IN THE SUPREME COURT OF FLORIDA

LARRY DONNELL BROWN, Appellant,	)
vs.	) Case No. 62,922
STATE OF FLORIDA, Appellee.	)

FILED

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BRIEF OF THE APPELLANT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Robert F. Moeller
Assistant Public Defender
Courthouse Annex
Tampa, Florida 33602-4197

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IN THE SUPREME OF FLORIDA

LARRY DONNELL BROWN,	)	
Appellant,	)	
vs.	)	Case No. 62,922
STATE OF FLORIDA,	)	
Appellee.	)	

STATEMENT OF THE CASE

A Pinellas County grand jury returned a two-count indictment against Appellant, Larry Donnell Brown, on June 10, 1981 (R 28-29). The first count charged him with the premeditated murder of Anna Jordan by asphyxiation, through binding her neck and/or placing a gag in her mouth (R 28). Count two charged him with burglary in that he entered Anna Jordan's dwelling with the intent to commit theft or sexual battery, and did make an assault upon Jordan during the course of the burglary (R 28).

Brown pleaded not guilty (R 35).

Through his counsel, Brown filed various pretrial motions (R 4, 5-6, 7-8, 9-10, 36, 70-71, 72, 73-74, 75-77, 78-79, 80, 81, 82, 83-84, 88-89, 106-113, 114-115, 116-117, 118-119, 120-124, 125-150, 151, 163-165). Among them were several motions attacking Florida's death penalty law, none of which was granted (R 70-71, 72, 73-74, 75-77, 78-79, 80, 90, 106-113, 125-150, 156).

This cause proceeded to a jury trial beginning October 26, 1982, with the Honorable Crockett J. Farnell presiding (R 341).

The jury found Larry Brown guilty as charged on both counts of the indictment on October 28, 1982 (R 171, 180, 181, 1235-1237). The verdict form for first-degree murder does not reflect whether the jury found premeditation or felony-murder (R 180).

On October 29, 1982 the jury returned a recommendation that the court impose upon Brown a sentence of life imprisonment without possibility of parole for 25 years (R 199, 1381). After the jury made its recommendation, the court ordered a presentence investigation (R 1381-1382).

Brown filed a motion for new trial (R 200-201), which was denied on November 15, 1982 (R 269). On the same date, the court orally sentenced Brown to death for the first-degree murder of Anna Jordan (R 278-280). The court did not orally impose any sentence for the burglary (R 268-281). However, the written judgment and sentence reflects both a death sentence for the murder and a consecutive life sentence for the burglary (R 203-207).

On December 17, 1982 the court filed his written findings as to why he imposed the death penalty upon Larry Brown (R 209-211).

Brown filed his notice of appeal to this Court on November 16, 1982, and the Public Defender for the Tenth Judicial Circuit was appointed to represent him on appeal (R 222).

STATEMENT OF THE FACTS

Anna Jordan was an elderly woman who lived alone in one of a group of close-together houses on Rhoda Court in St. Petersburg (R 685, 697, 1075). She was hard of hearing, and had trouble walking because she was bow-legged (R 677, 686, 693). She used a walker or grocery cart or cane to help her walk (R 677, 693).

Robert Baird knew Anna Jordan through his work at the Neighborly Center, which was an organization set up to help the elderly and handicapped (R 676-677). Baird went to Jordan's house on February 5, 1981 because the driver for the Neighborly Center was unable to contact Jordan to deliver her dinner (R 678). Baird found three jalousies off the bottom of a door at Jordan's house (R 678-679). He rang the bell and called Jordan's name, but received no response (R 679). After noticing that the door was locked, Baird crawled through the opening where the jalousies had been removed (R 679). He saw Anna Jordan lying on the floor in her living room (R 679). She appeared to have something around her neck (R 679-680). Apart from that, she was clad only in a sweater (R 680-681). Her eyes were open, but she appeared to be dead (R 680). There was a trickle of blood on one side of her mouth and by one ear (R 680). Baird asked Mrs. Taylor, the driver for the Neighborly Center, to call the police (R 680).

