IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,

Appellant,

v. CASE NO. 62,365

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Burr is the appellant in this case. The record on appeal consists of nine volumes. References to the record will be indicated by the letter "R", references to the transcript by the letter "T", and references to the supplemental record by the letters "SR".

II STATEMENT OF THE CASE

An indictment returned by the Leon County grand jury on October 29, 1981, charged Charlie Lewis Burr with first degree murder and robbery with a firearm (R-1-2). Subsequently the state filed a notice of intent to rely on similar fact evidence (R-37-38).

Responding to these actions, Burr's counsel filed a motion to dismiss the indictment alleging racial discrimination in the selection of Grand Jury Foremen (R-53-54) and a motion in limine regaring similar fact evidence. The court denied both motions (R-269; T-392).[1]

Burr proceeded to the guilt phase portion of his trial on June 8, 1982, before the Honorable Charles E. Miner, and during his case in chief, the state presented its similar fact evidence. Three men who worked at convenience stores in Brevard County said Burr robbed and shot them while they were at work (T-975-1015). In a subsequent trial of one of these robberies/shootings, however, Burr was acquitted of those crimes (see enclosure to motion to supplement the record filed in this Court on April 8, 1983).

Following the court's denial (T-1077) of Burr's motion for a judgment of acquittal, the state's key witness, Domita Williams, took the stand and recanted the testimony she had given for the state (T-1237-1238). The state put on a case in rebuttal after which the court instructed the jury. The jury found Burr quilty as charged on both counts (R-290-292).

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1. During the hearing on the motion to dismiss, the court incorporated the transcript of testimony taken at a similar motion in another case. By way of a motion to supplement the record, those transcripts have been made a part of this record of appeal.

At the sentencing phase of the trial, the state presented no additional evidence, but Burr presented several witnesses who said he was a good man and had been raised a Christian (T-435-451).

After arguments and instructions, the jury returned a recommendation that Burr live (R-292). The court, rejecting the jury's recommendation, sentenced Burr to death (R-321-323). The court also sentenced Burr to 99 years in prison for the armed robbery and retained jurisdiction over the first third of that sentence (R-322).

In sentencing Burr to death, the court found in aggravation:

> 1. That the murder was committed during the course of a robbery.
>
> 2. That the murder was committed for the purpose of avoiding or preventing a lawful arrest.
>
> 3. That the murder was committed in a cold, calculated and premeditated manner without any moral or legal justification.
>
> (R-311-320).

The court found nothing in mitigation (R-320).

Subsequently, Burr's appellate counsel filed a motion to supplement the record with key portions of Burr's Brevard County trial in which he was found not guilty. This Court denied that motion.

Counsel also filed a motion to relinquish jurisdiction to clarify the record on appeal. This motion was based upon the trial court's private discussions with the jury (T-472) and certain language used in its sentencing order that indicated that it may have had access to non-record information not available to Burr's counsel (R-319).

In response to this Court's order directing it to say whether or not is had considered any non-record information, the trial court said

that "no information relating to the guilt or innocence or sentencing phase of the proceedings was requested, given or received."

This appeal follows.

III STATEMENT OF THE FACTS

PRELIMINARY NOTICE

One of the primary arguments presented by this appeal is that the state did not present substantial, competent evidence of Burr's guilt. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, __U.S.__, 72 L.Ed.2d 652, 102 S.Ct.__ (1982). Because that is an unusual argument to make on appeal, and because Domita Williams, the state's key witness, recanted her prosecution testimony when called by Burr, the statement of the facts has been divided into two parts: The state's case and the defendant's case.

I. The state's case

By August 20, 1981, Domita Williams and Charlie Burr had been going together for two or three weeks and were talking of marriage (T-832,856). About 6:30 that morning Burr drove his car to Williams' house so he could take Williams to work (T-832). Burr went inside and 15 or 20 minutes later, or shortly before 7:00 a.m. (T-833-834), the couple left the house and headed west on Highway 27 towards Tallahassee (T-833). About 7:00 a.m. or a little later (T-834) Burr pulled into the parking lot of a "Suwannee Swiftee" convenience store and waited while Williams went inside (T-834). About five to ten minutes later (T-850) she came out of the store with a cheeseburger and candy bar (T-834). Burr then got out of the car and went inside (T-835). Williams began eating her sandwich and only looked up when she heard a shot (T-836-837). Burr, smiling,

got into the car and, seeing that Williams was crying, he asked her what was wrong (T-837). Williams saw the imprint of a gun in his pants (R-838).

Kim Miller, a customer, stopped at the Suwannee Swiftee about 7:00 a.m. and found the body of Steve Hardy, the clerk, lying over an open safe (T-866,871). Hardy had been shot behind the ear with a .22 caliber bullet (T-913); death was instantaneous (T-968). At 7:09 a.m. a dispatcher from the police department received Miller's telephone call reporting the incident (T-868). The police responded and within minutes they had cordoned off the area (T-874). They found, however, no fingerprints or hairs to tie Burr to the murder (T-886). $252.75 had been taken from the store (T-877).

About 8:00 a.m. (T-853) Williams arrived at the Worthington Park Apartments where Burr lived with a Katrina Jackson and her husband (T-918). Tammy Footman, a cousin of Williams, was also there. Williams entered the apartment alone (T-840). She acted nervous (T-1345) and asked if they had heard about the Suwannee Swiftee robbery (T-1357). Williams said that she had bought a cheeseburger there while Burr was inside, and on the way out she had heard a shot. She then got into the car and left (T-1357, 957). Whether she left by herself or with Burr is uncertain (T-1358). Burr came into the apartment a few minutes later (T-1346), and like Williams, he also acted differently (T-1358-1359). He began packing his bags and a short time later Williams and Burr left (T-1360).

At work sometime later, Williams asked her supervisor, Katherine Haygood, if she had heard about the robbery (T-1135). Although Williams

could not recall what she had told Haygood (T-841), Haygood said Williams (who was calm) (T-1139) told her she had bought a soda inside the store about 8:00 or 8:30 that morning (T-1138), and while inside she had seen a white boy in bluejeans walking up and down the aisles. Williams then left the store but drove by a short while later and saw several police cars outside the store (T-1137). Although Haygood encouraged Williams to call the police (T-1138), Williams never did (T-842).

Burr picked up Williams after work, and the pair drove to Melbourne for the weekend (T-843). Burr took with him a box of .22 caliber guns which he sold in Melbourne (T-844). Despite what had happened, and although Williams claimed she was afraid of Burr (T-856), she did not look like she was afraid of him (T-960), they continued to act like a couple in love (T-960), and they were still talking of marriage (T-856). (Burr had never threatened Williams (T-863)).

Emil Ferrell worked at a "Majik Market" in Palm Bay which is in the vicinity of Melbourne. On Saturday evening, August 22nd, he got a phone call at home from someone asking him who was working at the store the next morning (T-978). Ferrell said he was. The next morning, Sunday, he got another phone call asking who was working (T-978). Again, Ferrell said he was.

About 8:00 a.m. Burr came into Ferrell's store and stood by the microwave oven until the store was empty. He approached Ferrell and asked him if his name was Ferrell. He said yes, and Burr asked him if he had ever seen him. Ferrell said no. Burr then pulled out a gun and said "I'm going to kill you. Open the register." (T-1052). Burr told him

two more times to open the register. Without getting any money (T-1053), Burr shot Ferrell twice (T-1052).

With Burr still in the store, Ferrell ran outside and asked a customer, who had just driven up, for help (T-1055). The man fled and Burr came out of the store, jumped into a rather small, old blue or green car, and left (T-1058).

About midnight on August 28, 1981, James Griffen worked in a Majik Market in Port Malibar, also near Melbourne (T-991). Burr came in, and as Griffen rang up his purchase, Burr pulled out a gun and said, "Give me all your money and don't be no fool." (T-1063). After Griffen had given him the money, Burr stepped back and shot Griffen once in the abdomen. Griffen said he, "would get him for this," and turned. Burr shot him in the left elbow then left in a brown or marroon car (T-665).

Lloyd Lee was working in a 7-11 convenience store in Melbourne about midnight on September 8, 1981 (T-1069). A man Lee later said was Burr came into the store, got some items, and came to the cash register (T-1070). As Lee rang up the items, Burr pulled out a gun and demanded money (T-1070). After getting the money, he told Lee to "be cool" then turned to leave. He turned back, however, and shot Lee twice (T-1070).[2]

II. The defense's case

A series of customers arrived at the Suwannee Swiftee on August 20,

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2. Although Lee was sure of Burr's identity beyond a shadow of a doubt, Burr was subsequently acquitted of this robbery. See attachment to Burr's motion to supplement record filed with this Court on April 8, 1983.

1981, from shortly before 7:00 a.m. until approximately 7:10 a.m. All saw Steve Hardy alive.

Clarence Lowman arrived about 6:50 a.m. and left right after 7:00 a.m. (T-1078). As he was leaving, two other cars drove up (T-1078). Vincent Prichard drove up around 7:00 a.m. As he left the store, he saw a black man wearing glasses walk towards the store, stop, then walk away (T-1082-1083). A tall, young man drove up as Prichard drove off (T-1083). Although Prichard drove away, two minutes later he drove past the store after he had picked up some men (T-1086). As he drove by he saw Kim Miller, a friend of his, pull into the store (T-1086).

John Thompson pulled into the store about six minutes after seven (T-1096) and parked next to a blue Ford (T-1102). When he went inside, he saw Hardy, who was acting unusual, like he had something else on his mind (T-1106). Another man, not resembling Burr, stood at the back of the store by the cooler (T-1109). He acted suspiciously, like he was just passing the time (T-1116).

On August 20th, Domita Williams drove her mother (Minnie Pompey) to work about 6:30 a.m. (T-1156). Pompey worked at a day care center about a 20 minutes drive from where she lived, and that morning Pompey "punched in" at 6:56 a.m. (T-1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after seven she started on the 20 minute trip back home (T-1158).

