument made by [the prosecutor]." (RR 9-22, 144-149, 162-177)

The defendant, based upon the lower court reconstruction proceedings, renewed his motion for a new penalty phase. This motion was denined on July 7, 1983, with three Justices dissenting.

This appeal follows.

STATEMENT OF THE FACTS

On July 21, 1981, John Eubanks went to a ranch that he owned which was run by the defendant, Robert Craig. (R 682-683, 685, 693) Robert Schmidt was also employed at the ranch as a laborer. (R 691-692) Eubanks had told his wife and his secretary about some problems that he was having at the ranch with the defendant. (R 683, 693) Eubanks planned to conduct a cattle count at the ranch since he believed that the defendant and Schmidt had stolen some of his cattle. (R 778, 922, 1484)

While Eubanks was engaged in the cattle count along with Schmidt and Craig, Walton Farmer arrived at the ranch to talk to Eubanks. (R 933, 1484) Eubanks had offered Farmer a job. (R 715) While Eubanks and Farmer were in a remote area of the ranch with Schmidt and the defendant, they were shot and killed, presumably in an attempt to cover up the cattle theft. (R 945-953, 1409-1418) Two versions of the crime subsequently came to light.

In his statement to police two days after the incident[2/] and again at trial, Robert Craig told what happened in the remote area of the ranch. Eubanks was engaged in the cattle count when he was joined by Farmer. (R 1404-1406, 1409-1410, 2709-2710) Schmidt told the defendant that since Eubanks knew about the missing cattle, they were in big trouble and would have to kill both Eubanks and Farmer. (R 1396-1397, 1410, 2710-2711) Craig told Schmidt that he would not be able to do that. (R 1410, 2710)

The defendant was with Farmer and, some distance away and out of sight of the defendant, Schmidt was with Eubanks. (R 1413, 2711) Craig heard Schmidt shoot twice. (R 1413) Farmer and the defendant started running and

2/ This statement was suppressed by the trial court on the day of the trial. (R 2005 a)

Schmidt came into view, firing a couple of shots and yelling, "Shoot! Shoot!" (R 1414-1416, 1488) The defendant fell to the ground and, with his eyes closed, fired in Farmer's direction three times. (R 1414, 1486-1489, 2713) Everything happened so fast that the defendant just automatically shot without really thinking about it. (R 1414, 2713, 2973-2974)

When Craig opened his eyes, he saw Farmer on the ground. (R 1417) Schmidt walked past Craig and, standing over Farmer, shot the victim in the head. (R 1416-1417) Craig asked Schmidt about Eubanks, and Schmidt replied that Eubanks was dead. (R 1418)

Schmidt indicated that they would have to dispose of the victims' vehicles. (R 1418, 2714) With the defendant following in the ranch truck, Schmidt first drove Farmer's jeep to Clermont and then drove Eubanks' automobile to Belleview. (R 1419-1420, 2714-2715) Schmidt told the defendant that they would that night take the bodies to Wall Sink, a large, deep sinkhole in neighboring Sumter County. (R 1420, 2716)

At Schmidt's direction, the two men loaded cement blocks, plywood, bales of straw, a rope and an old blanket onto the ranch pick-up truck. (R 1423-1426, 2716) Schmidt took Eubanks' and Farmer's hats and wallets and put them into a paper bag. (R 1426-1427, 1494) The two men loaded the bodies onto the truck, covered them with the plywood and straw, and drove to Wall Sink. (R 1428-1432) There, after cutting the lock on the fence and driving near the sinkhole, Schmidt directed the unloading of the bodies. (R 1433-1437, 2716) The concrete blocks were tied around the bodies and Schmidt pushed the bodies over the edge into the 100-foot deep sinkhole. (R 1437-1440, 2716-2717)

At trial, Robert Schmidt testified for the state, as part of a deal allowing him to plead guilty to two counts of second degree murder and dropping charges against his wife who hid the murder weapon. (R 999-1001, 1018-1024,

1048-1051) Schmidt's version of the incident was that the defendant had been the instigator. (R 935-937) Schmidt testified that the defendant told him that they would have to kill Eubanks and Farmer since Eubanks knew of the cattle theft. (R 935) Schmidt also testified that the defendant had one month earlier mentioned killing Eubanks so that Eubanks' widow would be totally dependent upon them to run the ranch. (R 914-915) There was no discussion as to any details. (R 941)

It was Schmidt's version that while at the remote area of the ranch with Eubanks, Schmidt heard the defendant (who was out of sight with Farmer) yell to him, "Hey, Bob!," and then heard the defendant shoot first. (R 945) Schmidt shot Eubanks twice in the back of the head. (R 946-948) Schmidt then claimed that the defendant ordered Schmidt to shoot Farmer in the head since Farmer was still alive, which he did. (R 950-952) Robert Schmidt then said that the defendant took a few bills from Eubanks' wallet and looked for Eubanks' coveted shotgun in the trunk of Eubank's car. (R 954, 959) Later that night, the two men disposed of the bodies at the sinkhole, Schmidt claiming that the defendant directed the actions. (R 961-962, 967-974)

On July 22, 1981, Schmidt and Craig washed the bed of the pick-up truck and changed the tires on the truck. (R 982-986, 1474, 1477, 1479) The police and several acquaintances of Farmer gathered at the ranch that morning to search for the missing Farmer. (R 1470-1472) Craig, "running from a nightmare" and not knowing what to do, told a deputy that Farmer had left at about 5:00 p.m. the previous day and that Eubanks had left a short time later. (R 1471-1472)

Police investigation into the victims' disappearance led to the arrest of Schmidt and the defendnat for cattle theft. (R 2157-2159, 2185, 2368,

2375-2377, 2414-2415) After the police took five psychological stress evaluations of the defendant, Craig admitted to selling some of the Eubanks' cattle. (R 2161, 2183, 2191, 2378-2379) Several hours later, after repeated questioning, after hiding the defendant from a bondsman and an attorney who were on their way to bail the defendant out of jail on the theft charge, after appealing to the defendant's conscience by telling him the victims deserved a "Christian burial," after slamming a chair in front of the defendant and confronting the defendant, and without readvising the defendant of his Miranda rights, the sheriff obtained a statement from the defendant admitting his involvement in the deaths of Eubanks and Farmer. (R 2166-2167, 2212-2218, 2247, 2249, 2305-2306, 2311-2313, 2329, 2419- 2420, 2428, 2438, 2498, 2504-2506, 2534-2540, 2548) This statement, the trial court eventually ruled, was not freely and voluntarily given after a knowing and intelligent waiver of his rights. (R 595, 2005 a)

During this involuntary statement, the defendant agreed to lead the police to the sight where the bodies had been disposed. (R 2173, 2286-2289, 2389, 2393-2394) While en route to the scene, Sheriff Griffin received a radio call that he should telephone his office. (R 2242-2243, 2291-2292, 2323) The sheriff telephoned the station and was told that Attorney Steve Richey had been retained by the defendant's family to represent the defendant. (R 2291, 2323, 2555, 2560, 2563-2571, 2722-2730) Attorney Richey wished to speak to his client immediately, wanted the defendant returned to the jail, and wished all questioning of the defendant to cease. (R 2556-2560, 2722-2730) Sheriff Griffin, in a taped phone conversation, told his officers to tell Attorney Richey that they had been unable to contact the sheriff and that they had no idea where the defendant was. (R 2326, 2722-2730) Attorney Richey was then told by the officers to try to find the defendant at the jail. (R 2728) Upon returning to the police car, Sheriff Griffin did not relay to the defendant the fact of

Attorney Richey's retention by his family as his counsel; he did not relay the attorney's desire to talk to Craig, nor his demand that all questioning cease and that the defendant be returned to the jail. (R 2243, 2323)

The defendant led the police to Wall Sink, where the bodies were eventually recovered with the help of expert divers (police divers being unable to find the bodies). (R 851-854, 869-873, 884, 1052-1061, 2171-2175) Also discovered due to the defendant's help, were items of physical evidence recovered from the Wall Sink area. (R 853-854, 872-873, 1221-1240) Sheriff Griffin and Captain Brown admitted that, without the defendant's help, the bodies and evidence would never have been discovered nor would the crimes have been solved. (R 884, 2220-2221, 2323, 2441)

A motion to suppress the bodies and all the physical evidence was denied by the trial court. (R 596-597) Even though the confession was illegally obtained, the court ruled that the evidence "obtained as a result" would not be suppressed since its discovery was not dependent upon the confession. (R 596) Sheriff James Adams of Sumter County, who had been notified of the missing men, had testified at the suppression hearing contrary to Sheriff Griffin and Captain Brown, opining that he would have searched all of the sinkholes in Sumter County for the misssing men. (R 2840-2842) This was his belief, Adams claimed, notwithstanding the fact that police skin divers had been unsuccessful in locating the bodies at Wall Sink, that there are six or seven sinkholes within a twenty-mile radius, and that there were other bodies which he has not been able to locate in Sumter County. (R 2842-2843)

At trial, a standing objection was made by defense counsel and noted and overruled by the court concerning the admission of testimony regarding the bodies and evidence. (R 597, 1987-1988) The trial court did, however, suppress the fact that the defendant had led police to the scene. (R 597)

The medical examiner testified that Eubanks died from the two gunshot wounds to the head. (R 1273-1282) These wounds, ballistics tests showed, were inflicted by Robert Schmidt's gun. (R 1147-1149) Farmer had received six wounds: one, a grazing wound to the arm; a second to the left rear side; a third to the right arm; another to the right arm, which also entered the abdomen; a shot entering the chest and lung; and a final wound to the left rear skull. (R 1283-1296) The cause of death was the shot to the head; however the bullet wounds to the abdomen and chest were potentially serious. (R 1291-1297, 1305) Ballistics tests showed that the gunshot wound to the head was caused by Schmidt's gun. (R 1349-1351) A bullet recovered from Farmer's side could have been fired by the defendant's gun. (R 1352-1353)

At trial, the state, over defense counsel's objections, presented detailed evidence concerning the theft of cattle from the Eubank's ranch, a crime with which the defendant was not charged. The evidence, which involved testimony of twelve of the state's thirty-eight witnesses, included details as to the method of transporting the cattle, the cleanliness of a trailer used to transport the cattle, the amount of each cattle transaction, the cashing of checks for the cattle, and the use of the proceeds from the cattle theft and sale. (R 696-698, 703-705, 777-778, 781-785, 787-799, 803-827, 859-863, 894, 910-912, 918-919, 929-930, 981, 1008, 1011, 1077-1078, 1092-1102, 1210-1220, 1456-1460, 1480-1481, 1485) Also elicited over the defendant's objection was testimony concerning the defendant's purchase and use of cocaine and marijuana. (R 929-930)

During the penalty phase of the trial, the state elicited additional information from the medical examiner, including, over defendant's objections, the doctor's opinion on whether the murders were "execution-style" killings. (R 1711-1712, 1719) Defense counsel presented evidence regarding the defendant's

personal and family life, including the facts that Craig had never been in trouble before; that he was a good, obedient, loving, and gentle husband, son (one of eight children), and son-in-law; that he had voluntarily (at his father's request) quit school in order to provide needed help on his father's farm; that he had a good work record; and that Schmidt was the one who introduced the defendant to guns. (R 1730-1737, 1744-1746, 1747-1749)

The state, in its cross-examination questioned the defendant's father if he knew how many children the victim Walton Farmer had. (R 1738) An objection to this question was sustained. (R 1738) The prosecutor persisted and further questioned Craig's father if he knew what kind of person Walton Farmer was when he was growing up with his father. (R 1738) An objection to this question was also sustained. (R 1739) On rebuttal, the prosecutor called Walton Farmer's father and questioned him about the victim's age, number of brothers, and marital status. (R 1751) An objection to these questions were sustained as being improper rebuttal. (R 1751-1753)

ARGUMENT

POINT I

THE APPELLANT IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW BY THIS COURT BECAUSE THE RECONSTRUCTION OF THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE OF THE TRIAL IS UNRELIABLE AND INCOMPLETE.