Joseph Vermette, Anna Jordan's mailman, also went to her house on February 5 (R 686). He said there were four "slats" missing (R 686). Everything inside the house was in disarray (R 687). Vermette was unable to unlock from the inside the locks that were on the door from which the jalousies had been removed (R 687-689).

Paul Hayne, an emergency medical technician with the St. Petersburg Fire Department, was dispatched to Anna Jordan's house (R 705). He found her with her hands tied at the wrists behind her back, and with a rag tied around her neck (R 708, 712). She had quite a few black and blue marks on her face (R 708). Hayne checked for vital signs, but found none (R 713).

Joel Scot Cary, a forensic photographer with the Florida Department of Criminal Law Enforcement, took photographs of Anna Jordan's residence, and of her body (R 736-737). He also dusted the house for fingerprints, and obtained 19 latent prints (R 747, 749). Cary gathered various pieces of physical evidence as well (R 751). One item (State Exhibit Number 13) was a "bloody rag" found about two to three feet from Jordan's head (R 757, 772). It was rounded, and was more compact when Cary originally took it into his possession than it was at trial (R 758).

Cary did not find any signs of money or a wallet in Jordan's house (R 770).

Special Agent Edward Berwitz of the FBI compared hairs gathered from various items found in Jordan's house with known hair specimens from Larry Brown and George Dudley (R 793-799). He found some hairs that were of Negroid origin, but which did not belong to Brown or Dudley (R 798-799).

Another FBI special agent, Robert Beams, analyzed stains found on various items recovered from Jordan's house, and on two such items found blood stains which he was able to identify as "Group O" blood (R 807, 821). He also analyzed known blood samples from Larry Brown, George Dudley, and Anna Jordan, and ascertained that all

three individuals likewise had "Group O" blood (R 827). Approximately 45 per cent of the population of the United States falls within this blood grouping (R 827).

Frank Reinhart was the fingerprint technician to whom Joel Cary gave the latent prints Cary lifted from Jordan's residence (R 835, 838). Of the 19 latents, Reinhart found 12 to be insufficient for identification purposes and destroyed them (R 838-839). The remaining seven prints belonged to neighbors, police officers, and others who had legitimate reasons to be at Anna Jordan's house (R 839-840). None belonged to George Dudley or Larry Brown (R 840, 842). Reinhart also was given two fingerprints from a television set (R 841). They did not belong to Larry Brown (R 842-843). Reinhart was not able to determine whose fingerprints they were (R 841), but they appeared to be those of a very small person or a small child (R 842).

Detective Charles San Marco was one of the law enforcement personnel involved in the investigation of Anna Jordan's death (R 845). During the trial of this cause the assistant state attorney asked San Marco whether a third person [in addition to Larry Brown and George Dudley] arose as a suspect during his investigation, to which he responded in the affirmative (R 851). At that point a lengthy discussion was held out of the presence of the jury during which defense counsel objected to the detective's testimony because it was hearsay, and because of discovery violations by the State (R 851-897). The discovery violations consisted of not advising defense counsel of the last name of the third suspect (who was Ricky Brown, Appellant Larry Brown's stepson), and not advising defense counsel that George Dudley had picked Ricky Brown's picture from a photopack

as being the third person involved in the incident at Anna Jordan's house. The prosecuting attorneys averred that they did not know of the photopack until that very morning, although they conceded they had known that Ricky's last name was Brown for some time (R 856-859, 881). Detective Gary Hitchcox, however, testified out of the presence of the jury that he told the state attorney's office about the photopack identification the day after it took place (which was approximately four months before the trial) (R 870). Ultimately, the court ruled that testimony regarding Ricky Brown being the third suspect should be excluded due to the discovery violations committed by the State (R 887-888). Defense counsel requested an overnight recess prior to having to cross-examine Detective Hitchcox and George Dudley, and the court agreed to the request (R 891-893). Counsel also moved to continue the entire trial so that the public defender's investigative staff could conduct their own investigation in an attempt to locate Ricky and ascertain pertinent information he might have about the case (R 896). When the court denied this motion, counsel moved for a mistrial, which was denied (R 896-897).