Shortly after 7:00 a.m. Ruth Grant and her daughter Valerie were heading west toward Florida State University along Highway 27. They passed the Suwannee Swiftee and saw several police cars there (T-1194). A short time later, they saw an ambulance heading towards the Suwannee Swiftee and seconds later Domita Williams, a relative of theirs, passed,

also apparently heading home and passed the Suwannee Swiftee (T-1195).

Thursday, August 20, was the first day Domita Williams had to report to work at the Sunland Training Center in Tallahassee (T-1269). Because she did not have a car of her own, she drove her mother to work so she could use her mother's car (T-1269). As she returned home, she passed by the Suwannee Swiftee store and saw several police cars there (T-1270). She was at work by 9:00 a.m., and about 5:00 or 6:00 p.m., she saw Burr and he stayed with her that evening (T-1271-1272).

Several weeks later, when Detective Ash of the Leon County Sheriff's Office focused his murder investigation upon Burr, Williams and their group, he questioned Williams. When she talked with Ash, she felt scared because Ash told her that he had enough evidence to lock her up without bail (T-857). He also told her he could arrest her as an accessory after the fact (T-1388) and for withholding information (T-1166). Scared by Ash's threats (T-1261), and not knowing what to do (T-1293), Williams answered Ash's leading questions implicating Burr (T-1226,1313).

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING BURR'S MOTION TO DISMISS THE INDICTMENT AFTER BURR HAD ESTABLISHED AN UNREBUTTED PRIMA FACIE CASE OF DISCRIMINATION AGAINST MEMBERS OF HIS RACE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WITH REGARD TO THE SELECTION OF GRAND JURY FOREMEN.

For nearly a century, the United States Supreme Court has held that a criminal conviction of a black citizen cannot stand under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution if it is based on an indictment of a grand jury from which black citizens

have been excluded by reason of their race. Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); Bush v. Kentucky, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883); Eubanks v. Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958); and see Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), n.12. Accordingly, where sufficient proof of discrimination has been presented and not rebutted, the United States Supreme Court has consistently required that the conviction be set aside and the indictment returned by the grand jury be quashed. See Castaneda, supra, and Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Further, the court has extended this result where sufficient unrebutted proof of racial discrimination is established with regard to the selection of grand jury foremen. Rose v. Mitchell, supra.

In Rose, supra, the Supreme Court quoted from Castaneda, supra, as to what proof is required to establish a prima facie case of racial discrimination with regard to selection of a grand jury foreman:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied...Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. ...This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class... Finally... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.
>
> Rose at 443.

Turning now to the case at bar, there is no question, of course, that

appellant, a black citizen, is a member of a group cognizable as a distinct class capable of being singled out for different treatment under the laws. Rose v. Mitchell, supra, at 443 U.S. 565.

Further, the grand jury foreman selection procedure as established by Section 905.08, Florida Statutes, (1981) is susceptible of abuse. That section, which is the only section relating to grand jury foreman selection, says only:

> After the grand jury has been impaneled, the court shall appoint one of the grand jurors as foreman and another to act as foreman during absence of the foreman.

In Rose the Supreme Court found that a very similar procedure used in the courts of the State of Tennessee was susceptible of abuse. Rose v. Mitchell, supra, at 443 U.S. 566 and n.2 at 443 U.S. 548. Proof of the third requirement, the statistical proof of discrimination by use of the rule of exclusion, is similarly convincing. In the last quarter century 50 grand jury foremen have been selected (R-72). During that period the black population of Leon County averaged over 25 per cent of the total population of Leon County (R-72). Yet only one of the 50 grand jury foremen was black (R-72). The likelihood of such situation occurring absent racial consideration is so small that it precludes any reasonable belief that the situation might have occurred merely by chance.[3] Clearly, the requirements of the rule of exclusion

3. If we assume that the relative proportion of black citizens to the total population of Leon County was only 25 per cent or 1/4 during each of the 50 selections of grand jury foremen over the 25 year period, and this is a conservative assumption in light of the stipulation and the actual 1980 census figures (see 1980 U.S. Census Publication PHC 80-V-11, May 1981, which indicates a 1980 Leon County population of 149,795, of which 39,189 were non-white), it is seen that the probability of selecting no black grand jury foremen, absent racial considerations, is represented by $(1/2)^{0}$ $(3/4)^{50}$, which when calculated is $(3/4)^{50}$ or $(.75)^{50}$ or .0000005663. Thus, it clearly appears that there was only one (1) chance in 1,666,666 that mere chance could have been the cause for no black jury foremen being selected.

are met.

Therefore, Burr has satisfied each of the three requirements to establish a prima facie case of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Consequently, "the burden of proof shifts to the state to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." Alexander v. Louisiana, supra, at 405 U.S. 631 and 632. Also see Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970); Eubanks v. Louisiana, supra; Castaneda v. Partida, supra; and Rose v. Mitchell, supra. Moreover, the state acknowledged that a prima facie case of racial discrimination in selection of Leon County grand jury foremen had been established:

> MR. MEGGS [prosecutor]: Judge, these cases, Rose versus Mitchell does, as Mr. Murrell pointed out, established a procedure whereby that if there is a class singled out and then if there's a comparison to the proportions in the population, then what that does, if there have been no blacks, that could make out a prima facie case. And all the cases seem to indicate that once that has been done, that the burden of proof shifts from the defendant to show that it should be dismissed and that it was racially motivated, over the state.
>
> I think, in all fairness to our judiciary, that the State has presented testimony to this Court that our selection process of the grand jury in Leon County and in this Circuit is and has been racially neutral, even though the statistics maybe don't bear that out. All that did was make a prima facie case to get us where we are.
>
> [Emphasis Added.] (~~1SR-23~~ 2SR-22).

The state, however, presented little evidence to rebut this presumption of racial discrimination. The only relevant testimony in this regard came

from Judge Rudd and Judge Willis. Judge Rudd said:

> Q. Now what do you look for as the presiding judge, in the selection of a grand jury foreman? What are you looking for specifically in your selection process?
>
> A. A person who in my opinion has had the county's interest at heart and will continue to have the county's interest at heart, and particularly for leadership qualities to head up a group of people for six months, 18 people for six months. I want one with leadership qualities to avoid having a run-away grand jury that will go off on a tangent and won't be responsible.
>
> Q. All right, sir, now do you in making that selection, do you make the selection on the basis of the color of the skin of the person that you may select?
>
> A. No.
>
> (1SR-~~70~~ 32)

The relevant portion of Judge Willis' testimony was as follows:

> Q. Once that grand jury is impaneled, then what procedure have you yourself used... to select the foreman and the vice-foreman of that particular grand jury that has been impaneled?
>
> A. ...Personally, after I have drawn the grand jury, then I usually confer with the sheriff and the clerk and anyone else I feel that would be helpful and draw on my own knowledge of the people, if I do know, to try to select persons who are generally sufficiently either educated or experienced to preside over the grand jury and to act as a presiding officer. I just try to take into consideration the qualifications of the individual.
>
> Q. Judge, do you and have you made any decision, in the inclusion or or exclusion of any person to be a member of the grand jury, have you made that decision on the basis of the race of that person?
>
> A. No.
>
> 2SR-11-12
> (~~1SR-12-13~~).

The testimony of Judge Rudd and Judge Willis fell far short of explaining satisfactorily why no black grand jury foremen had been selected

in Leon County. The mere assertion by them that race was not considered in their selection process does not serve to rebut the presumption established by the prima facie case. In Turner v. Fouche, supra, at 396 U.S. 361, the court said:

> The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellant's prima facie case.

Similarly, in Alexander v. Louisiana, supra, at 405 U.S. 632, Justice White, writing for the court, said:

> The Court has squarely held... that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.

In addition to their denial of racial consideration, the testimony of Judge Rudd and Judge Willis provided nothing more than a few very nebulous and subjective criteria which they testified that they used in selecting grand jury foremen. Among these were "[having] the county's interest at heart," "leadership qualities," and "[being] sufficiently either educated or experience to preside over the grand jury." After presenting testimony as to these criteria, however, the state provided no explanation whatsoever as to why no black prospective grand jury foremen had met these requirements. Such explanation was, of course, essential if the state was to rebut the prima facie case established by appellant.

The vagueness of these criteria is readily evident when compared to the criteria used in other courts. For example, in United States v. Perez-Hernandez, 672 F.2d 1380, 1387 (CA 11 1982) the government rebutted the prima facie case of racial discrimination by showing:

> 1. The judges acted independently of one another in choosing grand jury foremen.

2. The guidelines used in selecting foremen included factors related to the ability of a person to perform the administrative functions and duties of a grand jury foreman:

1. Occupation and work history.
2. Leadership and management experience.
3. Length of time in the community.
4. Attentiveness during jury impanelment.

Moreover, apparently the additional responsibilities of a grand jury foreman in the federal system are menial and insignificant so that a judge can select the foreman from a questionaire. United States v. Holman, 680 F.2d 1340 (CA 11 1982), Perez-Hernandez, supra, at 1389 (Morgan, concurring).

Here, the state presented little evidence that some objective, non-racially motivated, criteria were used in selecting grand jury foremen. For example, because of the presumption of racial discrimination, Judge Rudd's subjective criteria that the foreman have the "county's interest at heart" is suspect. Judge Rudd never said what those interests were, and from the fact that racial discrimination has been proven, that factor, without further clarification, is suspect. Likewise, "leadership qualities" is somewhat vague. C.F. Turner v. Fouche, supra (where jury commissioners disqualified blacks because they were not "upright").

Similarly, Judge Willis' "education and experience" criteria lack the objectiveness of the standards approved in Perez-Hernandez, supra.

In Turner v. Fouche, supra, the Supreme Court found that the appellant there had established a prima facie case of racial discrimination in selection of jurors and the Court noted that many prospective black jurors had been excluded from consideration because of application of the subjective criteria of uprightness and intelligence. When the appellee there failed to give any explanation as to why this had occurred, the Court found that appellee had failed in its burden of rebutting the presumption of racial discrimination.