Robert Patrick Craig has a constitutional right to a complete transcript on appeal. Griffin v. Illinois, 351 U.S. 12 (1956); Mayer v. Chicago, 404 U.S. 189 (1971). In a capital case, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9, 16, and 21 of the Florida Constitution, demand a verbatim transcript of all proceedings in the trial court. See also Delap v. State, 350 So.2d 462 (Fla. 1977), where this Court recognized the importance of the availability of a full transcript, especially in a capital case.

The right to a transcript on appeal is meaningless unless it is an accurate, complete, and reliable transcript. Appellate counsel (especially one not present at the trial proceedings) has no means to fully review the proceedings below without such a complete, accurate, and reliable transcription, and thus cannot render effective assistance of counsel. Similarly, the rights to appeal and meaningful access to the courts are negated because both appellate counsel and this Court cannot fully review the proceedings below. See, generally, Hardy v. United States, 375 U.S. 277 (1964), where the Court held that the duties of an attorney could not be discharged on appeal without a whole transcript, and Bounds v. Smith, 430 U.S. 817 (1977), where the Court held that the right to access to the Courts encompasses a "meaningful" access.

In the instant case, a transcript of the prosecutor's arguments to the jury during the penalty phase of the trial was missing and unavailable. (A 5-6) Upon this discovery, the appellant moved this Court for an order remanding the case for a new penalty phase. On January 6, 1983, this Court denied the motion for a new penalty phase (with Justice McDonald dissenting), but did order the parties to attempt reconstruction.

This "reconstruction" was completed and approved by the trial court over the defendant's objections and exceptions to various items in it. (RR 24-25, 38-40, 80-83) The omissions and inaccuracies in, and the disputes concerning the "reconstruction" are substantial, and the appellant is prejudiced thereby. Specifically, the appellant is unable to adequately argue issues relating to the improper penalty phase arguments based on what is included in the "reconstruction" (See Point VII, infra), and cannot raise issues which are missing or which were in dispute in the reconstruction process.

First, this Court can know for a fact that the reconstruction is obviously incomplete. A review of defense attorney's arguments to the jury, spoke" minutes after the prosecutor's remarks, provides us with insight into several omissions in the reconstruction.

Defense counsel, in his argument, referred to the fact that the prosecutor told the jury that the defendant did not show any mercy to anyone in this case, so neither should the jury consider it for the defendant:

> MR. FOX [Defense counsel]: May it please the Court, ladies and gentlemen, Mr. Brown [the prosecutor] in his remarks told you I was going to get up and ask for mercy for my client, and that nobody else in this case got any mercy, so he should not have any. (R 1759)

Nowhere in the reconstruction, nor in the prosecutor's notes which formed a basis for this reconstruction, does this argument of the prosecutor appear. (RR

144-177) Yet, the comments were made by the prosecutor as evidenced by the above quote by defense counsel.

Defense counsel also noted that the prosecutor had quoted scripture to them during his penalty phase argument:

> If you feel you need to hear Scripture quoted to help you arrive at your verdict, as Mr. Brown quoted some to you.... (R 1760)

Again, conspicuously absent from the reconstruction and from the prosecutor's notes is any quote, reference to, or mention of scripture passages. (RR144-177)

Also missing from the reconstructed argument prepared by the state and approved by the trial court is an item mentioned by the trial judge during the hearing on the reconstruction. Judge Daniel states that he recalled something about the prosecutor questioning the reliability and veracity of the defendant. (RR 13) As stated further in the trial court's order approving the state's reconstruction:

> The court does recall that the prosecutor (Mr. Brown)...further questioned the reliability of the defendant as a witness, pointing out to the jury that the defendant had taken the stand to testify in the prior phase of the trial and his testimony was materially contradicted by other testimony and evidence.... Mr. Brown, in fact, argued to the jury that they (the jury) had already determined that the defendant was a cold blooded, calculating murderer whose testimony was not reliable by virtue of their rejection of his testimony in returning a verdict of guilty in Phase I of the trial. (RR 148)

Yet, although recalled by the trial judge, this argument does not appear in the attached and approved reconstruction of the prosecutor's argument, nor in the prosecutor's notes. (RR 150-161, 162-177)

A further showing a faulty memory and hence inaccuracy of the reconstruction is evidenced by the fact that the trial court indicated that the prosecutor got down on his knees during the penalty phase argument to the jury.

(RR 27) However, this act occurred during the guilt phase argument, as shown by the transcript of the defendant's response at the guilt phase of the trial. (See R 1649, 1653-1654)

Moreover, the state's "reconstruction" (RR 60-74) which the trial court accepted (RR 149) was based in large part upon notes which the prosecutor and another assistant prepared in advance of the missing argument. The accuracy of the state's "reconstruction" based upon these notes is questionable.

Initially, the prosecutor has admitted to the trial court that his "reconstruction" was accomplished by reading these notes and trying "to put [him]self in the mind set that [he] was in the motel room at the Sheraton in Tampa the night that [he] prepared the notes for the phase two closing...." (RR 3) (emphasis added) The reconstruction, then, is of what the prosecutor was writing in his motel room the night before the argument to the jury; not a reconstruction of what he actually said to the jury the following day.

Additionally, the prosecutor's "reconstruction" differs in many aspects from the notes -- in many places deleting words and phrases, in some places adding words and phrases, and in other places using different words and phrases. Examples of this include the use in the notes on six occasions of the notation "etc." (RR 151, 156, 157, 161); the deletion of material words and phrases in the reconstruction which are present in the notes (compare RR 64 with RR 153, RR 65 with RR 155, RR 66 with RR 156, RR 68 with RR 158, RR 69 with RR 159, and RR 71 with RR 161); the addition of words and phrases on the reconstruction (compare RR 63 with RR 152, RR 63 with RR 153, RR 65 with RR 155, RR 66 with RR 156, RR 67 with RR 157, RR 69 with RR 159, RR 69-70 with RR 160, and RR 71 with RR 161). Moreover, there are several notations in the margins of the notes which do not appear in the reconstruction. (RR 153, 156, and 157)

Based upon these differences which we know exist between the notes and the "reconstruction", we can only speculate as to the number of differences which must now be presumed to exist among the actual argument given to the jury, the notes, and the reconstruction. Did the prosecutor call the defendant "mercenary"? (RR 63) Did the state argue the mental anguish of the victim's family? (RR 155) According to the actual argument, was death at the hands of an angry, cold, uncaring, mercenary (RR 63, 66, 153, 156, 159); was the defendant seeking to secure future "profits" (RR 158); was the weapon a "terrible," "awful" pistol, which caused much pain? (RR 158) Was the sentence of the co-defendant of "no matter" at all (RR 161), or was it to be given some weight by the jury, (RR 71) according to the prosecutor's argument? These phrases all differ in material aspect between what is contained in the notes and what is in the "reconstruction."

The state's "reconstruction" adopted by the trial court, lacked any mention whatsoever of defense objections, the existence of which was not denied by the state and which was contended by defense affidavits. (See RR 38-40, 43-47) Additionally, there were several material disputes as to the contents of the argument, which disputes concerned:

> (a) the presence of defense counsel's objections to various arguments by the prosecutor.
>
> (b) reference to the defendant as "the devil," which reference was objected to by counsel.
>
> (c) the fact that the prosecutor pointed his finger directly in the defendant's face in a threatening and improper fashion, which fact was objected to by counsel.
>
> (d) the fact that the prosecutor's argument was highly theatrical and appealed to the emotions of the jury to which defense counsel objected. Additionally, as the defendant submitted in a response to the state's purported reconstruction, the prosecutor's reconstruction does not show the

extent of the emotional language, name-calling, and antics of the prosecutor. (RR 38-53, 80-83)

With these disputes, the differences between the notes and the reconstruction, and with the omissions clearly shown to exist, how can we be sure of the content of other items missing from the record and unavailable? How can we be sure of the accuracy of what has been "reconstructed." Was the co-defendant the "lesser of two evils," or was it that the prosecutor, in the heat of the argument, said that while the co-defendant was certainly no angel, he was not the "devil" of the pair, as the defendant was? (RR 39,45) Based upon expert studies as proffered in the trial court (RR 84-131) and based upon common sense, there is certainly the great probability of mistaken and inaccurate recall, especially when the "reconstruction" utilized notes from which the prosecutor departed in making his presentation (as has been clearly shown by the foregoing examples), and when the reconstruction has shown to be lacking and inaccurate in some items.

Adequate appellate review cannot be constitutionally received on such a weak, conflicting, unsubstantiated, and incomplete reconstruction of the record. The appellant cannot stipulate to such an inaccurate record (as must be presumed from the discrepencies).

While the trial court has adopted the state's version of the reconstruction as "reasonable," the appellant contends that this is not good enough. In this situation, review of the precise words and conduct of the prosecutor, as well as objections of defense counsel, are crucial for review of the issue concerning improper and prejudicial argument to the jury and the resultant improper sentence. Although the appellant admits that in many situations (such as whether certain evidence was presented or whether an objection was lodged) it may be possible to provide a substantially correct reconstruction by showing the general gist of what took place, such is not the case here. Argument of counsel

to the jury, where each word and gesture are crucial, is not subject to reconstruction. It is not merely the substance or tone of the argument to the jury which in this case must be reviewed, but instead it is the exact words and precise conduct of the prosecutor which are needed to form the basis of an issue on improper and prejudicial argument to the jury and the resultant improper sentence. Anything less than a full, accurate, verbatim transcript with no disputes as to the contents precludes or frustrates meaningful appellate review as guaranteed a defendant by federal and state constitutional due process and equal protection principles and by state statutory and constitutional provisions concerning appellate rights and procedures. Amend. XIV, U.S. Const.; Art. I, §9, and Article V, Section 3(b)(1), Florida Constitution; §921.141(4), Fla. Stat.; Griffin v. Illinois, supra; Dowd v. U.S. ex rel. Cook, 340 U.S. 206, 208 (1951); Cochran v. Kansas, 316 U.S. 255, 257 (1942); United States v. Selva, 559 F.2d 1303 (5th Cir. 1977); United States v. Atilus, 425 F.2d 816 (5th Cir. 1970); Delap v. State, supra; Fernandez v. State, 292 So.2d 410 (Fla. 3d DCA 1974); Yancey v. State, 267 So.2d 836 (Fla. 4th DCA 1972); Simmons v. State, 200 So.2d 619 (Fla. 1st DCA 1967). See also Fla.R.App.P. 9.140(f).

Additionally, case law indicates that neither the trial court nor the reviewing court ought to be left to resolve facts and issues presented by conflicting affidavits of interested and partisan attorneys. See Peri v. State, 426 So.2d 1021, 1027 (Fla. 3d DCA 1983); Smith v. Sherwood, 95 Wis. 558, 70 N.W. 682, 683 (1897); O'Conner v. Bonney, 57 S.D. 134, 231 N.W. 521 (1930). Yet, this is precisely the situation in the instant case. Such situation is untenable and unconstitutional under the Florida and federal constitutions.