Detective San Marco was instructed by the court that he was not to mention during his testimony that Ricky's last name was Brown or that he had any familial connection with Appellant Larry Brown (R 895). San Marco then testified in the presence of the jury that the first name of the third suspect was Ricky and that a probable cause pickup order had been put out for him, but he had not yet been arrested (R 897-898).

Gerald Ewing repaired a television set which Anna Jordan brought into his shop (R 902). At trial he identified State Exhibit Number

36 as that television (R 903-906).

Despite his earlier promise, the court did not grant an overnight recess prior to the testimony of George Dudley (R 907-912). He did, however, allow defense counsel a short recess prior to cross-examination of Dudley (R 938).

Dudley was charged with the same crimes as Larry Brown, burglary and first degree murder (R 924). He entered a plea of guilty to burglary and second-degree murder in anticipation of being sentenced to life imprisonemnt (R 924-925).

Larry Brown met Dudley at a bar at about 9:00 or 9:30 (p.m.) where the latter man was working and said, "We got a job to do" (R 925, 945). Dudley understood this to mean "[b]urglary or something" (R 925), even though Brown had never said anything similar to him before (R 947).

The two men met with Ricky, who was to participate in the job (R 925).

Over objection of defense counsel Dudley was permitted to testify that Ricky was Larry Brown's "son-in-law," and that Ricky was the son of Larry Brown's wife, Gloria Jean Brown (R 916-923, 925-926).

At night the three men went to the house that was to be burglarized, and Larry Brown removed two jalousies from a door (R 926-927). Brown entered the house, then opened another door through which Dudley and Ricky entered (R 927-929).

George Dudley testified at trial that Larry Brown discussed taking a black and white portable television while the men were walking to the house they were going to burglarize (R 929). (In his

deposition Dudley had said the three men did not talk at all as they walked to the house (R 948-949).) There was no talk about killing anyone (R 958). According to Dudley, Larry Brown did in fact take a television set from the house (R 929). Neither Dudley nor Ricky took anything (R 933-934).

When he first entered the house Dudley saw an elderly white woman sitting on the floor (R 929-930). (In his deposition Dudley had said the woman was sitting in a chair when he first saw her (R 955).) Larry Brown hit the woman once, and then tied her up (R 930). Brown used pieces of towel to tie the woman's hands behind her back, and to tie a loop around her neck (R 931). It appeared to Dudley that Brown was trying to tighten the loop, and to strangle the woman (R 963). (In his deposition Dudley had said that Brown did not seem to be pulling the binding tight, but that he merely tied it, and said the woman did not seem to have any problem breathing (R 963-964).)

Ricky had sex with the woman while Larry Brown ransacked the house after he tied up the woman (R 931-932).

Initially, after he was arrested, Dudley told the police it was Larry Brown who raped the woman (R 942). He told this lie because he thought Brown had told the police that Dudley killed the woman (R 942-943).

Apart from the one time Larry Brown hit the woman, Dudley did not see any blows struck (R 933). He never heard Brown threaten the woman (R 958).

Dudley was the first of the three men to leave the house (R 934). The woman was on the floor (R 934). At trial Dudley said on

direct examination that he could not tell if she was alive or dead (R 934). On cross-examination he testified that she appeared to be alive when he left the house (R 956).

George Dudley described his role in the events at Anna Jordan's house as one of merely standing around (R 959-960).

After the burglary Brown and Dudley went to a bar where Brown sold the television for $20 (R 936-937). Dudley did not receive any of the proceeds from this transaction (R 937-938).

Valerie Lambert was the person who bought the television (R 971-978). The purchase occurred at around midnight on February 4, 1981 (R 972, 981-982). Several weeks afterwards, Brown offered to sell her a console, but she declined (R 979). On this latter occasion Brown told her several times to remember the name George Dudley if anyone asked her any questions (R 979). He seemed nervous at the time (R 980-981).