Justice Stewart writing for the Court said:

> ... So far the appellees have offered no explanation for the overwhelming percentage of Negroes disqualified as not "upright" or "intelligent"... ...No explanation for this state of affairs appears in the record. ...If there is a "vacumm" it is one which the State must fill by moving in with sufficient evidence to dispel the prima facie case of discrimination.
>
> Id. at 361.

This Court, for all practical purposes, is confronted with the same situation which confronted the United States Supreme Court in Eubanks v. Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2. L.Ed.2d 991 (1959), and this Court must come to the same conclusion as did the Supreme Court in Eubanks, Justice Black, writing for a unanimous Court in Eubanks, said:

> Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory.
>
> * * *
>
> In Patton v. Mississippi, 332 U.S. 463, 469, 92 L.Ed. 76, 80, 68 S.Ct. 184, 1 ALR 2d 1286, this Court declared, in a unanimous opinion, that "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." This is essentially the situation here. True, the judges now serving on the local court testified generally that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors. But as Chief Justice Hughes said for the Court in Norris v. Alabama, 294 U.S. 587, 598, 79 L.Ed. 1074, 1081, 55 S.Ct. 579, "If, in the presence of such testimony as defendant adduced, the mere general assertion by officials of their performance of duty were to be accepted is an adequate justification for the complete exclusion of Negroes from jury service, the [Equal Protection Clause] - adopted with special reference to their protection - would be but a vain and illusory requirement." . . . We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges. It seems clear to us that Negroes have been consistently barred from jury service because of their race.
>
> Eubanks, at 356 U.S. 586-588

ISSUE II

THIS COURT SHOULD GRANT BURR A NEW TRIAL IN THE INTEREST OF JUSTICE AND BECAUSE HIS GUILT WAS BASED UPON INSUBSTANTIAL, INCOMPETENT EVIDENCE.

Reviewing the evidence in this unusual trial forces Burr to argue the difficult issue that in the interest of justice he should be given a new trial. Burr realizes the difficulty of this argument, but believes it must be made because of the wildly conflicting testimony of Domita Williams, the inappropriate behavior of the state attorney, and the other uncontroverted, exculpatory evidence presented by the defense.

Rule 9.140(f), Florida Rules of Appellate Procedure provides justification for this approach:

> (f) Scope of Review. The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

Consequently, this Court can reverse for the lack of sufficient evidence or in the interests of justice.

1. Sufficiency of the Evidence

This Court in Tibbs v. State, 397 So.2d 1120 (Fla. 1981) defined the scope of appellate review:

> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Id. at 1123[4] (Footnotes omitted.)

In this case, if this Court were to mechanically apply this definition, Burr would lose because the court would simply stop reading the record on appeal once the state had rested. That is, without Williams' defense story, the state's case was sufficient to withstand a motion for a judgment of acquittal. Nevertheless, how can all the conflicts in evidence be resolved in favor of the verdict when the one key witness here presents that conflict. For this Court to simply ignore the story Williams told for the defense in favor of affirming Burr's conviction would cause justice to gag on technicalities while swallowing gross injustice.

The Tibbs court, however, did not intend to resolve the problem this case presents: The witness who tells at trial two antagonistic versions of what did or did not happen. To the contrary, Tibbs established the standard of review for appellate courts when two or more witnesses at trial tell antagonistic versions of what happened. In that situation, this Court correctly said the issue is one of credibility, a matter peculiarly within the jury's sphere and virtually unreviewable on appeal. The appellate court, therefore, can only affirm if witness credibility is the issue. Here, the credibility issue has an unexpected twist. Domita Williams, as the state's key witness, said (in effect) that Charlie Burr committed the murder, and the next day, as the defense's key witness said (in effect) that Charlie Burr did not commit the murder. How can the jury which had seen and heard Williams lie at least one time (and maybe both stories were false) weigh her credibility

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4. Later, the court also said, "Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial." Id. 1125. Burr is not asking this Court to "reweigh" the evidence in his case.

when she testified for the state against her credibility when she testified for the defense? She is not two people, but one. Simply put after her courtroom schizophrenia, the jury had no credibility to weigh and the net effect of her testimony was so small as to be insubstantial. That is, a reasonable mind would not accept her testimony as adequate to support a conviction[5] that Burr was guilty. Miles v. State, 36 So.2d 182 (Fla. 1948). Nevertheless, even if her testimony was substantial, it was incompetent because Domita Williams was an incompetent witness.

That is, she did not appreciate the obligation to tell the truth that was required when she took the oath before testifying. Section 90.605, Florida Statutes (1981). In order to be competent the person testifying must be intelligent and understand the nature of the oath and possess a sense of obligation to tell the truth. Bell v. State, 93 So.2d 575 (Fla. 1957); Crockett v. Cassels, 95 Fla. 851 (Fla. 1928). Williams concededly was an intelligent woman (T-1256). But, obviously she felt no obligation to tell the truth.[6] Even the judge said she was a liar (T-1265,1327).

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5. Of course, the jury, which is presumably composed of reasonable people, found Burr guilty. The jury, however, also had the Williams Rule evidence to consider which Burr argues elsewhere that they should not have had. Moreover, the jury recommended a life sentence. In an analogous fashion, this Court has affirmed the death sentence of several men when the jury recommended life. This Court has done this to spite its ruling in Tedder v. State, 322 So.2d 908 (1975) that a life recommendation should be given great weight and overridden only if no reasonable men could agree that life was the appropriate sentence.
6. In Davis v. State, 348 So.2d 1228 (Fla. 3d DCA 1977) the parents of a five year old boy prompted him in what to say at trial. The appellate court, in the interests of justice, granted Davis a new trial and instructed the trial court to purge the boy's recollection of all recollections but his own. Burr asks this Court to do the same in his case.

Despite her blatent lies, however, the court unfairly left to the jury the resolution of the issue of Williams' competence. State v. Nelson, 603 S.W.2d 158 (Ct.Cr.App.Nash. 1980).

Moreover, the defense presented uncontroverted evidence to support its Domita Williams' defense testimony. That is, several regular customers of the Suwannee Swiftee said that they were in the store each for a couple of minutes from approximately 7:00 a.m. to 7:09 a.m. (the time when Kim Miller called the dispatcher (T-868)). This testimony is particularly important because each witness saw Steve Hardy alive. Consequently, considering how many customers came into the store, the robbery-killing could not have taken very long. Yet, Domita Williams, in her prosecution version, claimed she was at the store five to ten minutes (T-850).

Domita's mother, moveover, said that at 7:00 a.m. Domita and she were at the child care center where she worked (T-1157). The center was a 15 to 20 minute drive from the Suwannee Swiftee (T-1157). Also uncontroverted, Ruth and Valerie Grant said that they passed the Suwannee Swiftee on August 20th and saw several police cars there (T-1194). A short time later, they saw Domita driving her mother's car, heading towards the Suwannee Swiftee (T-1195).

Here we have two equally possible, but inconsistent, stories. In the ordinary situation, according to Tibbs, the result of appellate review is predictable. The only problem, however, is that Domita Williams is the key witness to both stories. What should a court do when presented with two reasonable theories, one pointing to guilt, the other to innocence?

In circumstantial evidence cases, the rules are well settled. If the circumstantial evidence is capable of a hypothesis of innocence as well as of guilt, the defendant should be acquitted. Jaramillo v. State, 417 So.2d 257 (Fla. 1982). Here Domita Williams presented two equally possible stories,

one pointing towards guilt, the other towards innocence. Consequently, this Court should reverse Burr's judgment and sentence.

2. In the interests of justice

Rule 9.140(f) Rules of Appellate Procedure authorizes this Court to grant new trials "in the interest of justice." While what is meant by that phrase is unclear, the courts have granted new trials in the interest of justice when a fundamental error occurred at trial, Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977), or several errors combined to require a new trial, Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978) or counsel did not object to the errors. Solomon Webb v. State, Case No. 58,306, Fla. opinion filed April 14, 1983. Perhaps the best definition of "in the interest of justice" is that of "due process." While itself often times a vague term, at least due process means that the state must play fairly and act according to the rules it has created. Granting a new trial in the "interest of justice," therefore, means that something has occurred which has offended our sense of fairness. McClain v. State, 353 So.2d 1215 (Fla. 3d DCA 1978); Ferber v. State, 353 So.2d 1256 (Fla. 2d DCA 1978).

In this case, many unfair things occurred. The primary unfairness, however, was the state's admitted actions in molding the testimony of and coercing Domita Williams to implicate Burr.

Before trial, the prosecutor called several witnesses into the library and questioned each one (T-1282). That was permissible, but what was wrong was that he questioned each one in the presence of the other witnesses (T-1282). This is significant because before opening arguments, the court imposed the rule of sequestration (T-800). The purpose of that rule is "to avoid the coloring of a witness' testimony by that which he has heard from other witnesses who have preceded him on the stand." Spencer v. State, 133 So.2d 729, 731 (Fla. 1961),

cert.denied, 369 U.S. 880, 8 L.Ed.2d 283, 82 S.Ct. 1155 (1962). The prosecutor in this case must have known that the court would impose the rule. In a case as important as this, with seasoned defense counsel, he could not have assumed otherwise. Nevertheless, he thwarted the rule's intent by reviewing several witnesses' testimony in front of other witnesses. Did it make a difference? Katrina Jackson was one of the witnesses who heard Domita Williams try to tell the prosecutor she wanted to change her story (T-1249). At trial, Jackson also had a change of heart because she initially claimed Williams made no mention of Burr committing the Suwannee Swiftee robbery (T-922-923).[7] Only after the prosecutor interrogated her further outside of the jury's presence did she return to her story she had told in the library.

Jackson's return to the fold, however, may have been prompted more by what happened to Williams after Williams told the prosecutor that she wanted to change her story.

> Q. Yesterday morning before you came to the courtroom here, where did you go?
>
> A. To Willie Meggs' office.
>
> Q. The State Attorney's Office?
>
> A. Right.
>
> Q. Now, before going there, what was going through your mind? What were your intentions before coming there yesterday morning?
>
> A. Telling the truth.
>
> Q. You had decided to tell the truth?
>
> A. Right.