Failure to vacate the appellant's death sentence and grant a new penalty phase would frustrate this Court's duty and the appellant's right of full review, especially since we are dealing with a capital case. This was the

decision of the Third District Court of Appeal in Wester v. State, 368 So.2d 938 (Fla. 3d DCA 1979), wherein the court reversed and remanded for a new trial. There, because of missing stenographic notes, the trial court had approved a reconstructed record, over defense objections as to the sufficiency of the reconstruction. Appellant contended, and the district court agreed, that the reconstructed record before the appellate court did not provide an adequate basis for appellate review, thereby depriving him his right to the effective assistance of counsel.

Here, too, as conclusively demonstrated in this argument, the reconstructed record cannot provide an adequate basis for appellate review. The appellant has shown substantial omissions and other transcript deficiencies. Specific prejudice also exists, although not required [see United States v. Selva, supra], because it is apparent that the appellant and this Court cannot rely on the accuracy of the "reconstruction" to support argument to this Court, and the appellant cannot know what additional arguable errors are unreported in the reconstruction. A new penalty phase (or imposition of life sentences) is therefore required.

POINT II

THE TRIAL COURT ERRED IN ADMITTING, OVER DEFENSE COUNSEL'S OBJECTIONS, EVIDENCE WHICH WAS OBTAINED AS A DIRECT RESULT OF THE DEFENDANT'S INVOLUNTARY STATEMENTS, WAS A DIRECT RESULT OF THE DENIAL OF THE DEFENDANT'S RIGHT TO SPEAK TO HIS ATTORNEY, AND WAS A FRUIT OF AN ILLEGAL ARREST, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The trial court in the instant case suppressed the defendant's statements to the police, ruling that the defendant did not freely and voluntarily waive his rights. (R 595, 2005 a) However, the court refused to suppress the physical evidence obtained following the confession. (R 595-596) This denial of the motion to suppress is error.

During the involuntary statement, Craig agreed to show police where the bodies had been disposed; and the defendant did, in fact, subsequently lead police to the scene. (R 2173, 2286-2289, 2389, 2393-2394) Police officials and the prosecutor all admitted that the finding of the bodies and the physical evidence discovered at that scene was a direct result of the defendant's confession and cooperation with the police. (R 595-596, 884, 2220-2221, 2323, 2441) The trial court, while stating that the evidence was obtained as a result of the confession, ruled that the evidence did not stem from the statement, but was found elsewhere:

> (THE COURT: It [the suppression] concerns only the statements; it does not concern the evidence.)
>
> (MR. BROWN [the prosecutor]: I'm not sure, if the Court is now suppressing the statments as not being consistent with Miranda, -- -- --)
>
> (THE COURT: For the reason I said, as not being made freely and voluntarily after a conscious and intelligent waiver.)

(MR. BROWN: So the evidence we gained as a result?)

(THE COURT: As I stated at the previous hearing, the evidence that came as a result did not depend upon the statements, it was found elsewhere. I believe it is still available for use.)

(MR. FOX [Defense counsel]: Again, for clarification, I just -- --)

(THE COURT: That's why I cautioned all of you not to mention the confession. I've been reviewing cases on it.

(MR. FOX: Just to reiterate, the argument that follows, let's say, I think I understand the Court's ruling, that would be fruits of the statement?)

(THE COURT: I'm sure that's what you're saying. If they were fruits depending solely upon the confession, you would be right. But my ruling is that the fruits do not depend solely upon the statement.) (R 595-596) (emphasis added)

This ruling that the physical evidence was actually found independent of the defendant's confession and cooperation is clearly erroneous. First, the defendant's giving directions to the location was still part of the confession. He had been asked during the taping of the confession to provide police with a location. Craig responded that he could not describe how to get there, but that he would show them. (R 2173, 2286-2289, 2389, 2393-2394) Therefore, the fact of the defendant's physically directing the police to the sight was still part of the interrogation. Also, the facts do not support the court's ruling that the bodies were actually found independantly. The defendant led police to the scene. They marked the area and returned the next day to gather the evidence and to recover the bodies with the assistance of divers. Sheriff Griffin, Captain Brown, and Deputy Whitaker all admit that the defendant led them to the bodies, and without Craig's doing so, they would not have found the evidnece.

(R 884, 2220-2221, 2323, 2441) The testimony of Sheriff Adams (of Sumter County) merely indicates that he believes he probably would have found the bodies without the defendant; not that he already had found them without the defendant. (R 2840-2843) He had not yet begun the searches of the many sink-holes in the area. (R 2840-2843) The evidence was found as a result of the defendant.

Therefore, the physical evidence obtained as a direct result of the tainted confession must be suppressed as a "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963).

Notwithstanding the unlawful confession, the evidence still should have been suppressed because it was also a fruit of an unlawful arrest. The defendant was arrested on the property where he resided without an arrest warrant. Police had called him from his house to the gate of the ranch late at night, telling him to unlock the gate to let them in. Thereupon he was placed under arrest for cattle theft. (R 2157-2159, 2185, 2368, 2375-2377, 2414-2415) This warrantless arrest on the defendant's premises was illegal pursuant to the holding in Payton v. New York, 445 U.S. 573 (1980). The discovery of the bodies and other physical evidence is a fruit of this illegal activity and must be suppressed on this basis as well. Wong Sun, supra.

Additionally, the physical evidence must be suppressed because of the denial of the defendant's right to access to counsel. Evidence obtained in violation of the right to counsel must be suppressed. Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); Brewer v. Williams, 430 U.S. 387 (1977). Where police have prevented an attorney retained by the defendant or by his family from consulting with the defendant prior to or during custodial interrogation, any evidence obtained following such prevention must be suppressed. Miranda v. Arizona, 384 U.S. at 465 n. 35, citing with approval

People v. Donovan, 193 N.E.2d 628 (N.Y. 1963). As stated in Donovan, supra at 630:

> [W]e condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together. And, it necessarily follows, if such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also... contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.

In the instant case, two violations occurred. The first violation was prior to the taped confession and came when the defendant was being booked into the jail. Sheriff Griffin called the jail and interrupted the booking process, when he heard that a bondsman and counsel for the defendant were coming to the jail to bail the defendant out. The sheriff told the jail personnel to return the defendant to him and that if anyone came looking for the defendant, not to tell them where he was. (R 2498)

The second violation of the right to counsel occurred when counsel obtained for the defendant by his family called the sheriff's department requesting to speak to his client. (R 2291, 2323, 2555, 2560, 2563-2571, 2722-2730) At the time of the call, the defendant was in the process of leading Sheriff Griffin and Captain Brown to the location of the bodies. The sheriff's department radioed the sheriff asking him to call the station. (R 2242-2243, 2291-2292, 2323) Sheriff Griffin telephoned (out of the defendant's presence) and was told that the defendant's attorney wished to speak to the defendant and wanted all questioning with his client to cease immediately and wanted the defendant returned to the station so that the attorney could speak to him. (R 2556-2560, 2722-2730) Sheriff Griffin, wishing to keep Craig incommunicado, told his staff to tell the attorney that they could not locate the sheriff and

did not know where he was. (R 2326, 2722-2730) A sheriff's department tape recording was made of the phone conversation with the sheriff:

> JOHNSON: OK, and also we need to let you talk to Randy Swails. He has some lawyer on the phone with him. Hang on a minute, I'll put you through.
>
> SHERIFF: OK
>
> * * *
>
> SWAILS: Sheriff
>
> SHERIFF: Yeah.
>
> SWAILS: On the other line I've got a Mr. Rich, attorney he's been retained to represent Mr. Craig.
>
> SHERIFF: Who is it?
>
> SWAILS: A Mr. Rich or Richey.
>
> SHERIFF: Oh well, just tell him you don't know where I am.
>
> SWAILS: Can't get in touch with you.
>
> SHERIFF: Yeah, I've got Craig.
>
> SWAILS: Uh-huh.
>
> SHERIFF: And just tell him that he's, we'll be back to the jail shortly. You understand.
>
> SWAILS: OK.
>
> SHERIFF: Okey, dokey?
>
> SWAILS: OK. (R 2725-2726)

The sheriff did not relay this information regarding his attorney to the defendant. (R 2243, 2323)

The deception continued when Attorney Richey called the sheriff's department a second time:

GREEN: Sheriff's Department, Officer Green.

NOLAN: Green, take this call back over there. He [Attorney Richey] wants to talk with the Sheriff and all that, and I don't know where they are or nothing. Maybe you can stall him better than I can.

GREEN: OK

* * *

RICHEY: This is Steve Richey, an attorney in Leesburg, all right? I communicated a few minutes ago with the booking desk and talked to a deputy who advised me he was going to find the Sheriff who is with a client that I have been retained to by the name of Robert Craig. Supposedly they haven't been able to find Mr. Craig and the Sheriff to advise the Sheriff and Mr. Craig that I've been retained to represent Mr. Craig. I need for that to be communicated not only to the Sheriff who supposedly has Mr. Craig* and is talking with him, but also Mr. Craig, and I am requesting that that interview with the Sheriff cease until I can discuss and talk with my client about his rights to talk with the Sheriff.

GREEN: Well, I'll see if I can raise him on the radio, we haven't been able to.

RICHEY: I am communicating that to you directly since I've been getting the runaround over there you know, saying we can't find the Sheriff, and Robuck talked* with his client 15 minutes ago, sitting 3 doors down from where the Sheriff was and that just tends to irritate me. So I need somebody to communicate that so that you know that everybody knows that I'm not going to get in my car and drive over there until I find out that has been communicated to Mr. Craig and that the interview has been terminated and I need somebody to call me back here at my home so I can know that.

* * *

And I'm advising that any communications made after I say that I represent him and wanted to talk to him you know

GREEN: I know he's out on his radio someplace, but I don't know exactly where. We tried to call him a few minutes ago. I think you called over a few minutes ago.

RICHEY: It's been within the last 15 minutes.

GREEN: Yeah, we tried to raise him then, and couldn't raise him.

RICHEY: All right, well, somebody needs to communicate that so we don't get involved in a mess.

* * *

GREEN: Stand by a minute, Marion.

Mr. Richey, I tried to raise Lake 1 on the air and I don't get any response from his whatsoever, so I don't know where he's at.

RICHEY: And he's not in his office right now.

GREEN: He went 10-8 at one time and that's about 30 minutes ago or better, and we tried to raise him twice and I just tried again so

RICHEY: Does that mean, are you saying that my client Robert Craig is with him?

GREEN: I don't know.

RICHEY: Well, where is Robert Craig.

GREEN: That I don't know. Have you checked over at the jail?

RICHEY: Well, you know they tell me that he's with the Sheriff.

GREEN: Well, they stick us down here in this radio room and we don't know too much what's going on except what's said on the radio or you know

RICHEY: Uh-huh.

GREEN: We broadcast for him on all our frequencies and he hadn't answered any of them. (R 2726-2729) (emphasis added)

Such police conduct, in blatant disregard for the defendant's rights, is an outrage to the United States and Florida constitutions. Evidence obtained following such improper conduct must be suppressed.

In Davis v. State, 287 So.2d 399 (Fla. 2d DCA 1974), the Court addressed an almost identical issue (although it was not so egregious a violation). In Davis, supra, immediately following the defendant's arrest, the defendant's father retained an attorney to represent and advise the defendant. The attorney called at the jail and requested to see his client. The attorney was kept waiting for 1½ hours. During that time, and clearly after the attorney's request to see his client, the police obtained a confession from the juvenile. Citing Escobedo v. Illinois, the Court suppressed the confession on the basis that the defendant was deprived of "effective representation by counsel at the only stage when legal aid and advice would help him." Davis v. State, supra at 400. So, too, must the evidence here be suppressed. This Court should reverse the defendant's judgments and sentences and remand with directions to grant the motion to suppress the bodies and other physical evidence.