Theresena Brown attended a get-together sometime between her birthday on January 23, 1981 and the time Larry Brown was arrested at which Larry Brown said he had killed one white bitch and did not mind killing another (R 1010). This statement was made during or after a fight with his wife (who was not white) in which his wife tried to stab him with a knife (R 1010-1011, 1015, 1017). Brown had been drinking before he made the statement (R 1011). Theresena did not know what to believe when she heard the statement because Larry Brown was "a big liar" (R 1024).

Annette Heywood was present at the same party, which she remembered as occurring approximately a week before Larry Brown was arrested (R 1029). The statement she recalled Brown making was that he had

killed one white bitch and would kill his wife too if she did not leave him alone (R 1030). After his arrest Brown called Heywood from jail (R 1031). When talk turned to the statement Brown had made, he denied having made it (R 1031-1032). After some argument with Heywood on this issue, Brown finally told her to shut up because the telephone was tapped (R 1032). Two weeks later Brown called Heywood again and asked her to deny having heard the statement in question (R 1033-1034).

Dr. Joan Wood, Chief Medical Examiner for the Sixth Judicial Circuit, performed an autopsy upon Anna Jordan on February 6, 1981 (R 1059-1060, 1067). She observed some bruises and abrasions on Jordan's face, and areas where the skin was rubbed off (R 1072). There was also a bruise on Jordan's left thigh, one just above her left ankle bone, and two bruises in the region of the small of her back, as well as a scratch-like abrasion on the right side of her back near her shoulderblade (R 1073). She had a superficial tear of the skin at her vaginal opening (R 1073). There was bruising on Jordan's wrists where she was bound (R 1071, 1092-1093).

The marks on Jordan's face were consistent with a hand having been applied against the face with some pressure (R 1074). In Wood's opinion, not all the marks on Jordan's face could have been caused by one hand with one motion (R 1001). The bruises were, however, consistent with one grabbing and one striking (R 1099-1100).

Wood's internal examination revealed two bruises of the scalp that were not visible externally, a bruise of the frontal scalp, and a bruise over the collarbone (R 1076). Wood believed the bruises of the scalp, which were behind Jordan's ears, in the region of the

bone, and bruises of her face beside her mouth, were caused by pressure from a piece of cloth that was about her mouth and tied behind her head (R 1095). There was a small band of hemorrhage in the lining of the voice box, as well as pinpoint hemorrhages in the epiglotis and eyes (R 1077). The pinpoint hemorrhages were consistent with pressure being applied to these areas (R 1077). Jordan had three bruises and superficial scratches at the back of the roof of her mouth (R 1078). These were consistent with fingers having been inserted into the throat (R 1078). These injuries in the mouth might have bled slightly (R 1078). There were no observable bruises on the exterior of Jordan's neck (R 1002).

Wood said that a rounded piece of material found near Anna Jordan's body was "strongly suggestive" of a gag (R 1080-1081). However, the fact that the piece of cloth was found two feet away from Jordan was not consistent with the cloth being a gag held in place by another strip of cloth (R 1101).

Wood concluded that asphyxiation was the cause of Anna Jordan's death (R 1082). She could not state with certainty how the asphyxiation occurred, but expressed the following possibilities, over defense objection: obstruction of the airway by fingers or a gag, pressure on the neck by a person's hand or some other object, including the material which was around Jordan's neck (R 1083-1084) (although when Wood examined Jordan's body, the material around her neck was tied only loosely (R 1084, 1096)).

Sperm cells found in vaginal washings from Anna Jordan indicated to Dr. Wood that Jordan had sexual intercourse no more than eight to twelve hours before her death, and probably much closer to the time of death than that (R 1086-1087).

Jordan died sometime between 3:00 p.m. on February 4 and 3:00 a.m. on February 5, but probably before midnight on February 4 (R 1089).