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7. Tammy Footman, another prosecution witness, likewise heard what happened between Williams and the prosecutor.

Q. Can you tell the jury about what happened after you went to the State Attorney's Office?

A. What happened? Okay. When we first got there, we were called into the library. I was in there. Katrine Jackson, Tami Footman and an officer and another witness, Darrel Footman, were in there, also. He questioned everybody. So, when he got around to me, I stated that I wasn't in the car the day of the murder.

Q. You told who that?

A. Willie Meggs.

Q. You told him you were not in the car?

A. Right.

Q. Did you tell him that your previous statements were not correct?

A. I don't think I did, but I told him I wasn't in the car at all.

Q. What happened after that?

A. He told me to come in his office, which I did. Then I started telling him again that I wasn't in the car. He got bent all out of shape. He didn't want to hear it. He was mad, furious.

Q. He got a little upset?

A. Yes.

Q. What happened after that?

A. I still tried to tell the truth to him. Then he took me in Don Modesitt's office. I was going to tell the truth to him. Then he called me a liar and called me a bitch.

Q. Mr. Modesitt called you that?

A. Right.

Q. Was he mad with you?

A. Yes, he was.

Q. Did he tell you and indicate to you what the consequences were if you gave two different types of testimony under oath?

A. Yes, he did.

Q. What did you think that meant?

A. I didn't know right then. I was scared.

Q. Did you tell them why didn't you come in here and tell the jury yesterday morning what you are telling them now? Didn't you stick by what you had planned to do that morning?

A. Because Modesitt said he was going to put me in jail, also. That was the second time somebody had told me that. I was afraid of going to jail.

Q. So, you changed your mind?[8]

A. Right.

Although the prosecutor was "mad, furious" and "didn't want to hear [Williams change]" arguably all he ever told Williams was to "tell the truth." Enmund v. State, 399 So.2d 1362 (Fla. 1981), affirmed, __U.S.__, 73 L.Ed.2d 1140, 102 S.Ct.__ (1982). Nevertheless, the state attorney, as conceded by the prosecutor, threatened to lock Williams up right then (T-1260-1261). Because of those threats, she changed her story again. Those threats, however, constituted undue pressure and are condemned. Davis v. State, 334 So.2d 823 (Fla. 1st DCA 1976).

In Davis, the prosecutor, like here, had a witness who wanted to change her story. The prosecutor threatened her with a perjury charge and would have put her in jail if she took the stand and gave "that" story. Apparently she did not, because Davis was convicted. The First District Court of Appeal, however, reversed the conviction saying:

> It is our opinion that the "interview" of the subject witness shortly before her testimony by the assistant state attorneys, at which time she was threatened with prosecution for perjury, constituted the type of undue pressure condemned in Lee [v. State].

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8. The prosecutor admitted that what Williams said about what happened on the morning of trial was true (T-1254-1255). Also, Charlie Ash, a police investigator, threatened to put Williams in jail without bond when he first interviewed her (T-1261).

> While it is true that the assistant state attorneys admonished the witness to tell the truth, it must have been obvious to the witness that the "truth" was that which she had testified to at an earlier deposition.

Similarly here, the prosecutor and state attorney intimidated and threatened Williams until she capitulated and changed her story to what they wanted to hear.[9] Surely, Burr deserves a new trial because of such prosecutorial misconduct.

Other, less dramatic points, cropped up in this case which, when considered together, indicate that a new trial in the interest of justice is required. Dukes, supra. Besides the two stories Domita Williams told at trial, she has told other stories (T-959-1350). Moreover, a mysterious man was walking toward the door of the Suwannee Swiftee when Clarence Lowman drove up to get coffee (T-1082). The man turned and walked away. Shortly thereafter, Lowman left to pick up some workers, but, within two minutes he drove by the store and saw Kim Miller (the man who discovered Hardy's body) pull into the Suwannee Swiftee (T-1086).

Moreover, as related above, other witnesses corroborated Williams' second version of what happened and cast doubt upon what she said when she testified for the state. Likewise, after the murder, several witnesses said that Williams did not act unusual (T-960,1139,1160), but she and Burr continued to act like a couple in love (T-960). For a woman afraid of Burr (T-856), such conduct was bizarre.

Even the similar fact evidence differs from the way the Suwannee Swiftee murder occurred. (See Issue III)

In short, Domita Williams was incompetent, her testimony insubstantial;

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9. Apparently, the state attorney made some sort of apology after his threats, and presumably after Williams had changed her story to what he wanted to hear (T-1305).

the prosecutor orchestrated the witnesses' testimony before trial and the state attorney used threats when Williams sang out of tune. This Court, in the interests of justice should reverse.

ISSUE III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF EMIL FERREL, JAMES GRIFFIN AND LLOYD LEE, CONCERNING ROBBERY/SHOOTINGS COMMITTED BY BURR IN BREVARD COUNTY AS THEIR ONLY RELEVANCY WAS TO SHOW BURR'S BAD CHARACTER.

In its case, the state presented three witnesses from the Melbourne, Brevard County area who claimed that Burr had robbed and shot them. This evidence was relevant, the state claimed, because it was similar fact evidence.

Evidence of other crimes which is relevant to a material fact in issue is admissible unless the sole effect of such evidence is to show an accused's bad character or propensity to commit crime. Williams v. State, 110 So.2d 654 (Fla. 1959). Nevertheless, because of its inherently damning character, the court should closely scrutinize the relevance of the "Williams Rule" evidence before admitting it. And, unless the evidence has substantial relevance, it should be excluded. Ingram v. State, 379 So.2d 672 (Fla. 4th DCA 1980). Accord, Drake v. State, 400 So.2d 1217 (Fla. 1981); Ruffin v. State, 397 So.2d 277 (Fla. 1981).

Moreover, while evidence of similar fact crimes is admissible to prove motive, intent, absence of mistake, common scheme, identity or general pattern of criminality, Ashley v. State, 265 So.2d 685, 893 (Fla. 1972), such evidence must tend to establish a material or essential element of the crime charged. Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974); Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979). If it is offered to prove an issue not contested by the defendant, then that evidence is inadmissible. Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974).[10] In short, for collateral evidence to be admissible, it

10. Of course, by pleading not guilty the defendant technically contests every element of a charged offense. Such technicality, however, is insufficient to have raised an issue for Williams Rule purposes. See e.g., U.S. v. Ring, 513 F.2d 1001 (CA 6 1975). Were it otherwise, Williams rule evidence would be admissible in every case as the perpetrator's identity and intent are always issues the state has to prove.

must tend to prove a material issue contested by the defense.

Typically Williams Rule evidence is admissible because it establishes the identity of the criminal or demonstrates his intent to commit the crime. For example, in Brown v. State, 381 So.2d 690 (Fla. 1980) evidence that the defendant robbed and raped a couple in a motel was relevant in a murder trial where the defendant raped and robbed a store clerk before killing her. The similar scene was relevant because it tended to identify the defendant as the killer. Id. 694-695. Likewise, in Cortizo v. State, 357 So.2d 213 (Fla. 3d DCA 1978) evidence of other drug sales was relevant to show the defendant's intent to sell the drugs he possessed.

In this case, the state argued the entire spectrum of possible uses of collateral fact evidence (T-1033,1037). But, by whatever tag it labeled the use of the evidence, ultimately, the only possible relevance the Brevard County robberies had was to either identify Burr as the robber in the Tallahassee robbery or to show his intent when he went inside the Suwannee Swiftee. Neither element, however, was seriously at issue in this trial.

That is, Burr's intent to commit the murder was clearly demonstrated by the manner of the killing. That is, the prosecution in closing (T-1418, 1419,1422,1440) and the court in its sentencing order (R-319) repeatedly characterized the murder as an "execution." Whether this murder was sufficiently premeditated to be used as an aggravating factor at sentencing is arguable, but from the position of the body and entry point of the bullet, the jury could easily have concluded that Burr had a pre-meditated intent to kill.[11] Moreover, as the unchallenged evidence shows, the

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11. The prosecution in closing felt premeditation had been so well proven that he did not need to argue it (T-1417).

victim was killed during a robbery from which the jury can infer his premeditation under the felony murder doctrine. Adams v. State, 341 So.2d 765 (Fla. 1977). Burr's intent, in short, was not an issue in this trial.

Likewise, his identity as the perpetrator of these crimes is unchallenged. If the jury believed Domita Williams, Burr committed the murders. If they did not, Burr is innocent. Consequently, the only real trial issue was Williams' credibility.[12]

This case is similar to Waddy v. State, 355 So.2d 477 (Fla. 1st DCA 1978). In that case, the mother of an abused child said that Waddy battered her child on May 2, 1976 (the date of the charged offense) as well as on several other dates. In light of the mother's eyewitness testimony concerning the May 2nd battery, identity was not an issue, and the evidence of the other batteries was irrelevant. Accord, Styles v. State, 384 So.2d 703 (Fla. 2d DCA 1980).

Moreover, similarities between the convenience store robbery-murder here and the convenience store robberies in Brevard County were not so unusual or special as to point unmistakably to Burr. Drake v. State, 400 So.2d 1217 (Fla. 1981). Further, the similarities that existed between the Suwannee Swiftee robbery and those in Brevard County are common to most convenience store robberies.

In arguing for the admissibility of the Williams Rule evidence the state

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12. In the pretrial hearing on the Williams Rule evidence, the state said that one of the grounds for admission would be "absence of mistake." (T-380-381). That is, the Williams Rule evidence would bolster Williams' credibility because it showed that Burr had a propensity to commit convenience store robberies. Using this evidence for that purpose, however, is nothing but bad character evidence. See, Williams, supra.

listed the following similarities:

1. The victims were white males.
2. The weapons used were small caliber pistols.
3. Automobiles were used to leave the store.
4. No people were inside the store when the robberies occurred.
5. The shootings were unprovoked.
6. The crimes occurred within a short time.

(T-1030-1033)

In addition, the court said there was similarity in the time chosen to commit the crime: The crimes were committed either very early or very late to insure no other customers were at the store (T-1040-1041).