POINT III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND DENYING THE MOTIONS IN LIMINE AND FOR MISTRIAL AND ALLOWING DETAILED EVIDENCE AND ARGUMENT ON COLLATERAL CRIMES WHICH BECAME A FEATURE OF THE TRIAL THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Prior to trial, Appellant moved in limine to prevent the state from presenting evidence of Appellant's involvment in cattle rustling. (R 1984-1986) No written order on this motion is in the record on appeal. However, prior to the elicitation of any testimony on this issue, Appellant made his objection known. The trial court noted and overruled a standing objection to any evidence dealing with any type of cattle theft. (R 702) The state was then allowed to present detailed testimony concerning the theft of cattle from the Eubanks' ranch, a crime for which the appellant was not charged. Of the thirty-eight (38) state witnesses, at least twelve (12) of them testified as to details concerning the method of transporting the cattle, the cleanliness of the trailer used for transport, the amount of each cattle transaction, the cashing of checks for the cattle and the use of the proceeds from the cattle theft and sale. (R 696-698, 703-705, 777-778, 781-785, 787-799, 803-827, 859-863, 894, 910-912, 918-919, 929-930, 981, 1008, 1011, 1077-1078, 1092-1102, 1210-1220, 1456-1460, 1480-1481, 1485) Of the eight hundred and eight (808) pages of trial testimony, approximately ninety (90) of these pages dealt with this issue. The prosecutor greatly emphasized these collateral crimes in his summation. (R 1585, 1589, 1591, 1593-1608, 1615, 1630, 1637, 1646) Testimony of a state witness also indicated that the appellant used the money from the cattle thefts to buy guns, home appliances, cocaine and marijuana. An objection as to relevancy was

overruled and a motion for mistrial based upon evidence of a collateral crime was denied. (R 929-930)

The state argued that the evidence concerning the cattle rustling was presented in an effort to prove a motive for the killings. The state attempted to justify the testimony concerning Appellant's purchase of illicit drugs by contending that it was relevant to prove the reason that the appellant needed to kill Eubanks. The state's theory was that this would enable the appellant to obtain a large sum of money which was needed since cocaine is very expensive. It should be noted that the state never filed the requisite notice of its intent to offer this type of evidence under Section 90.404(2), Florida Statutes (1981). Appellant contends on appeal that the trial court's action in overruling the objections and denying the motions in limine and for mistrial resulted in the collatteral crimes becoming a feature of the trial which resulted in the denial of Appellant's constitutional right to due process and a fair trial. Amend. V, VI and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

The Florida standard for the introduction of evidence revealing other crimes is clear. Williams v. State, 110 So.2d 654 (Fla. 1959), is the leading case in the area. Williams reveals that:

> [E]vidence revealing other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or material bearing on some essential aspect of the offense being tried. Id. at 662.

An extension of Williams occurred in Williams v. State, 117 So.2d 473 (Fla. 1960), which held that the State may not make a prior or subsequent offense a feature instead of an incident of the trial. This Court expressed concern that the testimony of collateral crimes degenerates from the developments of facts

pertinent to the issue of guilt into a character attack. Appellant contends that this occurred in the case at bar.

The introduction of the type of evidence at hand has been codified in the Florida Evidence Code. Section 90.404(2), Florida Statutes (1981) states:

> (a) Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

However, the statute goes on to provide that the state must furnish written notice to an accused if it intends to offer this type of similar fact evidence. §90.404(2)(b), Fla. Stat. (1981). As previously noted, the state failed in this respect.

The state's theory as to the relevancy and admissibility of the testimony that Appellant needed money in order to buy cocaine and marijuana borders on being ludicrous. It is clear that the relevancy of such evidence must be clear and convincing, not illusory, fancied, or suppositious. Headrick v. State, 240 So.2d 203 (Fla. 2d DCA 1970). The State's theory of admissibility stretches the boundaries of credibility. Furthermore, this as well as the voluminous testimony concerning Appellant's cattle rustling became a feature rather than an incident of the trial. This resulted in the obfuscation of the true issues involving guilt and innocence. Appellant was portrayed as a drug-using, cattle-rustling murderer. The jury received the impression that he was an outlaw who would not hesitate to take a life.

In addition to the detailed testimony in evidence regarding these prior bad acts for which the appellant was not on trial, the prosecutor did not hesitate to exploit Appellant's predicament at trial. When the appellant took the stand to testify, the prosecutor repeatedly asked questions concerning

Appellant's involvement in cattle rustling. Upon the advice of his attorney, the appellant was forced to invoke his Fifth Amendment priviledge of non-incrimination for every juror to see. (R 1387-1392, 1458-1460, 1467-1469, 1476, 1480-1483) If the uncharged crimes were not a feature of the trial prior to his testimony, they certainly became one at this point. The prosecutor was quick to point out in closing argument that the appellant failed to reveal all of the facts of his wrong doings to the jury, thus commenting on Appellant's exercise of his constitutional right to remain silent. (R 1641) This only served to magnify the error in allowing the collateral crimes to become a feature of the trial.

The prosecutor also gave great emphasis to the collateral crimes during his argument. He repeatedly reminded the jury of the cattle rustling incidents and assinated the appellant's character by characterizing him as a thief. (R 1585, 1589, 1591, 1593-1608, 1615, 1630, 1637, 1646) The issue of Appellant's guilt or innocence as to the crimes for which he was on trial became obscured by the misdirected emphasis of the state's argument.

In addition to the cases of Williams, supra, Florida courts have expressed concern over prosecutorial argument dwelling upon irrelevant and immaterial testimony as to collateral crimes of the defendant. Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st DCA 1973).

> A defendant in this jurisdiction is not entitled to a perfect trial but is entitled to a fair trial. The prosecution in the instant case was not content to try this man upon the charges lodged against him and upon competent evidence proving his guilt of same but to the contrary the prosecution adduced extensive extraneous testimony which precluded this defendant from receiving a fair and impartial trial. The judgment of conviction is reversed with the directions to grant defendant a new trial. Id. at 466.

Even if a trial judge finds evidence of this type to be otherwise relevant, it is still inadmissible when its probative value is substantially outweighed by its unduly prejudicial nature. §90.403, Fla. Stat. (1981); Young v. State, 234 So.2d 341 (Fla. 1970). The case at bar presents a classic example of the above. The probative value of the extensive testimony and argument pertaining to collateral crimes was substantially outweighed by its prejudice. The result was that the former offenses were made a feature of the trial. Denson v. State, 264 So.2d 442 (Fla. 1st DCA 1974). The result of the testimony simply demonstrated the bad character of the appellant thus unduly prejudicing him. See Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977). Although it was not requested, a limiting instruction on the purpose of the introduction of this type of evidence should have been given. Pickles v. State, 291 So.2d 100 (Fla. 3d DCA 1974). As a result of this ommission the jury was never informed as to the permissible scope of consideration for such evidence. It undoubtedly weighed heavily on their minds.

The introduction of the objectionable evidence and the continuous argument by the state resulted in a character attack upon the appellant which became a feature of the trial. The issue of guilt or innocence as to the crime charged became tainted. The trial court could have prevented this occurrance by granting Appellant's motion in limine or the motion for mistrial. By not doing so, the appellant was denied his constitutional right to a fair trial. The conviction should accordingly be reversed and this cause remanded for a new trial.

POINT IV

IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 12 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON IMPROPER AND PREJUDICIAL COMMENTS BY THE PROSECUTOR DURING HIS CLOSING ARGUMENT TO THE JURY IN THE GUILT PHASE.

A fair trial is a fundamental right to which all defendants are entitled. Simmons v. Wainwright, 271 So.2d 464, 466 (Fla. 1st DCA 1973). A prosecuting attorney has the duty to avoid conduct which could compromise a fair trial. The standard of conduct expected of a prosecutor was well-stated in Cochran v. State, 280 So.2d 42, 43 (Fla. 1st DCA 1973):

> It is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to effect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.

Appellant submits that the prosecutor's improper remarks throughout his closing argument utterly destroyed his fundamental right to a fair trial.

In his closing argument during the guilt phase of the instant case, the prosecutor, Jimmy Brown, made improper comments and gestures which served no purpose whatsoever except to poison the minds of the jury against Appellant and thus deny Appellant his fundamental right to a fair trial. These instances of misconduct include:

> 1) engaging in speculation as to what the co-defendant's attorney "would argue" to the jury if Appellant had been offered a plea bargain and testified against the co-defendant Schmidt. (R1584-1587);

2) testifying as to why the State chose to bargain with the co-defendant Schmidt. (R1583, 1587-1588);

3) totally misrepresenting the actual facts of the case, to the point of actually deceiving the jury into believing that the case never could have been solved without Schmidt's help. (R2587);

4) improperly referring to the indictment in such a way as to convey to the jurors that another jury listened to the evidence and decided that Appellant committed the murders with which he was charged. (R1588);

5) commenting on defense counsel's ability to "twist", "bully" and "confuse" the State's witness Schmidt. (R1611);

6) improperly interjecting into the legal theory on principals, the exhortation that "it does not make a difference in the eyes of God". (R1619);

7) implying that defense counsel, by his objection, somehow did not want the jury to know about the law on principals. (R1620-1621);

8) appealing to the sympathy of the jury by making reference to the victim's wife and home. (R1624-1625);

9) implying that the jury may infer guilt from the fact that Appellant actively assisted his attorney during the trial by "passing notes back and forth, talking, whispering, whatever he's been doing." (R1629);

10) referring to Appellant as a "murderer, a cold-blooded, mercenary, murderer" and "A liar, a coward, a thief, a murderer." (R1629-1630);

11) referring to Appellant as a liar. (R1630, 1641-1642);

12) exhorting the jury to consider Appellant's invocation of his Fifth Amendment right against self-incrimination as inferring guilt. (R1641, 1645); and

13) apparently engaging in theatrics such as falling to his knees before the jury (R1649, 1653-1654) and waving the guns around during his argument (RR27, Point I, supra).

These highly improper and prejudicial comments have been consistently condemned by the courts of this state, other states, and even the United States Supreme Court. While it is true that an attorney is permitted wide latitude in making his arguments to the jury, such latitude is bounded by the requirement that such arguments are predicated upon the evidence and the logical inferences which follow. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). A prosecutor must not allow himself to become an unsworn witness. Smith v. State, 74 Fla.44, 76 So. 334 (1917). The needless speculation of the prosecutor as to what would occur if another person (Schmidt) were on trial instead of Appellant is completely dehors the evidence. Similarly, the prosecutor's testimony as to why Schmidt was permitted to "bargain" is beyond the evidence in this case. In fact, the prosecutor seriously misrepresented, perhaps even deceived the jury, that in order to "break this case" it was necessary to deal with Schmidt. (R1587). This ignores the testimony adduced at the suppression hearing, at which the prosecutor was present, where the investigating officers testified that had it not been for Appellant, they never would have found the bodies and thus the case never would have been solved. (R884,2220-2221,2323,2441). Although this testimony was never presented to the jury because Appellant's statements were suppressed, the prosecutor, who had actual knowledge of this, chose to ignore it and argued to the jury that the opposite was true: that Schmidt, not Appellant, was responsible for solving the crime.

Reference to the indictment which suggests that another jury has previously examined it and found probable cause that an accused had committed a crime is highly improper. In State v. Onidas, 635 S.W.2d 516 (Tenn. 1982), the Court reversed a conviction on the grounds that the prosecutor during voir dire told the jury that the grand jury and a judge had already determined that probable cause existed to believe that the defendant had committed the crime. The Court

noted that the jury had not been told of the ex parte nature of grand jury proceedings and accepted the argument that:

> ... the natural and probable effect of the misleading statements of the Assistant District Attorney were to effectively deprive the defendant of the benefit of the presumption of innocence to which he was entitled at the beginning of his trial and throughout the proceedings until the jury's verdict was reported. The prosecutor's statements to the prospective jurors were misleading and were calculated to create bias in the minds of the jurors against the defendant's cause.