These similarities, however, hardly are so unusual that they unmistakably point to Burr as the culprit. Convenience store robberies, unfortunately, are very common and the scenario in each case virtually remains the same. Typically, the robber comes into the store, selects a few items to purchase and gives them to the clerk. For obvious reasons, no one else is in the store. The robber then produces a pistol and demands money. It is given to him and he flees.

This scenario is simple and unexciting and was followed in all these cases with the addition of the unprovoked shootings. That is somewhat unusual, but the manner of the shooting in this case significantly differs from those in Brevard County. That is, in the Brevard County robberies Burr faced the clerks and shot them twice in the abdomen or chest area (T-1063, 1071). In the Suwannee Swiftee case, the victim was shot in the back of the head while he laid on the floor (T-969).

Other differences, moreover, exist between this case and the Williams Rule evidence cases. In the Brevard County cases, the robberies occurred either close to midnight (T-991,1005) or early on Sunday morning (T-978). Few people could be expected to be in those stores then. In the Suwannee

Swiftee case, on the other hand, the robbery occurred on Thursday at 7:00 a.m., a time when many people routinely stopped at the store on their way to work (T-1078,1081,1101).

Other differences are present. In this case, Burr lived within a five minute drive of the Suwannee Swiftee (T-890). How far he lived from the stores in Melbourne is unknown. In this case, Burr drove a rented 1981 Oldsmobile Cutlass which was beige and blue (T-832,923). In two of the Brevard County cases, the car was not new or big and was a dark green or blue (T-987-988), or it was a light cream or yellow Chevrolet Camaro (T-1010).

In one of the Brevard County cases, the robber held the gun in his right hand (T-986), in another it was in his left hand (T-998). Moreover, in the Brevard County cases, the robber apparently wanted to buy something when he approached the clerk (T-997,989,1005). Here, we do not know what Burr did once he was inside the store.

The robbery and shooting of Emil Ferrell also is very different from this case. Ferrell said that someone called him Saturday night and Sunday morning wanting to know who was on duty Sunday (T-978). Then, when Burr came to the counter, he asked Ferrell what his name was and asked him if he had ever seen him before. Burr then pulled a gun and said, "I'm going to kill you." (T-1052). In none of the other Williams Rule cases did anything similar to that occur, and the state presented no evidence to prove that it happened in this case.

Finally, subsequent to Burr's trial for the Suwannee Swiftee crime, a jury acquitted Burr of committing the robbery and attempted murder of Lloyd Lee, one of the Williams Rule victims. (See attachments to the motion to supplement record filed with this Court on April 8, 1983). At Burr's trial, Lee, like the other Williams Rule victims (T-1068,1054) was positive

that Burr was the one that robbed and shot him.

> I'm as sure he is the one that shot me as I am sitting here talking to you now.
> [13]
> (T-1073)

The facts in the Williams Rule case have only a general similarity to the facts in this case. Nothing so unusual points unmistakably to Burr as the robber in all of the incidents. Moreover, significant discrepancies exist which further weaken the logical relevancy of the Williams Rule evidence.

Logical relevance, however, is only one aspect of relevancy. The evidence, besides being logically relevant, must also be legally relevant. That is, to be admitted, the court must determine that its probative value outweighs its prejudicial effect. Here the tremendously shocking impact of the Williams Rule evidence outweighed its probative value.

That is, the state's case stands on falls upon Domita Williams' credibility. Katrina Jackson perjured herself at trial (T-956-957) and Footman and Haygood gave sketchy testimony incriminating Burr. As argued elsewhere, the state's case is extraordinarily weak. Nevertheless, the Williams Rule evidence bolstered Williams' credibility by showing that in the Suwannee Swiftee robbery Burr acted in conformity with his bad character and criminal propensities. In that sense that evidence became a feature of the trial, Williams v. State, 117 So.2d 473 (Fla. 1960), because it is the only evidence that clearly and unequivocally identified Burr as a robber and killer. But, as Williams says, that purpose is

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13. Of course, the state could not have used the Lloyd Lee case as Williams Rule evidence had the jury acquitted Burr before his Suwannee Swiftee trial. State v. Perkins, 349 So.2d 161 (Fla. 1977). If so, why should it be able to use it now? By using Williams Rule evidence before it has obtained a conviction for that evidence, the state assumes the risk of a subsequent acquittal.

irrelevant.

The court compounded its error in admitting that evidence by instructing (over defense objection) (T-1400,1551) the jury that it was relevant to show a "pattern of criminality" (T-1545). A pattern of criminality, however, is propensity and, hence, is not a legitimate issue for the jury to consider.

The court in reading the Williams Rule instruction followed Cotita v. State, 381 So.2d 1146 (Fla. 1st DCA 1980). In Cotita, Cotita was charged with committing a lewd and lascivious act against his children. At trial, the state produced evidence that Cotita had committed similar acts at other times with his children and with other children. Id. at 1147. The First District Court of Appeal, in affirming his conviction, said the evidence was relevant to show a pattern of criminality. Cotita and the cases following it, however, are special because they involve sexual crimes against children. Other cases, in fact, specifically have limited the pattern of criminality use of Williams Rule evidence to child sex cases because of the unique problems inherent in those cases. Coler v. State, 418 So.2d 238 (Fla. 1982) (Adkins, dissenting); Hodge v. State, 419 So.2d 346 (Fla. 2d DCA 1982); Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982). The court in State v. Rush, 399 So.2d 527 (Fla. 2d DCA 1981), moreover, specifically recommended that the law against the use of propensity evidence, Section 90.404(2), Florida Statutes (1982), be amended to permit admission of propensity evidence in child molesting cases. No court, however, has been willing to extend the pattern of criminality/propensity use of Williams Rule evidence to cases such as this which involve only a robbery and murder. The reason is easy to find: A pattern of criminality is the same as propensity, and rather than convict a person for his guilt in a specific crime, a jury may very well convict him simply because he is a crook. Hence, the trial court here erred in admitting the

Brevard County crimes and compounded its error by instructing the jury that they could consider these crimes to show a pattern of criminality.

ISSUE IV

THE COURT ERRED IN FAILING TO CONTROL THE STATE'S INFLAMMATORY AND PREJUDICIAL CLOSING ARGUMENT.

Domita Williams' credibility was the sole issue the jury had to resolve (T-1458). If it believed her when she testified for the state, Burr killed and robbed Hardy. If it believed her when she testified for the defense, Burr is innocent. The murderer's identity is not at issue and neither is his intent.

Nevertheless, the state in its closing argument characterized Burr as a "master of disaster" who killed or terrified everyone he knew.

> Why? Why would Domita go in and say he was wearing this shirt with this ["master of disaster"] on his sleeve? Why would she go in and tell them she bought a cheeseburger? Why would these three women make up this story? Why? Why? Why? Why? Using your common sense, it was not a made-up story. It led to the arrest of this man and he's here in this courtroom today, the "master of disaster." And that's just exactly what he did, everywhere he went after August the 20th, it was disaster. Every step he took was disaster for whoever got in front of him.
>
> (T-1424)

That theme permeated the state's argument and denied Burr of his fundamental right to a fair trial. Wilson v. State, 294 So.2d 327 (Fla. 1974).[14] The state repeatedly referred to Burr as a "master of disaster" (T-1424,1425, 1432,1434,1436,1454,1527) and once as an "assassin" (T-1436). Such offensive

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14. Referring to Burr as a "master of disaster" was not invited by the defense as the state had the first and last closing arguments, and it made its first reference to Burr as such in its initial closing argument (T-1424). Darden v. State, 328 So.2d 445 (Fla. 1976).

epithets, however, are highly improper. Green v. State, Case No. 81-2487 (Fla. 3d DCA, opinion filed March 1, 1983) (prosecution referred to Green as a "dragon lady") Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979) (prosecution referred to Glassman's office as a "Disney World at Southwest 22nd and 6th" and inferred Glassman was "Donald Duck-quack, quack."). Yet, the state picked the words "master of disaster" printed on the sleeve of the shirt Williams said Burr wore and expanded it into a characterization of Burr.

> Ladies and gentlemen, the master of disaster is a person to fear. Don't look at him like you see him today sitting over there with his smug face and a nice little white shirt on. Look at him with his black shirt with "Master Red" on it, with a heinous picture on it, with a pistol in his hand shooting people. That's how Domita knows him. She has reason to fear him, good reason to fear him.
>
> (T-1432)

The "master of disaster" theme also explained why, according to the state, Williams changed her story.

> She won't tell us, but Domita Williams is afraid. Does -- from what she said she saw of this man, does she have any reason to be afraid? An interesting thing happened and an interesting thing was -- came out when she came back yesterday afternoon. And I hope you caught it. If you didn't, ask to listen to her testimony again.
>
> Domita Williams told you yesterday afternoon, "I decided to tell the truth when I found out they didn't have any other evidence." Domita Williams is afraid from what she has told y'all are going to find this man not guilty. And she wants to come back in here, folks, and try to help him out, because she's afraid that if he walks out of this courtroom, what's going to happen. And she has told this story consistently, consistently, consistently. Five times she told the same story, about the cheeseburger.
>
> (T-1429)

But Williams never said Burr threatened her; to the contrary, Burr had not threatened or in any way intimated that if she did not change her testimony

something would happen to her (T-1248,1285). Ash (T-1261) and Modesitt (T-1284), the state attorney, on the other hand, have threatened her.

Moreover, the state continued its "master of disaster" theme by improperly arguing that the three robbery/shootings in Brevard County, the Williams Rule evidence, could be used to show Domita Williams' absence of malice (T-1433).[15] Of course, Williams Rule evidence is admissible if it is relevant despite the fact that it also exhibits a defendant's bad character of criminal propensity. Williams v. State, 110 So.2d 654 (Fla. 1957). Nevertheless, the state cannot argue that propensity, Davis v. State, 397 So.2d 1005 (Fla. 1st DCA 1981), but that is what the state did here.

> You can use what he did in Melbourne to help you in determining whether there has been a mistake in this case.
>
> (T-1433)
>
> * * *
>
> But, before church time, dressed in his suit, his Sunday best, he walks in and robs and tries to kill a man. That is this Defendant.
>
> Is there any wonder Domita fears him?[16] Is there any wonder she's afraid? Is there any wonder that she changed her testimony when she found out that all that we had that would put him there at that store was her? Is there any wonder that she now wants to come in and tell the truth? She has every reason to fear him.
>
> (T-1435)

The thrust of the state's argument is that Williams changed her story because she knew what sort of person "the master of disaster" was and what he

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15. The court, in the pretrial motion to suppress, had said that such use was improper (T-380-381).
16. The state presented no evidence Domita was aware of the Brevard County robberies.

would do to her if he ever got out of jail. What the state is really saying is that Burr acted in conformity with his bad character and will do so again if he is not found guilty. Not only does this argument unfairly attack Burr's character and emphasize his criminal propensity, Davis, supra, it is also a subtle message to the jury that if they turn this murderer lose, this "master of disaster," he will kill again. Specifically, Domita Williams has a real fear for her life. See e.g., Grant v. State, 194 So.2d 612 (Fla. 1967); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982). Such comments, however, encourage the jury to find Burr guilty not because of his guilt in this case, but because he is a bad person generally who deserves to be put away for society's benefit. While such may be the case, that conclusion is for the judge to make at the sentencing, not for the jury to consider in determining Burr's guilt. Chavez, McMillian, Grant, supra.

Along these same lines, the state claimed Williams changed her story when she found out the state had no other evidence against Burr but her testimony:

> Domita said yesterday afternoon after she said, "I'm afraid. I found out you didn't have any other evidence against him but me, so I decided I would change my story. And now I'm going to tell the truth." Why did she go in and tell Katherine Haygood she was at the store that was robbed?
>
> (T-1431)

But nowhere did Williams say that and from no evidence could the state reasonably infer that that was the reason she changed her story. Also, the state produced no evidence that Williams knew of the Melbourne robberies (T-1435) or that Burr took everything he touched in the store with him (T-1511) or that Ms. Haygood had not lied (T-1513). Finally, as mentioned, the state produced no

evidence of Burr's threats against Williams. Such extra-testimonial knowledge (if it was such) was not part of the evidence the jury heard, and it amounted to the prosecutor giving unsworn testimony. Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), Grant, supra.

The state's characterization of Burr as the "master of disaster" spread to Burr's counsel whom the prosecutor labeled as "the master of confusion."

> But, folks, over on the sleeve, this tells you about Charles Lewis Burr: "The Master Of Disaster." There he sits, by his lawyer, the master of confusion. Charlie Burr, that's what he was wearing.
>
> (T-1424)

Repeatedly, the prosecution referred to defense counsel as "the master of confusion" (T-1424,1429,1437,1443,1447) and characterized his defense as focused only on creating confusion or a reasonable doubt.

> And then she comes back in here after talking to the master of confusion. She comes back here and says, "I was afraid, and I have lied and I want to tell you the truth..." (T-1429)
>
> * * *
>
> And I don't brand him the master of confusion other than just for emphasis. But, the Master of Confusion began his case.
>
> Now, you see, his job in defending Charles Lewis Burr is to try to raise a reasonable doubt (T-1437).
>
> * * *
>
> And then he called Bill Gunter and Linda Hensley back. Now, this is interesting. It is really interesting. Linda Hensley is a hair expert. And she didn't identify Charles Lewis Burr's hair there. She did find some hair in the place. She told you that if she had of found hair similar to his, she couldn't say for sure it was his. Now, what does that add? Nothing--confusion (T-1440).
>
> * * *
>
> Hair is not falling out of your head all over the floor. Just adds to the confusion, trying to confuse you and raise a reasonable doubt (T-1441).

* * *

Now, Katherine Haygood said it; Katrine said it. Then -- well, we will come to Tammy a little later. The next witnesses -- and I want us to try to work our way through this, but I want us -- I think we can do it, because the Master of Confusion wants to put in a little doubt. And he's had his investigator, Ed McFarland very busy, been real busy this last week. Seems like these people come in and destroy the case (T-1443).

* * *

She doesn't see the highway patrol car and siren going, but her mother does. They are confused about the day. The Master of Confusion has brought them in here and they are confused (T-1447).

* * *

Now, Mr. Keith will have an opportunity to speak with you. After he speaks for a while, I will have an opportunity to come back. I would ask you to listen very carefully to him, but keep in mind that Mr. Keith has already tried to confuse you by times, by this late information. These folks sat on it, folks, for so long. They sat on it for nine months. And then big Ed McFarland, good friend of mine, goes out and talks to them, "Oh, yeah, yeah. Yeah, I know all about it." (T-1457).

* * *

Who was the last person she talked to before she came in here and changed her story on Thursday? Mr. Keith; she talked to him. She changed her story (T-1523).

Moreover, the state, without any evidence, intimidated Ed McFarland, an investigator for the Public Defender's Office, got people to change their story, to lie for Burr.

> And he's had his investigator, Ed McFarland very busy, been real busy this last week. Seems like these people come in and destroy the case (T-1443).
>
> * * *
>
> Now, Ed McFarland hadn't talked to her, folks. Charlie Ash talked to her and some deputies talked to her one time. Charlie Ash goes

> back and talks to her and he writes up a report on February 5th, 1982 -- not June the 1st, not Ed McFarland; didn't know any of this stuff was going to come up, had no idea. All of a sudden, June the 1st, Ed McFarland would strike. We would start learning that all of a sudden this couldn't have happened, because they were riding to work to the nursery that morning (T-1451).
>
> * * *
>
> Now, Mr. Keith will have an opportunity to speak with you. After he speaks for a while, I will have an opportunity to come back. I would ask you to listen very carefully to him, but keep in mind that Mr. Keith has already tried to confuse you by times, by this late information. These folks sat on it, folks, for so long. They sat on it for nine months. And then big Ed McFarland, good friend of mine, goes out and talks to them, "Oh, yeah, yeah. Yeah, I know all about it." (T-1457).

Characterization of defense counsel, his investigator, and his defenses are totally improper. Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973). Rather than attacking the defense theory the state chose to attack counsel by imputing unworthy motives on counsel's part for "destroying his case." The prosecutor is saying, in effect, that only he held the scepter of truth, and that any attacks upon it were by dark forces bent on destroying the simplicity of truth. Such positions are familiar to the inquisitors, demagogues, and the star chamber; it is, however, completely alien to our adversarial system of justice.

Finally, the prosecutor appealed to the emotions of the jury:

> But, folks, it's time to get emotional and it's time to get worked up when a young man, 20 years old,[17] working, has his brains blown out in a Minit Market by a man wearing a Master of Disaster shirt, a hidious

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17. The state produced no evidence of Hardy's age.

> shirt, walks in and puts a pistol to the back of his head and blows his brains out. It's time to get emotional. It's time to get worked up. (T-1515).
>
> * * *
>
> It's not a time to be impartial. It's a time to stand up and be counted. It's a time to stand up for right. It's a time to stand up for justice. It's a time to do that which is right in this courtroom (T-1515-1516)

Such inflammatory appeals to do what is right, to take a stand for justice, and to get worked up encourages the jury to forget the evidence and Burr's culpability and to convict him as one blow for truth and justice in the war against crime. Grant, Chavez, supra. Such appeals were improper and were part of what has become a mountain of impropriety in the closing arguments in this case that individually and collectively have become reversible error regardless of any defense objection. Carlile v. State, 129 Fla. 860, 176 So. 862 (1937).

This Court should reverse for a new trial.

ISSUE V

THE COURT ERRED IN DENYING BURR'S MOTION TO EXCLUDE TAMMY FOOTMAN AS A REBUTTAL WITNESS AS SHE VIOLATED THE RULE OF SEQUESTRATION OF WITNESSES.

In rebuttal to Burr's defense the state called Tammy Footman to corroborate Domita Williams' story when Williams had testified for the state. Footman, however, had sat in the courtroom during part of the trial.[18] In particular she heard Katrina Jackson's story of what had happened on the morning of the murder. Footman, for purposes of trial, was with Jackson when Domita Williams and Burr came to Jackson's apartment (T-1322). As a courtroom

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18. At the start of trial, the court imposed the rule of sequestration on all of the witnesses (T-799-800). Footman, while listed as a state witness, was not placed under the rule (T-1322).

spectator, she heard Jackson's two versions of what did or did not occur that morning and she saw how the prosecutor handled the situation. In objecting to Footman's testimony, Burr's counsel said:

> MR. KEITH: Yesterday. And heard the testimony of Katrine Jackson, which is very much her testimony or along similar lines. She was supposedly there the same time. I feel her testimony could very well be influenced by what she saw going on with Katrine Jackson's testimony. She was listed as a witness by the State. They didn't call her up here at the beginning of the trial. She wasn't required to be under the rule, evidently, because she didn't go out of the courtroom. She heard the testimony.
>
> (T-1322)

Nevertheless, after hearing a proffer of Footman's testimony, the court allowed her to testify. The court, however, abused its discretion by doing so.

The rule of sequestration is the traditional method courts use to prevent a witness from shaping his testimony because he heard what other witnesses have said. Dumas v. State, 350 So.2d 464 (Fla. 1977); Atkinson v. State, 317 So.2d 807 (Fla. 4th DCA 1975). Nevertheless, when a witness violates that rule, his testimony is not automatically excluded. Holder v. United States, 150 U.S. 91, 37 L.Ed. 1010, 14 S.Ct. 10 (1893). Instead, in a manner similar to the inquiry made when a party has committed a discovery violation, Thomas v. State, 372 So.2d 997 (Fla. 4th DCA 1979), the court must inquire if the violation was with the state's knowledge, connivance, or consent. Atkinson, supra, Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In this case, the court made no such inquiry. At no time did it ask the state if it knew of Footman's presence in the courtroom or in any way encouraged or suggested she listen to the trial testimony. Where the state had already listed Footman as a witness, the better policy for the state to

have followed would have been to have subjected her to the rule without considering whether she might actually be called as a witness. If it had done so, the problem now raised would not be an issue. Nevertheless, because of the court's failure to conduct a proper inquiry, this Court should reverse Burr's judgment and sentence for a new trial. Dumas, supra.