635 S.W.2d at 517.

Comments on defense counsel or defense tactics are particularly offensive as well as unethical. Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982). Similarly, it is improper for the prosecutor to apply offensive epithets to an accused. Johnson v. State, 88 Fla. 461, 102 So. 549 (1924); Glantz v. State,343 So.2d 88 (Fla. 3d DCA 1977); Murray v. State, 425 So.2d 157 (Fla. 4th DCA 1983) (wherein, as here, the prosecutor called the defendant a liar).

Comments by the prosecutor which refer to a victim's family or imply that "God" thinks an accused is guilty are highly prejudicial since they tend to engage the sympathy of the jury to the detriment of the accused. Gluck v. State, 62 So.2d 71 (Fla. 1952); Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972).

The invocation of the right against self-incrimination is an absolute privilege of all persons and guilt may not be inferred from its exercise. Bowles v. United States, 142 U.S.App.D.C. 26, 439 F.2d 536 (D.C.Cir. 1970)(en banc) cert. denied 401 U.S. 995, 91 S.Ct. 1240, 28 L.Ed.2d 533 (1971). Consequently, such comment by the prosecutor on Appellant's failure to tell the whole story are both prejudicial and improper.

Appellant acknowledges that most of the remarks of the prosecutor went unobjected to at trial. However, defense counsel did object three times. The

first objection was interposed to a perceived misstatement of the law by the prosecutor. (R1620-21). This objection was overruled and the prosecutor commented upon defense counsel's objection in such a manner that conveyed the impression that defense counsel did not want the jury to know what the law on principals was. (R1621). The second objection was interposed after the prosecutor had begun commenting on the bullet evidence. Defense counsel objected on the ground that the prosecutor had gone beyond mere comment on the evidence to actually supplying it. (R1635). This objection was overruled. (R1635). Finally the record reflects the following:

> [BY MR. BROWN, THE PROSECUTOR]:
>
> And what does that show? Not just his participation, since he said it from there, it shows again that he's a liar, because he lied about that from the witness stand.
>
> And then the defendant when he testified said that Schmidt by himself took the bodies and pulled them over the edge into Wall Sink. You heard the testimony about the size of Bobby Farmer. You know about the blocks and you can take them back with you. You've seen Schmidt. What does your common sense tell you about that? The defendant is lying once more.
>
> MR. FOX: I'm going to object. May we approach the Bench?
>
> CONFERENCE AT BENCH OUT OF HEARING OF JURY:
>
> (MR. FOX: It's been exceedingly difficult for me to maintain my seat throughout the closing argument with his continued reference to my client's testimony as lying. I move for a mistrial based on the continued presentation of that and other matters that he's presented in closing argument, and move for a mistrial on the whole thing.)
>
> (MR. BROWN: I'm not making any reference about Craig that wasn't made by Mr. Fox in his closing argument about Schmidt when he talked about him lying. I think it's quite fair. And the instruction the Court has already given, and the instructions the Court will give, what I say

is my summing up of the evidence and is not evidence, and it is not law I am submitting to them. This is the proposition, I think most of the time I say "I submit to you", I think it is very clear and there is obviously no prejudice to the defendant, and no basis for a mistrial, and I will ask the Court to deny the motion and overrule the objection. I'm about to talk about the credibility of witnesses.)

(THE COURT: It would be more appropriate in that phase of your summation.)

(MR. FOX: And the testimony about Craig not participating in the blocks, that's contrary to his testimony, and he's saying it's a lie.)

(THE COURT: If it's conrtary, you have rebuttal.)

(MR. FOX: But when he ways it's a lie, it seems to compound the problem.)

(THE COURT: You can cover it on rebuttal. Both of you are entitled to fair comment on the credibility of witnesses, but I think you'd better ease up on your characterizations, or at least properly preface them by language that would tend to show that you are submitting from the testimony that the testimony might be untruthful. I don't think the prejudice is enough for a mistrial, I'll deny your motion for mistrial, but I caution you, Mr. Brown.)

CLOSING ARGUMENT ON BEHALF OF THE STATE CONTINUED:

(R 1641-1644, emphasis added). From this excerpt, it is clear that the trial court recognized the impropreity of the prosecutor's argument but still denied the motion for mistrial. Such offensive characterization of an accused is improper. Johnson v. State, 88 Fla. 461, 102 So. 549 (1924); Glantz v. State, 343 So.2d 88 (Fla. 3d DCA 1977); Murray v. State, supra.

Appellant submits that the absence of objections to the numerous prejudicial comments by the prosecutor does not preclude appellate review. As support for this position, this Court is directed to Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979) wherein the court's reversal was based on a

finding that even though most of the prosecutor's closing argument went entirely unobjected to at trial, the contents of the final argument, taken as a whole, were such as to utterly destroy the defendant's right to the essential fairness of his criminal trial. As the Peterson court noted, this Court's holding in Pait v. State, 112 So.2d 380, 385 (Fla. 1959) is directly applicable:

> The general rule is that an alleged error based on improper argument to the jury will not be considered by an appellate court unless a timely objection was registered in the trial court. Rogers v. State, 158 Fla. 582, 30 So.2d 625; Carlile v. State, 129 Fla. 860, 176 So. 862. However, when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge. Florida Appellate Rules 3.7(i) and 6.11, subd. a, 31 F.S.A. Cooper v. State, 136 Fla. 23, 186 So. 230; McCall v. State, 120 Fla. 707, 163 So. 38; Simmons v. State, 139 Fla. 645, 190 So. 756; Carlile v. State, supra. Certainly, the better practice is to bring the matter promptly to the attention of the trial judge. Defense counsel has the duty to remain alert to such things in fulfilling his responsibility to see that his client receives a fair trial. Except in rare instances where a grievous injustice might result, this court is not inclined to excuse counsel for his failure in this regard. We think the remarks here fall within the exception.

In sum, the comments by the prosecutor in his closing argument were so prejudicial and so improper so as to destroy Appellant's fundamental constitutional right to a fair trial. Reversal is required.

POINT V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE MAXIMUM AND MINIMUM PUNISHMENTS FOR THE LESSER INCLUDED OFFENSES OVER APPELLANT'S TIMELY OBJECTION AND IN VIOLATION OF THE CRIMINAL RULES OF PROCEDURE, THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Over defense objection, the trial court instructed the jury as to the maximum and minimum penalties for the lesser included offenses in addition to the crimes charged. (R 1521-1222) Rule 3.390, Fla.R.Crim.P. states:

> (a) The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.

For many years, the question of whether the above-cited rule was mandatory or directory was in doubt. This issue was finally resolved by the landmark case of Tascano v. State, 393 So.2d 540 (Fla. 1980) wherein this Court held that the rule was mandatory upon request of either the state or the defendant. The rationale of the decision rested entirely upon the plain language of the rule. There is no requirement that prejudice be shown. The failure of the trial court to give such an instruction when requested by either party can never be harmless error. Murray v. State, 403 So.2d 417 (Fla. 1981). To hold otherwise would negate the effect of the mandatory provision in the rule. Id. at 418. The decision in Murray, supra, likewise turned upon the plain and simple language contained in the rule.

Appellant contends that the plain and simple language of the rule also requires reversal in the instant case. The rule clearly sets forth the duty of the trial judge to instruct the jury as to the maximum and minimum sentences

which may be imposed "for the offense for which the accused is then on trial." (emphasis added) Appellant was not on trial for any of the lesser included offenses. Hence, under the plain and simple language of the rule, it was error for the trial judge to instruct on these lesser included offenses over Appellant's objection.

While no prejudice need be shown under Murray, supra, and Tascano, supra, Appellant submits that prejudice did occur. The jury heard the maximum and the minimum penalties for all of the lesser included offenses. Of course, the maximum penalties for the lesser included offenses were not nearly so severe as the penalties for the crimes for which the appellant was on trial. The same is also true for the minimum penalties for the lesser included offenses. The jury was instructed that if they returned a guilty verdict as to a lesser included offense, the appellant could have received probation. No minimum mandatory sentence of twenty-five (25) years was available for any of the lesser included offenses. The jury undoubtedly got the message that a lesser verdict could result in freedom for the appellant.

While the issue at hand appears to be a novel one, the converse situation has been addressed. It is clear that a defendant is not entitled to a jury instruction on the penalty provisions of lesser included offenses. McGough v. State, 407 So.2d 622 (Fla. 5th DCA 1981); James v. State, 393 So.2d 1138 (Fla. 3d DCA 1981); Mitchell v. State, 304 So.2d 466 (Fla. 3d DCA 1974) and Settle v. State, 288 So.2d 511 (Fla. 2d DCA 1974). Since a defendant is not entitled to such an instruction under the clear language of the rule, neither should the state be entitled to it. Similarly, this Court has rejected the contention that a defendant is entitled to an instruction on the potential for an increased maximum penalty where the state is seeking enhancement under the habitual offender statute. Nappier v. State, 363 So.2d 803 (Fla. 1978).

While no prejudice is required, Appellant submits that the prejudice is manifest in the case at bar. Accordingly, Appellant's convictions and sentences must be reversed in this cause and must be remanded for a new trial.

POINT VI

THE TRIAL COURT ERRED IN ALLOWING THE MEDICAL EXAMINER TO TESTIFY, OVER THE DEFENDANT'S OBJECTION, THAT THE MURDERS WERE, IN HIS OPINION, EXECUTION-STYLE KILLINGS, IN VIOLATION OF DUE PROCESS OF LAW.

At the penalty phase of the trial, the court permitted the medical examiner to testify that the killings, in his opinion, were committed in an execution-style fashion. (R 1711-1712, 1719) Defense counsel's objection was overruled. (R 1711) The trial court later referred to this opinion testimony in his sentencing findings.

Section 90.702, Florida Statutes (1981), states that experts may render opinions if such opinion is within the area of his training, skill, experience, or knowledge. See also Fisher v. State, 361 So.2d 203 (Fla. 1st DCA 1978); Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977). Before the expert may testify regarding an opinion, the subject matter must be beyond the common understanding of the average layman. Johnson v. State, 393 So.2d 1069 (Fla. 1980).

Here, the opinion of the doctor that the killings were in an execution style fashion should have been excluded. There was no showing that the doctor had any expertise in the field of executions, or what even was meant by such a term. It is submitted that such term is not a medical term, but rather a legal one. Allowing such opinion testimony improperly raised the matter to the dignity of a professional medical diagnosis. Also, the matter was not beyond the common understanding of the laymen concerning this conclusory opinion. It therefore should have been excluded.

Because this improper opinion testimony was admitted and considered by the jury and the trial court, the death sentences must be vacated and remanded for a new penalty trial before a new jury.

POINT VII

IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 12 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS BY THE PREJUDICIAL AND INFLAMMATORY REMARKS OF THE PROSECUTOR.

It is well-settled that a prosecutor must refrain from making arguments that are inflammatory and abusive. Collins v. State, 180 So.2d 340, 343 (Fla. 1965). Once it is established that a prosecutor's remarks are offensive, this Court in Pait v. State, 112 So.2d 380, 385 (Fla. 1959) emphasized that "the only safe rule appears to be that unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment must be reversed." Such inflammatory comments are violative of an accused's fundamental right to a fair trial, free of argument condemned. Pait, supra.