Moreover, defense counsel was unable to say that Footman's testimony was uninfluenced by what she had heard (T-1352), and the state said nothing to assist the court in resolving that problem. Steinhorst, supra. In this case, the lack of inquiry was particularly crucial. That is, prior to trial, the state had conducted an en mass review of several witnesses' testimony with Footman present (T-1282). At trial, she also saw how the prosecutor handled Jackson's change of testimony. Consequently, she may very well have conformed her testimony to agree with Jackson to avoid going through what Jackson had suffered regardless of what may have been the truth. In any event, the prosecution made no effort to contradict the possibility of influence. Steinhorst, supra.

Therefore, the court abused its discretion in admitting Footman's testimony without determining the state's complicity in violating the rule, and without determining if Footman's testimony was substantially affected by her presence during the trial.

ISSUE VI

THE COURT ERRED IN SENTENCING BURR TO DEATH, WHEN IT OVERRODE THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has repeatedly held that a jury's recommendation of life imprisonment must be given great weight. See e.g. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982);

and the trial court can override such a recommendation only if the facts justifying a death sentence are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, at 910; see Provence v. State, 337 So.2d 783, 787 (Fla. 1976); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Walsh v. State, supra, at 1003. If there is any reasonable basis for the jury's life recommendation, the trial court cannot impose death. See Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Walsh v. State, supra, at 1003. In the present case, the reason for the jury's life recommendation is patently clear on the record - six or more of the jurors retained some genuine doubt of Burr's guilt, or at least did not feel that the state's evidence was sufficiently strong to justify a death sentence. In this case, this is a reasonable and even a compelling basis for a life recommendation. See Smith v. Balkcom, 660 F.2d 573, 580-82 (5th Cir. 1981); Model Penal Code, Section 201.6(1)(f) (Proposed Official Draft, 1962) (set forth in Appendix to McGautha v. California, 402 U.S. 183, 222-25 (1971) and 1980 Revised Comments, at 134. See also Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); People v. District Court of State, 586 P.2d 31, 35 (Colo. 1975). Burr's death sentence must therefore be reversed with directions to the trial court to impose a sentence of life imprisonment. See Walsh v. State, supra, at 1003.

The legal issue which is central to this point on appeal is clearly defined, and this Court cannot sustain the death sentence unless it holds that doubt as to guilt (i.e. genuine doubt, but not necessarily rising to the level of reasonable doubt needed to convict, see Smith v. Balkcom, supra), or the jury's degree of confidence in the quantity or quality of the evidence of guilt, cannot be a reasonable basis for a life recommendation.

Also, if Florida's death penalty statute were to be so construed as to deny him the opportunity to seek a meaningful life recommendation from the jury by maintaining his innocence and urging the jury to consider whether the evidence is strong enough to justify death, such a construction of the statute would place it in violation of the Eighth and Fourteenth Amendments. See Lockett v. Ohio, supra; People v. District Court of State, supra; Smith v. Balkcom, supra.

The key issue at trial was Domita Williams' credibility, and as discussed in Issue II her credibility was so weak that under this Court's holding in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, __U.S.__, 72 L.E.2d 652, 102 S.Ct.__ (1982) the jury had no substantial, competent evidence of Burr's guilt.

Moreover, during the sentencing phase of his trial, Burr clearly focused upon the weakness of the state's case as the key factor in recommending the life sentence (T-462-465). While Burr presented several witnesses who said he had been a devoted church-goer in his youth, that fact along with his age, 21 (T-448), was a relatively weak mitigating factor. Likewise, Burr's mother apparently cried in court when asked if her son should live (T-451). In his closing, however, the prosecutor negated the impact of this show of emotion by noting that almost every mother would plead for the life of her son (T-455).

Nevertheless, as mentioned, Burr clearly thought that his claim of innocence, though rejected by the jury, was sufficiently strong to warrant a life sentence. That is, Domita Williams, admittedly and obviously lied somewhere in this trial. She was, however, the state's key witness and without her testimony the state would not have had a case against Burr. Nevertheless, the jury had to make a choice of which story Williams told was true, and

obviously by their verdict they chose her prosecution version.

By accepting that version, however, did the jury completely reject the case Burr presented? Not necessarily. Recall that several disinterested defense witnesses implicitly contradicted Domita Williams' story by claiming to have seen Steve Hardy alive within one or two minutes of his death (T-1078,1096). Also, relatives of Williams saw Williams coming back from taking her mother to work on the morning of the murder shortly after it had occurred. Such evidence must have disturbed the jury sufficiently so that although they chose the state's version, such choice was made with reluctance. That reluctance obviously found expression in the jury's recommendation of life.

This view is further supported by the court's sentencing order where it said:

> I find from the evidence that three aggravating circumstances have been established beyond a reasonable doubt. With the first and last of these the jury was no doubt in unanimous accord.
>
> (R-319)

Such a statement of knowledge of how the jury voted is pure speculation by the trial court. Nevertheless, assuming the jury found these two factors, the jury's recommendation of life assumes greater significance. If the jury could have returned a life recommendation despite a "unanimous" finding of at least two aggravating factors, they must have found a very strong mitigating factor to outweigh those aggravating factors. The only such factor that the jury could have found of such magnitude was the weakness of the state's case. Of course, reasonable men could differ as to the weight of that mitigation as was evidenced by the trial court's override of the jury's recommendation. But the fact that such disagreement exists further strengthens Burr's argument: Only when reasonable men cannot disagree about the

appropriateness of a death sentence is that sentence justified despite a jury's life recommendation.

The inherent reasonableness of this jury's decision to recommend life reflects their lingering doubt as to Burr's guilt and has a strong historical and scholarly basis. Virtually all post-Furman death penalty statutes are based on the approach taken in the Model Penal Code as adopted by the 1962 Annual Meeting of the American Law Institute. [See Proffitt v. Florida, 428 U.S. 242, 247-48 (1976), noting that Florida's death penalty statute is patterned in large part on the Model Penal Code; see also Gregg v. Georgia, 428 U.S. 153, 189-91, 193-93 (1976); Jurek v. Texas, 428 U.S. 262, 270-71 (1976); Straight v. Wainwright, __So.2d__ (Fla. 1982) (case nos. 62,168, 61,182, opinion filed September 14, 1982) (1982 FLW 436, 437)]. Model Penal Code § 210.6 provides for a separate penalty proceeding before the trial court and jury, during which various aggravating and mitigating circumstances (most of which are identical or very similar to those enumerated in the Florida statute) may be established and are weighed to determine whether a life sentence or a death sentence is appropriate. However, under certain circumstances, no penalty phase is conducted at all; the trial judge simply imposes a sentence of life imprisonment if one or more of the considerations listed in § 201.6(1) are met:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> * * *
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(Emphasis supplied)

In the 1980 Revised Comments to Model Penal Code § 201.6 (at p. 134), this provision was explained in the following terms:

> Finally, Subsection (1)(f) excludes the death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt." This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

See Lockett v. Ohio, 438 U.S. at 605 ("the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence").

Of course, almost every case has some doubt in it, and Burr is not arguing that if any doubt exists, a defendant should not be executed. He does not need to because in this case the problems the jury had to resolve are so evident that certainly they must have had at least some doubt about the truth of Domita Williams' prosecution story. Consequently, the jury could have reasonably believed Domita Williams' prosecution story and convicted Burr. Yet, at the same time they very much may have wanted to leave open a "safety valve" in case the defense version was correct.

Of course, the Model Penal Code is not binding Florida law. Nevertheless, it clearly demonstrates that some residual, but genuine, doubt as to guilt, and the nature or quantity of the evidence of guilt, can be a relevant consideration on the issue of the appropriate penalty. (See also Smith v. Balkcom, 660 F.2d 573, 580-81 (CA 5 1981). Indeed, the framers of the Model Penal Code consider these matters to be so critically relevant to the issue of penalty that a death sentence should be precluded, notwithstanding the hypothetical existence of a dozen aggravating factors, where the evidence does not foreclose all doubt of guilt. Consequently, a jury's life recommendation, based on the ground that the evidence does not foreclose all doubt of guilt, is

reasonable.

Moreover, this Court has reduced death sentences to life imprisonment when the evidence presented in the guilt phase conflicts. For example, in Malloy v. State, 382 So.2d 1190 (Fla. 1979) the evidence was conflicting over whether Malloy or one of his two other accomplices (who were not sentenced to death) was the triggerman. This Court reduced Malloy's death sentence because of that unresolved conflict.

Further, as this Court said in Lewis v. State, 398 So.2d 432, 438 (1981):

> . . . the jury is not limited in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

As the Model Penal Code illustrates, the strength or weakness of the evidence of guilt is a consideration reasonably relevant to the question of mitigation of punishment. Clearly, Burr may submit to the jury, as non-statutory mitigation under Lockett (1) that, while recognizing that he has been found guilty of the capital offense, he maintains his innocence, and (2) that the evidence is not of such a conclusive character as to foreclose the possibility of his innocence. He may attempt to persuade the jury that based on these considerations he should receive a life sentence rather than death. In the event that the jury agrees, and returns a life recommendation based on these non-statutory mitigating considerations, that life recommendation must be given effect. See Welty v. State, supra, at 1164-65. Otherwise, the Florida death penalty statute is unconstitutional under Lockett v. Ohio. In People v. District Court of State, 586 P.2d 31 (Colo. 1978), the Colorado Supreme Court held that state's death penalty statute unconstitutional under Lockett, in that it restricted consideration

of mitigating circumstances to those enumerated in the statute. Rejecting the state's suggestion that it construe the subsection setting forth statutory mitigating circumstances as allowing for presentation and consideration of non-statutory mitigation as well, the court noted several impediments to such a construction:

> First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence 'at the time of the offense.' Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442, 449-50, n.19 (1977).
>
> Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.
>
> People v. District Court of State, supra, at 35.

Cf. Straight v. Wainwright, __So.2d__ (Fla. 1982) (case nos. 62,168, 61,182, opinion filed September 14, 1982) (1982 FLW 436, 437), in which this Court apparently recognized that a convicted capital defendant and his attorney, as a matter of principle or strategy, may maintain his innocence and forego presentation of other mitigating circumstances. Straight's attorney "viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case"; for this reason, the attorney's alleged failure to investigate for the purpose of developing evidence of mitigating circumstances did not constitute ineffective assistance. Appellant submits that the decision in Straight makes sense only if the defendant is allowed to maintain his innocence before the jury, to argue that the evidence is not conclusive enough to warrant the death penalty, and to receive the benefit of the jury's life recommendation if he is successful in obtaining it. Otherwise, Straight simply affords the defendant, as the price for maintaining

his innocence and preserving the integrity of his case, a free pass to the electric chair.

The most compelling reason why a jury's life recommendation, returned on the basis that the evidence does not foreclose all doubt of guilt, is the simple undeniable fact that an innocent person can be convicted. Charlie Burr still maintains his innocence; as a matter of law he is guilty, but as a matter of fact he may not be. As Justice Marshall, concurring in Furman v. Georgia, 408 U.S. 238, 366-68 (1972) observed:

> Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.
>
> * * * * * *
>
> No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.

When six or more jurors recommend a life sentence because they believe that the evidence does not conclusively eliminate the possibility of innocence, their concern is reasonable. If the trial judge overrides a life recommendation which was based on the jury's residual, but genuine, doubt as to guilt, he does so in violation of the Tedder standard and in violation of the constitutional protection against cruel and unusual punishment. If this Court were to conclude otherwise, the overwhelming irony would be that a convicted capital defendant who is in fact innocent would be in a far worse position to argue for his life than the many guilty capital defendants. Should he perjure himself and say "I was drunk when I did it," "I was crazy

when I did it," when he knows that in truth he didn't do it at all? If it is recognized that it is possible for an innocent man to be convicted (and see Tibbs v. State, 337 So.2d 788, 791 (Fla. 1976) and Tibbs v. State, 397 So.2d 1120 (Fla. 1981)), then a defendant must be afforded a meaningful opportunity to maintain his innocence before the penalty jury. This is not to say that a defendant who maintains his innocence is automatically entitled to a life sentence rather than a death sentence. This is to say that if he is successful in convincing the jury that there is enough possibility of his innocence that he should receive life imprisonment rather than the death penalty, that life recommendation cannot constitutionally be overridden. The jury, acting as spokesman for the community's sense of justice, said by its recommendation that enough of a possibility remained that Domita Williams' prosecution could be wrong, that it would create an unacceptable risk of injustice to execute Charlie Burr. The life recommendation was reasonable, and must be given effect.

ISSUE VII

THE COURT ERRED IN FINDING THAT BURR COMMITTED THIS MURDER FOR THE PURPOSE OF AVOIDING LAWFUL ARREST.

In finding that Burr committed the murder for the purpose of avoiding or preventing a lawful arrest, the court said:

> The execution of Steven Harty was committed by Charlie Lewis Burr for the purpose of avoiding or preventing a lawful arrest for the armed robbery of Steven Harty. By his conduct during the 13 day period which began with Steve Harty's pitiless murder, Charlie Burr gave forceful expression to the first principle of the code of the lawless that "dead men tell no tales". That Emil Ferrell, James Griffin and Lloyd Lee lived to identify him is no testimonial to his marksmanship. That they did not join Steve Harty in the bonds of death can only be attributed to the grace of a benevolent Creator.
>
> (R-319-320).

In enacting Section 921.141, Florida Statutes (1981) the legislature intended that this factor apply primarily to killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). However, when a court finds this factor for killings involving persons other than policemen, this Court has also said that the dominant motive for the killing must be to avoid arrest. Menendez v. State, 368 So.2d 1278 (Fla. 1979), and the proof of the killer's intent must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). For example, in Menendez, the victim was found laying on the floor with his hands outstretched in a supplicating manner. Also, Menendez had killed the victim with a gun which had a silencer. From these facts, the trial court said that the murder was committed for the purpose of avoiding lawful arrest. This court, however, disagreed saying that the sketchy facts provided insufficient evidence of Menendez's motive.

Similarly here, the trial court has only a killing it has styled as an execution to justify this factor. The manner of Hardy's killing certainly suggests that Hardy was killed to avoid lawful arrest, but that explanation is as speculative as any other reason for the killing.[19]

Moreover, the Williams Rule evidence used by the court to support this factor does not. That is, Burr knew that Emil Ferrell was not dead after he shot him because Ferrell ran out of the store before Burr left (T-1054). Likewise, he probably knew that Griffin was alive when Burr left the store (T-993). If Burr wanted to kill someone, he certainly knew how to do it. What is uncertain, however, is why he did so. Certainly, this case did not have the very strong evidence of intent that other cases this Court has decided have had.

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19. For example, Burr may have hated white males (T-390) or may have had a "contract" to kill Hardy (which is possibly the reason he shot Ferrell) or Hardy may have made some sort of menacing gesture (T-993).

For example in Adams v. State, 412 So.2d 850 (Fla. 1982) the state presented evidence that Adams and the victim knew each other, and Adams hid the body. In Vaught v. State, 410 So.2d 147 (Fla. 1982) the victim pulled off Vaught's mask and said, "I know you and I know where you live." Vaught struggled with the victim, shot him once, and then he shot him four more times as he lay helpless on the ground. In Martin v. State, 420 So.2d 583 (Fla. 1982), Griffin v. State, 414 So.2d 1025 (Fla. 1982), and Smith v. State, 424 So.2d 726 (Fla. 1982) the defendants robbed convenience store clerks, abducted them, and killed them in remote areas. However, in Shriner v. State, 386 So.2d 525 (Fla. 1980), a case similar to this one, Shriner did not abduct the clerk but shot her twice at the store. The trial court did not find that Shriner committed the murder to avoid lawful arrest.

These cases suggest that in order for the state to prove the dominant motive of the murder was to avoid lawful arrest, the state must show more than merely that the murder was committed in a cold, calculated and execution style manner. In those cases where this Court has upheld this factor, some additional evidence of the defendant's motive was necessary to support a finding of this factor.

In this case, the state presented no additional evidence to support this factor. Consequently because the evidence was ambiguous as to this finding, the court erred in finding it.

ISSUE VIII

THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID LAWFUL ARREST AND THAT IT WAS COMMITTED IN A COLD AND CALCULATED MANNER BECAUSE THESE FINDINGS FOCUS UPON THE SAME ASPECT OF THE MURDER: THE MANNER IN WHICH IT WAS COMMITTED.

The court in overriding the jury's recommendation of life found that this "execution" was committed for the purpose of avoiding or preventing a

lawful arrest and it was committed in a cold, calculated and premeditated manner. Specifically, as to this last factor the court said:

> The murder of Steven Harty was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Of this, can there be any doubt?
>
> (T-320)

While this issue focuses upon the doubling aspect condemned in Provence v. State, 337 So.2d 783 (Fla. 1976), at the outset Burr points out that the court failed to support the quoted finding with the "specific written findings of fact" required by Section 921.141(3), Florida Statutes (1983).[20] Consequently, his argument is somewhat unfocused because he, like this Court, must guess what specific facts the court used to support this finding.

As a general observation, this Court has said that the aggravating factor "cold, calculated and premeditated" applies to execution or contract killings. Jent v. State, 408 So.2d 1024 (Fla. 1981), McCray v. State, 416 So.2d 804 (Fla. 1982). That is, the cold blooded intent is shown by the manner or method of a killing.

In this case, however, the trial court also used the manner in which Burr committed this murder (i.e. "the execution" of Steven Hardy) to find that the murder was committed for the purpose of avoiding or preventing lawful arrest (R-319). Even the use of the Williams Rule shootings suggests that Burr shot those people in an execution manner. Consequently, the court used the same aspect of the crime, the execution manner of the killing, to find two

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20. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

aggravating factors.

This Court, however, has condemned the "doubling" of aggravating factors. Provence, supra. Aggravating and mitigating factors are to guide the court in analyzing the character of the defendant and the circumstances of the crime. Lockett v. Ohio, 438 U.S. 586, 57 L.E.2d 973, 98 S.Ct. 2954 (1978). The factors, therefore, are weighed by the judge in imposing sentence rather than counted. State v. Dixon, 283 So.2d 1 (Fla. 1973). Nevertheless, the possibility is too great that the court may give undue weight to one aspect of the crime because it is found in two aggravating factors.

The doubling of aggravating factors is particularly acute in this case because the court overrode the jury's life recommendation. That is, the court somehow knew that the jury unanimously found that Burr committed the murder during the course of a robbery and that it was committed in a cold, calculated and premeditated manner (R-319). In overriding the jury's recommendation of life, however, the court found only the additional aggravating factor that Burr committed the murder for the purpose of avoiding lawful arrest by virtue of the execution style method in which he acted in this case and others. But the court and the jury found that the aspect of the murder was also reflected by the cold, calculated and premeditated manner of the killing. Therefore, in rejecting the jury's recommendation the court simply disagreed with the conclusion reached by 12 reasonable people; it presented nothing more to justify overriding the life recommendation. Merely disagreeing with the jury's recommendation, however, is insufficient to justify a sentence of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Thus, the court erred in doubling these two aggravating factors and this Court should reverse Burr's sentence and remand for a new sentencing hearing.

V CONCLUSION

Based upon the arguments presented here, Burr asks this Honorable Court to: (1) reverse the trial court's judgment and sentence and remand for a new trial; (2) reverse the trial court's sentence and remand for an imposition of a life sentence; or, (3) reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand to Mr. Andrew Thomas, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and a copy has been mailed to appellant, Mr. Charlie Lewis Burr, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 22 day of June, 1983.

DAVID A. DAVIS