In the instant case, there is no complete accurate, verbatim transcript of the prosecutor's closing argument in the penalty phase which this Court can intelligently review on appeal. (See Point I, supra.) Appellant submits that even the prosecutor's verbatim "recollection" adopted by the trial court as reconstruction still reveals the inflammatory and prejudicial nature of the prosecutor's closing argument.

Initially, the prosecutor told the jury that by their verdicts they found Appellant guilty of the "cold-blooded, calculated murders of John Smith Eubanks...and Walton Robert Farmer..." (R 165) While it is true that Appellant was found guilty of first degree murder, such a conviction can be based either on a theory of premeditation or felony murder. The evidence for premeditation need not show a well-thought-out plan but rather premeditation can be based on

even a moment's reflection. Consequently the prosecutor's characterization of the jury verdict is a misstatement of the law.

The prosecutor then gave his personal opinion that he carefully thought about the case and assured the jury that the death penalty is required for the crimes of which the jury convicted Appellant. (RR 165) Personal beliefs have no place in argument to the jury. Tyson v. State, 87 Fla. 392, 100 So. 254 (1924); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976).

In arguing that these murders were heinous, atrocious and cruel, the prosecutor made reference to actions which occurred after the victims were dead and thus misled the jury. (RR 169) Halliwell v. State, 323 So.2d 357, 361 (Fla. 1975). Similarly, the argument that Appellant may have "chose the exact spot where these two men would die, how they would die, and even what means to use to lure the victims into a secluded spot, away from friends and family..." (RR 168) while it may show premeditation, offers no support for a finding that the actual murders were heinous, atrocious and cruel. Id. In an analogous sense, the prosecutor's statement that after killing Eubanks, Appellant continued by "rifling his still warm body, searching his car trunk for a favorite shotgun of the victim which the Defendant coveted, and then weighting down the victim's body and that of Bobby Farmer, and consigning them to a deep, concealed, watery grave, without benefit of consecration, in a remote Sumter County sink hole" (RR 170) is irrelevant to proving that the murders were committed in a cold, calculated and premeditated manner. Additionally, emotional arguments as made by the prosecutor (RR 11, 14) have no place in a penalty phase argument. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

Also improper was the prosecutor's remark that after the murders, "the Defendant showed no remorse or concern." (RR 170) In Riley v. State, 366 So.2d 19 (Fla. 1978), this Court reversed a sentence of death based partly on the

finding that Riley had shown no remorse, holding that such a finding represented a non-enumerated aggravating circumstance and thus had to be disregarded.

Exhortations to the jury that they should return a certain verdict "on behalf of the People of the State of Florida, on behalf of those two murdered men who lie cold in their graves, on behalf of their families, and in the name of decency and justice" (RR 174) have been condemned as improper. Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976).

The absence of any objection on the record is not fatal to Appellant's argument since the accurate record has been lost through no fault of Appellant. The record reflects that some objections were indeed made and overruled. (RR 148) The lack of objections to the obvious improper arguments of the prosecutor emphasizes the prejudice accorded Appellant by the loss of the transcript and subsequent reconstruction. (See Point I, supra.)

Notwithstanding, the absence of a true transcript, Appellant submits that a new penalty phase before a new jury is required because the jury's recommendation was so tainted by the prosecutor's remarks that "neither rebuke nor retraction may entirely destroy their sinister influence..." Thus the absence of objection is not fatal. Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959); Peterson v. State, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979).

POINT VIII

THE TRIAL COURT ERRED IN OBTAINING OFF-THE-RECORD AND IN UTILIZING IN SUPPORT OF THE DEATH SENTENCE AS TO COUNT ONE THE VOTE OF THE JURY IN RECOMMENDING LIFE IMPRISONMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION.

In the instant case, the jury vote in favor of life imprisonment, as in all jury life recommendation verdicts (See Fla. Std. Jury Inst. Crim. Cases, pp. 81-82), did not include the vote tally of the jury recommendation. (R 2016) Somehow, on his own and off the record, the trial judge learned that the vote of the jury was seven-to-five in favor of life. (R 2088, 2110) The trial court utilized the "weakness" of the jury vote for life in justifying the death sentence imposed for Count I. (R 2109-2110)[3/] Defense counsel, learning of this for the first time upon receipt of the written findings after the sentencing hearing, filed a written objection to this extrajudicial matter. (R 2131-2132)

In Gardner v. Florida, 430 U.S. 349 (1977), the United States Supreme Court reiterated the law that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. Gardner held that using portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity afforded the defendant to rebut, challenge, or object to the report, denied due process.

In Porter v. State, 400 So.2d 5, 7 (Fla. 1981), the Florida Supreme Court, in applying Gardner to the extrajudicial consideration of depositions held:

3/ See also Point IX A and C(5), infra.

> That ruling [Gardner] should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court.

See also Jacobs v. State, 357 So.2d 172 (Fla. 1978); Harvard v. State, 375 So.2d 833 (Fla. 1979).

Because of this flagrant, constitutional error, the defendant's sentence as to Count I should be vacated. Since this factor is totally improper, a Gardner hearing is not the appropriate relief; rather the imposition of a life sentence is appropriate. See Point IX A and C(5).

POINT IX

APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT UTILIZED IMPROPER STANDARDS IN THE SENTENCING WEIGHING PROCESS, INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Following the presentation of additional evidence at the penalty phase, the jury returned a recommendation of life imprisonment for the murder of John Eubanks, and a death recommendation for the killing of Walton Farmer. (R 2015, 2016) The trial court, overruling the jury's life recommendation as to Count I and placing great weight on their death recommendation as to Count II, sentenced Robert Patrick Craig to die for both first-degree murder convictions. (R 2088-2110, 2111-2115)

The sentences of death imposed upon Robert Patrick Craig must be vacated. The court, in giving improper weight to both the jury's life recommendation (giving it little weight) and their death recommendation (giving it very strong weight because of the vote), found improper aggravating circumstances (misstating many of the facts), considered non-statutory matters in aggravation, failed to consider highly relevant and appropriate mitigating factors, and applied incorrect standards for the mitigation. These errors render Craig's death sentences unconstitutional in violation of the Eighth and Fourteenth Amendments. See Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). The specific misapplications are addressed separately below:

A. The Trial Court Improperly Considered The Weight To Be Given The Jury's Recommendation.

1. The Jury Life Recommendation (Count I)

The critical and proper role of the jury's advisory sentencing verdict in determining the appropriateness of the death sentence has long been recognized and many times explained 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 a life recommendation carries great, if not controlling weight; the decisions of this Court have strictly followed that standard. See, e.g., Washington v. State, 432 So.2d 44 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Smith, G.E. v. State, 403 So.2d 933 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980); Tedder v. State, 322 So.2d 908 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975). The standards for overruling the jury life recommendation as to Count I in the present case have not been met. 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, 382 So.2d 1190, 1193 (Fla. 1979), for rejecting the jury's life recommendation as to Count I.

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.

This Court in Tedder held that, even though the trial court had found no mitigating circumstances of that case there was no reason to override the jury's life 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 the latter to recommend life imprisonment. See also Gilvin v. State, 418 So.2d 996 (Fla. 1982).

In the sentencing phase of the instant case, following the state's presentation of additional medical testimony (some of which was speculative),[4/] the defense tendered testimony to show several mitigating circumstances. (See subsection B, infra.) After due deliberation, a majority of the jury recommended that the court impose a sentence of life imprisonment upon Robert Patrick Craig as to Count I of the indictment. (R 2016) No less than seven[5/] reasonable jurors (accepted as reasonable by the state at the commencement of the trial) considered the facts of this case and voted to recommend that a life sentence be imposed as to Count I.

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

4/ See Point VI, supra.
5/ See Point VIII, supra.

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 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 Washington v. State, supra at 48, this Court again reversed a death sentence imposed over the jury's life recommendation where, during the defendant's attempt to sell stolen guns, a deputy sheriff became suspicious and, upon approaching the defendant, was shot repeatedly, killing him. This Court found as mitigating against the above facts the defendant's age of nineteen, the defendant's lack of previous criminal activity, and the defendant's character as testified to by members of his family. On those facts, similar to those present in the instant case, this Court held there was insufficient reason in the record to override the jury's advisory life sentence.

Also, in Cannady v. State, supra, a case wherein the victim was shot five times, this Court found that there existed a reasonable basis for the life recommendation since the jury could have relied upon the defendant's age of 21 and his lack of significant criminal activity. Likewise, in Walsh v. State, supra, this Court ruled that a reasonable basis for the life recommendation

existed based on the defendant's lack of a prior record and testimony of his good character.

In McCampbell v. State, supra, this Court reversed a death sentence imposed over a jury life recommendation in a case where, during a robbery the defendant shot a security guard in the back of the head, killing him. The Court held that the jury could have been properly influenced in recommending life by factors such as the defendant's employment record, his prior record as a model prisoner, his family background, and the disposition of his co-defendant's cases (again, these factors are quite similar to those in the instant case).

In Goodwin v. State, supra, the murder of four persons who came upon a marijuana unloading operation was held to be cold blooded and cruel. This Court, however, reversed the death sentence imposed over a life recommendation, noting that even though the defendant helped tie up the victims, knowing that they would probably be killed, he was not the triggerman and was not present during the killings.

In Smith, G.E. v. State, supra, this Court ruled that the jury's life recommendation was reasonable and the judge's death sentence was not justified since nothing in the record showed that the judge had any additional information not known to the jury and he did not demonstrate how no reasonable man could differ on the matter of sentencing in the case. In discussing the sentence, this Court also noted the questionable credibility of the only witness who connected the defendant to the homicide (which involved a beating and stabbing).

In the instant case the trial judge specifically noted the absence of any additional evidence not presented to the jury, and he failed to demonstrate how no reasonable man could differ on the death sentence as to Count I, merely rejecting the life recommendation because to vote was close and concluding that no reasonable man could differ. But a life recommendation, no matter what the

vote is entitled to great weight. See Hawkins v. State, ____ So.2d ____, FLW 245 (Fla. 1983); Rose v. State, 425 So.2d 521 (Fla. 1982); Tedder v. State, supra. Also, as in Smith, G.E. v. State, supra, the credibility of the former co-defendant is questionable, at best. Where the evidence is conflicting, as noted in the Chambers, supra, concurring opinion, the jury recommendation must be followed since they, as triers of fact, obviously arrived at a different conclusion on the facts.

From 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 as to Count I. With regard to this sentence, the trial court found three aggravating circumstances and one mitigating circumstance. The sentencing judge relied on improper and unsupported aggravating circumstances. (See subsection C, 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 of life imprisonment as to Count I.[6/] Moreover, the sentencing judge ignored strong and material factors in mitigation. (See subsection B, infra.) Therefore, there exists no compelling reason under the facts of the case sub judice that would justify the imposition of death sentence as to Count I over the jury's recommendation; it was entitled to great weight. Burch v. State, supra. See also Neary 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

6/ 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.

life. Thompson v. State, 328 So.2d 1, 5 (Fla. 1976). The trial court erred in doing so. Tedder v. State, supra.

The trial judge cannot (and did not) justify his actions of overruling the jury as to Count I, merely concluding that he was correct, the jury was wrong, and their vote was weak. (R 2110) The jury's life recommendation must be reinstated.

2. The Jury Death Recommendation (Count II).

As to Count II, the jury recommended that the judge impose the death penalty upon the defendant. (R 2015) The appellant submits, first of all, that said sentencing recommendation is unreliable since it could be based upon inflammatory argument to the jury by the prosecutor (See Point VII, supra), and could be based upon improper nonstatutory aggravating factors presented to the jury with regard to Count II, Walton Farmer's murder. During penalty phase testimony, the prosecutor questioned the defendant's father concernign how many children the victim-Farmer had. (R 1738) Notwithstanding a sustained objection, the prosecutor persisted and questioned if Craig's father knew what kind of relationship Walton Farmer shared with his father while growing up. (R 1738) Again, an objection was sustained. (R 1739) On rebuttal, the state then called Walton Farmer's father and elicited testimony concerning the victim-Farmer's age, number of brothers, and marital status. (R 1751) An objection to these questions was sustained. (R 1751-1753) These matters, elicited persistently by the state over defense objections were clearly improper non-statutory aggravating factors which could have seriously tainted the jury with regard to the Farmer killing. See Teffeteller v. State, ____ So.2d ____ (Fla. Sup. Ct. case no. 60,337, decided 8/25/83); Elledge v. State, 346 So.2d 998 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1978); Proffit v. Florida, 428 U.S. 242, 250 n. 8, 256 n. 14 (1976).

Additionally, the trial judge gave undue consideration to the death recommendation as to Count II, using the 10-2 vote to bolster the weight it should be given. While not amounting to the undue consideration given the death recommendation in Ross v. State, 386 So.2d 1191 (Fla. 1980), the rationale of that opinion requires a reversal of the death sentence based upon the undue weight being given to this vote factor (a non-statutory aggravating factor, at that). See also State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

The jury recommendation of death as to Count II, being based on improper matters of emotion, must be rejected. The strength of the vote as to the death recommendation was an improper factor in aggravation to be considered and which was given too much weight by the trial judge. The death sentence should be vactated.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh The Aggravating Circumstances, If Any.

1. No Significant History Of Prior Criminal Activity.

The appellant lacked a significant history of prior criminal activity. §921.141(6)(a), Fla. Stat. (1981). The trial court found this mitigating circumstance present as to the murder of Eubanks since Craig had had absolutely no previous trouble with the law. However, the trial judge rejected this factor when considering the sentence as to Count II on the basis of the contemporaneous conviction of Count I. This was error.

This Court has discussed this circumstance as follows:

> Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance. State v. Dixon, supra at 9.

See also Cook v. State, 369 So.2d 1251, 1257 (Ala. 1979). The crux of this mitigating factor, then, is the word "significant." See State v. Dixon, supra at 10; Cook v. State, supra.

Here, Robert Patrick Craig had gone for 23 years until this episode without committing any type of offense, major or minor. Certainly, this factor should be given weight in determining the appropriate sentence. Notwithstanding the case of Ruffin v. State, 397 So.2d 277 (Fla. 1981), this Court has approved a finding of no significant history where the defendant had also committed a robbery contemporaneously with the murder, Menendez v. State, 419 So.2d 312 (Fla. 1982), and in Lewis v. State, 377 So.2d 640 (Fla. 1980), where the court found that one prior felony conviction did not negate this circumstance. The one contemporaneous crime in the instant case should not negate this circumstance in Craig's case considering his 23 years of crime-free life.

2. The Defendant's Participation Was Minor And The Defendant Was Under The Substantial Domination Of Another.

The trial court rejected these mitigating factors for both convictions. The evidence clearly shows, however, that the defendant was not the triggerman and was not even present when Eubanks was killed. See Goodwin v. State, supra; Slater v. State, 316 So.2d 539 (Fla. 1975). Further, in this same light, Schmidt was the actual cause of Farmer's death, inflicting the lethal wound.

The trial court rejects this factor solely on the basis of Schmidt's self-serving and questionable testimony. The testimony of a witness of questionable credibility is insufficient on which to base a rejection of this factor. See Smith, G.E. v. State, supra. Additionally, the testimony of Schmidt himself contradicts much of what is found by the judge in that Schmidt stated that he was normally the leader. (R 1047) Merely because the defendant was the foreman does not mean that he was the leader in these killings. Schmidt also admitted to being equally responsible for the cattle thefts. (R 1011)

Plus, it was Schmidt who first introduced the defendant to the use of guns. (R 1733, 1736, 1748) Moreover, it can be assumed that on the conflicting evidence concerning this circumstance, the jury must have felt that the defendant had not planned and had not led these killings or else they would have recommended death for both sentences. Since they did not, we must assume that they rejected much of Schmidt's testimony and based their life recommendation on the fact that the defendant was not present and had not master-minded these killings. Stokes v. State, 403 So.2d 377 (Fla. 1981).

3. The Defendant's Age Is A Mitigating Factor.

First of all, it must be noted that the trial court erroneously found the defendant to be 24 years old at the time of the incident. (R 2100) However, the defendant was only 23 at the time. (R 2030) This Court has approved ages close to that of the defendant as mitigating circumstances, especially when coupled with other mitigating circumstances, such as lack of prior criminal activity. See, e.g., King v. State, 390 So.2d 315 (Fla. 1980) (age 23); Thompson v. State, 389 So.2d 197 (Fla. 1980) (age 26); Brown v. State, 381 So.2d 690 (Fla. 1980) (age 23); Hoy v. State, 353 So.2d 826 (Fla. 1978) (age 22 with no prior record); Swan v. State, 322 So.2d 485 (Fla. 1975) (age 19); Sullivan v. State, 303 So.2d 632 (Fla. 1974) (Overton J. Concurring: age 25 with no prior record). In the instant case, the defendant's age of 23, coupled with the lack, until this episode, of any prior criminal activity requires that age be found in mitigation.

Moreover, it should be noted that the judge erroneously states that the defendant did not suffer from any immaturities. (R 2101) However, the only evidence regarding this point is the uncontradicted testimony of the defendant's father that Bob Craig had the maturity level of a 16-year old, and was extremely gullible. (R 1738)

4. Compelling Non-Statutory Mitigating Factors Are Present.

The trial judge indicates in his findings that the pre-sentence investigation reports the void of any competent mitigating evidence and that the defendant has not proven any other aspect of his character relevant to mitigation. (R 2101, 2109) To make such a finding is to ignore the entire pre-sentence investigation and its attachments and the entire defense case during the penalty phase of the trial! Leaders of the community (including a judge, a state senator, county councilmen, court personnel, and law enforcement personnel), friends, acquaintances, and family members wrote letters to the judge on the defendant's behalf trying to explain to him why the defendant's life should be spared, expressing the many factors there were about Robert Craig that were worthwhile. (R 2047-2049) Petitions signed by 133 members of the community who felt that Bob Craig had something to offer, asked for life sentences. (R 2080-2087) Yet the trial court all but ignored these.

Specifically, the additional factors calling for Robert Craig to live include the fact that the defendant was a model prisoner during the trial and after his conviction. (R 2941-2945) At the sentencing hearing, defense counsel sought to present this relevant evidence, yet the judge refused to consider it, claiming it was irrelevant since it was being presented for the first time at sentencing. (R 2941, 2946-2948) The judge's ruling excluding the evidence is incorrect and unconstitutional. Lockett v. Ohio, 438 U.S. 586 (1978). This Court has allowed all aggravating factors and matters to negate mitigating factors which occur prior to the time of sentencing to be utilized in the sentencing determination. See Daugherty v. State, 419 So.2d 1067 (Fla. 1982). King v. State, 390 So.2d 315 (Fla. 1980); Ruffin v. State, supra. Therefore, these matters in mitigation occurring prior to sentence, should be considered.

They include the fact that the defendant was a model prisoner, helping out in the hospital ward, and always courteous. (R 2943-2944) In McCampbell v. State, supra, this type of evidence was considered very important in mitigation. Based upon this same evidence, the defendant has shown that he is a good prospect for rehabilitation, which was a mitigating factor in Menendez v. State, 419 So.2d 312 (Fla. 1982); and Simmons v. State, 419 So.2d 316 (Fla. 1982).

The defendant wished to present further testimony from Sheriff Griffin and Captain Brown concerning the defendant's cooperation in the case and the fact that the crimes would not have been solved without the defendant's assistance. (R 2943) This should have been considered by the trial court. See Washington v. State, 362 So.2d 658 (Fla. 1975).

Additional factors in mitigation include the fact that the defendant had been a hard worker at his previous jobs, McCampbell v. State, supra; and that he was a good, loving, obedient son, who, at his father's request, had dropped out of school to help on the family farm where he was needed. See Washington v. State, supra; Walsh v. State, supra; McCampbell v. State, supra. The defendant was a fine, considerate husband, who was always polite and was well-liked by his family and acquaintances. Id. With the exception of this incident, Bob Craig had a gentle disposition, not hurting anything or anyone. Id. (R 1730-1737, 1744-1746, 1747-1749, 2053, 2078) Also, as stated during his confession, the defendant felt a great deal of remorse. (R 2718)

Finally, a proper consideration in mitigation is the disposition of the at least equally-culpable Robert Schmidt, who refused initially to cooperate with the police, who hid the murder weapon, who has been involved in violence in the past, who has threatened the defendant with violence, and who actually pulled the trigger on the shots which ended Eubank's and Farmer's lives. (R 946, 952, 999-1000, 1008, 1011, 1018-1024, 1028, 1043-1048, 1347-1351) Robert

Schmidt, "who is certainly no angel" was allowed to plead guilty to two counts of second degree murder with life sentences. (R 1000) McCampbell v. State, supra; Slater v. State, 316 So.2d 539 (Fla. 1975).

These non-statutory factors which the trial court failed to consider or even specifically rebut in its factual findings, together with the strong statutory mitigating circumstnaces weigh heavily against any aggravating factors and call for the reduction of Craig's sentences to life imprisonment. Robert Patrick Craig's life is worth sparing.

C. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, supra at 9. The state has failed in this burden with regard to the aggravating factors found by the trial court. The court's findings of fact, based in part on facts not proven by competent, substantial evidence beyond a reasonable doubt, do not support these circumstances and cannot provide the basis for the sentences of death.

1. Financial (Pecuniary) Gain

The trial court found as an aggravating circumstance as to both murders that they were committed for "financial gain." (R 2092-2094, 2101-2102) This finding is error.

Case law indicates that this aggravating factor is limited in its application to situations where the sole or primary motive for the killings is in order to obtain monetary gain. See Simmons v. State, 419 So.2d 316, 318 (Fla. 1982); State v. Dixon, supra at 9. This Court has approved the finding of pecuniary gain only in cases in which an actual robbery was occurring or at least being attempted, or in which the defendant receives something of value during the crime. See, e.g., Bolender v. State, 422 So.2d 833 (Fla. 1982)

(murder during robbery and torture of cocaine dealers); Ross v. State, 386 So.2d 1191 (Fla. 1980), (killed burglary victim and ransacked house for valuables); Antone v. State, 382 So.2d 1205 (Fla. 1980) (contract killing); Hargrave v. State, 366 So.2d 1 (Fla. 1979) (robbery of a convenience store). Here, the thefts of the cattle had already been accomplished; therefore the murders were not committed in order to receive something of value during the killing episode. In this regard, this case is similar to McCray v. State, 416 So.2d 804 (Fla. 1982). In McCray, the defendant had broken into a van, took out guns, and placed the guns in some woods next to the van. When the defendant returned to retrieve the guns, he encountered the owner of the van, whom he killed. This Court disapproved the finding of the aggravating circumstance of pecuniary gain under these circumstances. Thus, in the instant case, the evidence of the past cattle theft does not support this finding.[7/]

Additionally, the trial court seeks justification for this finding on the testimony of Robert Schmidt, a witness of questionable credibility, that the defendant had previously mentioned how nice it would be if Eubanks was dead since the defendant would then be indispensible to the running of the ranch. This motivation for the murder was not proven by substantial, competent evidence beyond a reasonsble doubt, as is required. In Simmons v. State, supra at 318, the Court rejected this aggravating circumstance based on similar evidence. In Simmons, there was some evidence that before and after the murder, the defendant indicated a possible expectation of monetary benefit through the sale of the victim's car and trailer. This Court rejected this aggravating factor, stating that this evidence was insufficient "to prove a pecuniary motivation for the

7/ Indeed, if these killings took place solely for pecuniary gain during the course of the cattle thefts, the defendant would be guilty only of third-degree felony murder. §782.04(4), Fla. Stat. (1981).

murder itself beyond a reasonable doubt." Id. See also Phippen v. State, 389 So.2d 991 (Fla. 1980); Peek v. State, 395 So.2d 492 (Fla. 1980).

The above argument also applies to the factual findings concerning the defendant's lust for the victim's shotgun and the alleged searching through Eubank's wallet after Schmidt had killed Eubanks. Also, even if these facts were adequately proven, any such desire to take these items was not the sole or primary motive for the killing, but merely an afterthought. See Young v. Zant, ____ F.2d ____ (M.D. Ga. 12/8/80). See also Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979), for an analagous situation concerning the proof necessary to establish that the motive for the murder was to prevent an unlawful arrest. Therefore, evidence establishing this aggravating circumstance beyond a reasonable doubt is lacking and was, at most, speculative.

Further, as to the murder of Farmer, evidence of any pecuniary gain to be derived from his killing is totally non-existent. Nothing was taken from Farmer, and the prior cattle theft was from Eubanks. The evidence is unrefuted (including that by Schmidt, presented by the state) that Farmer was not at the farm to assist in the cattle count, but rather merely to talk to Eubanks; Farmer was carrying on this conversation with Eubanks during the cattle count, but he was not actually involved in the count, and was not aware of the numbers. (R 933, 1010, 1484) This evidence clearly contradicts the trial court's factual findings as to Farmer's murder in this regard. This aggravating factor as to Count II has not been proven.

2. Especially Wicked (Heinous), Atrocious, Or Cruel

The trial court found this circumstance in aggravation of both murders. Said findings were improper since they were based upon erroneous facts

and are not supported by the facts which were present when these facts are compared to cases were the factor was ruled inapplicable. This Court defined this aggravating circumstance in State v. Dixon, supra at 9:

> It is out interpretation tht 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, supra at 910, 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 conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, supra at 9.

An examination of the trial testimony reveals that the court's written findings are inaccurate, incomplete, and do not support the finding of this aggravating factor. As to the murder of Eubanks, the trial court's finding that the death of Eubanks had been planned its commission and coverup for months is patently false. (R 2094-2095) While there is some questionable, speculative evidence from the co-perpetrator and actual killer of the victims that the defendant had day-dreamed about what life would be like without Eubanks around, that discussion was only one month prior to the incident, was not believed even by Schmidt, and did not include any discussion of the disposal of the bodies or the coverup, as claimed by the trial court's findings. (R 914-915, 941, 1014, 1032) Also, there was no evidence of any planned location for the killings, as

claimed by the trial court (R 2095), except immediately prior to the shooting. There was no prearranged signal either. (R 945)

Even in a light most favorable to the state's case, i.e. taking the testimony of Schmidt as absolutely credible, the facts surrounding the killings recited by the court are erroneous. Eubanks did not suddenly try to free the area, exclaiming "Let's get out of here," as claimed by the court (R 2095); rather Eubanks, not finding any evidence of any fresh cattle tracks, merely said to Farmer, "This is a bunch of bull shit, let's go." (R 944) Eubanks did not try to flee; he did not know that he was about to be killed, as found by the judge. (R 2095) Rather (according to Schmidt's story), Eubanks, upon hearing gunfire, was ducking up and down, trying to see into the hammock. (R 946, 947, 1277) Schmidt shot Eubanks twice in the back of the head while Eubanks was faced away from him. (R 946-947) His death was instantaneous. (R 1282)

Under these corrected set of facts, Eubank's killing was not heinous, atrocious, or cruel. Simmons v. State, 419 So.2d 316 (Fla. 1982); Odum v. State, 403 So.2d 936 (Fla. 1981); Tatero v. State, 403 So.2d 355 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981) (fact that killings were premeditated is insufficient to establish this factor). Also, the manner of Eubanks death is irrelevant to Craig's sentence, since Craig had no active participation in the manner of the shoots. (R 1028)

Concerning the death of Walton Farmer, the above cases apply with equal force, notwithstanding the fact of several more shots at Farmer. In McCray v. State, supra, the defendant yelled, "This is for you, m____ f_____" as he pumped three bullets into the victim. Yet, this Court held this insufficient for a finding of especially heinous, atrocious, or cruel. Similarly in Kampff v. State, 371 So.2d 1007 (Fla. 1979), the defendant, after planning the

killing, went to the victim's place of employment and shot her three times. This Court struck this aggravating circumstance stating that the shots were fired in rapid succession and that the shooting of the victim a final time in the head merely ended her misery.

Here, the shots were fired in rapid succession. Therefore, although in pain, Farmer was not languishing very long before his death. The shots were not designed to inflict great pain upon the victim; there was no plan for torturing him; at worst, they merely showed that the defendant was a very poor marksman. Merely because Farmer may have been in some pain for a while is insufficient under the above cases and under the recent decision of Teffeteller v. State, ____ So.2d ____ (Fla. Sup. Ct. Case No. 60,337, decided 8/25/83) (slip opinion, pp. 8-9). Also, the contention that Farmer's arms may have been raised in a defensive gesture is insufficient to support this finding. Menendez v. State, supra. Any other findings of "fact" by the court as to Farmer twisting, turning, or attempting to run are purely speculation on the judge's part and hence have no place in the determination of this factor. State v. Dixon, supra; Kampff, supra.

The trial court also recites at great length the method of disposal of the bodies and other actions of the defendant, including misleading the victim's family in their initial search. These factors are clearly irrelevant to the finding of heinous, attrocious, or cruel, and cannot form a basis for this finding. Simmons v. State, supra (burning body after death to dispose of it); Blair v. State, 406 So.2d 1103 (Fla. 1981) (burying of the body); Halliwell v. State, 323 So.2d 557 (Fla. 1975) (the actual killing is the only relevant indicator).

Therefore, the trial court erred in finding this factor as to both counts.

3. Cold, Calculated, And Premeditated

The trial court's finding of "cold, calculated, and premeditated" is improper. In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court indicated that Section 921.141(5)(i), Florida Statutes (1981) authorizes a finding in aggravation for premeditated murder where the premeditation is "cold, calculated and...without any pretense or moral or legal justification." Id. In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court noted that:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification."

In support the court relies on the same facts which it used to support especially heinous, atrocious or cruel. (R 2096) The finding of this circumstance then is at least an improper doubling of aggravating circumstances. See Clark v. State, 379 So.2d 97, 104 (Fla. 1979); Provence v. State, 337 So.2d 783 (Fla. 1976). Additionally, since the court utilized the same erroneous factors related to the events leading up to and during the killings, the Court is referred to the argument made above in subsection C(2), supra, to show that such erroneous, questionable, and/or speculative "facts" cannot support cold, calculated, or premeditated either. Similarly, the findings relating to the events after the killings (disposal of the bodies) is irrelevant as argued above in subsection C(2).

The conclusion by the Court that the defendant is "governed not at all by any feelings of moral, christian or human decency or duty" is totally irrelevant to this factor. The aggravating circumstance talks about excluding certain types of killing where there is a moral or legal justification. See, e.g.

Cannady v. State, 427 So.2d 723 (Fla. 1983). It does not speak of Christian morals or human decency.[8/]

An examination of the cases wherein this circumstance has been approved, shows that it is not applicable here. See, e.g., Bolender v. State, 422 So.2d 833 (Fla. 1982) (defendant tortured drug dealers to death in order to get them to reveal the location of their cocaine); Jent v. State, 408 So.2d 1024 (Fla. 1981) (victim beaten and raped by six men before being doused with gasoline and set afire; death resulted from the burns); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983) (victim beaten by three men, and then taken to isolated area where he was shot twice).

The fact that these killings may have been premeditated is insufficient to support this finding. Jent v. State, supra; Blair v. State, 406 So.2d 1103 (Fla. 1981). The fact that Farmer was shot multiple times and that Eubanks was shot twice does not support this finding. Cannady v. State, 427 So.2d 723 (Fla. 1983); McCray v. State, supra. See also Mann v. State, 420 So.2d 578 (Fla. 1982) (10-year old victim was abducted and her disposed-of body was later found; killing caused by a skull fracture and stab wounds).

This circumstance is not supported by substantial evidence. See Jent v. State, supra.

4. As To Count II Only, Conviction Of Another Capital Felony

Prior to the two murder convictions in this case, Robert Craig had no previous convictions of any sort. However, the trial court found this aggravating circumstance to Count II based upon the conviction of the defendant as to Count I. (R 2101) This finding violates due process, and Craig's death sentence as to Count II must be reversed.

8/ Furthermore, such conclusions are clearly contradicted by the evidence presented in mitigation and attached to the pre-sentence investigation. See Point IX B ( ), and see especially R 2078.

Initially, the appellant is aware of King v. State, 390 So.2d 315 (Fla. 1980), where this Court held that a violent felony committed after the capital felony and tried in the same trial as the capital felony can qualify as a "previous" violent felony for purposes of this aggravating circumstance. However, this holding does not comport with due process standards. Craig asks this Court to recede from these cases and hold that only convictions for violent felonies occurring before the trial of the capital case for which the death sentence is being considered can be used to satisfy this aggravating circumstance. See State v. Stewart, 250 N.W. 849 (Neb. 1977); State v. Goodman, 257 S.E.2d 569 (N.C. 1979). Contemporaneous or subsequent violent crimes committed close in time to the capital felony are not an accurate reflection on the history of the defendant's character. Their use allows a single violent episode resulting in the capital crime and another violent felony to skew the character analysis which must be performed in determining if a death sentence is appropriate.

5. Non-Statutory Aggravating Factors

In the trial judge's sentencing finding, he mentions, in conjunction with other factors, certain non-statutory aggravating factors. These include the vote of the jury's life and death recommendations (See subsection A, supra), the fact that Eubanks had treated the defendant well, and the defendant's alleged lack of human decency and a lack of Christian duty. (R 2097, 2098, 2105, 2109) Since aggravating circumstances are strictly limited to those provided for the statute, McCampbell v. State, supra; Riley v. State, 366 So.2d 19 (Fla. 1978), the death sentences based upon these improper factors must be vacated.

Accordingly, Craig's death sentences are based in substantial part on improper and unsupported aggravating factors. In addition, the sentencing judge

ignored the strong and material statutory and non-statutory mitigating factors. The judge overruled one jury recommendation of life without proper compelling reasons, and gave improper weight to the strength of the jury death recommendation. Robert Patrick Craig's death sentences must be vacated and remanded for entry of life sentences.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the appellant requests this Honorable Court to grant the following relief:

1. As to Points II, III, IV, and V, reverse the appellant's judgments and sentences and remand for a new trial; and

2. As to Points I, VI, VII, VIII, and IX, vacate the sentences of death and remand for imposition of life imprisonment, or, in the alternative, for a new penalty phase trial.

Respectfully submitted,

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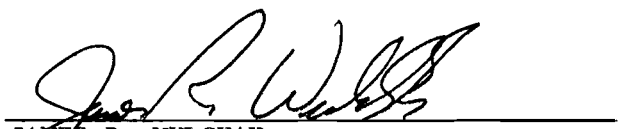
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, to his office located at 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and a copy mailed to Mr. Robert Patrick Craig, Inmate No. 083717, Florida State Prison, P.O. Box 747, Starke, Florida 32091, this 29th day of August, 1983.



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