Neither the sexual assault, nor the striking of Anna Jordan, nor the two combined, would have caused her death (R 1090).

Dr. Wood was the final witness presented by the State at trial.

When the State rested, defense counsel renewed their previous motions for mistrial, and moved for judgments of acquittal with respect to both counts of the indictment; all motions were denied (R 1108-1116).

Defense counsel then moved the court to call Detective Hitchcox as a court witness, as he was the chief investigating detective, was an agent of the State, and had great potential to be a hostile witness (R 1131). The court denied the request without prejudice to the defense to "pursue him as a hostile witness" if it became appropriate to do so (R 1131). The defense then rested without presenting any evidence (R 1131).

Larry Brown asked the court to give the jury verdict forms for first-degree murder which would indicate, if the jurors found him guilty, whether the finding was predicated upon premeditated murder or felony-murder (R 1135-1139). The court denied the request (R 1139). Brown objected to the denial (R 1207-1208).

During her closing argument to the jury, one of the prosecuting attorneys[1] accused defense counsel of intimidating George Dudley by

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1) Two assistant state attorneys prosecuted this case, and two assistant public defenders represented Larry Brown (R 341).

shouting at him and by positioning Larry Brown in a particular part of the courtroom (R 1173). Brown's objection to this argument was overruled, and the court refused to instruct the jury to disregard the prosecutor's remarks, with the court finding the remarks to constitute "fair comment" (R 1173-1174); the prosecutor continued arguing along the same lines (R 1174).

The jury deliberated three hours and 16 minutes before returning guilty verdicts on both counts (R 1234-1235).

Prior to the beginning of the penalty phase of the trial, the State expressed its intention to introduce a 1977 judgment and sentence against Larry Brown for attempted second-degree arson, but the court sustained Brown's objection to this evidence (R 1254-1259).

At the penalty phase the State introduced the testimony of Claude Hudson, who said that on March 11, 1981 two men kicked down the door to his house and hit him, one man with a pool cue and the other with a broomstick (R 1296-1304). He identified Brown as being one of the men (R 1302-1303).

The State also introduced, over objection, the testimony of Detective Rod Kosares regarding statements Larry Brown and George Dudley made to him about the Hudson incident after Brown and Dudley had been given Miranda warnings (R 1305-1311). Both men acknowledged being in the building where Hudson lived, but each denied striking him (R 1309-1311).

Finally, the State put into evidence a certified copy of the judgment and sentence against Brown for aggravated battery in the Hudson matter (R 197-198, 1311-1312).

The defense called Detective Gary Hitchcox of the St. Petersburg Police Department as Brown's first witness during the penalty phase (R 1313). He was the detective in charge of the investigation into the death of Anna Jordan (R 1313). Hitchcox had known Brown for about nine years (R 1315). Brown had acted as a confidential informant and had, over a period of time, provided the police with reliable information regarding various criminal activities (R 1315-1316).

During March of 1981 Hitchcox spoke with Brown concerning the Anna Jordan case (R 1314-1318). Before he spoke with Brown his investigation had reached a dead end as far as developing suspects (R 1318). Brown supplied Hitchcox with information that enabled the police to recover the television that was taken from Jordan's residence (R 1316-1318). Brown told Hitchcox that George Dudley had sold the television at a bar (R 1322). There were some inconsistencies in the information Brown gave to Hitchcox (R 1318, 1323-1325).

On cross-examination of Hitchcox the State elicited the fact that when confronted with inconsistencies in his statements and with statements made by George Dudley which implicated him in the Jordan murder, Larry Brown "got upset, turned away from the table where we [Hitchcox and Brown] were talking and said he would see me in court" (R 1331). After some further cross-examination of Hitchcox by the State, defense counsel unsuccessfully objected and moved for a mistrial on the ground that this testimony constituted an improper comment on Brown's exercise of his right to remain silent (R 1333-1335).

The State was also permitted to elicit, over objection, the

fact that Larry Brown's reputation for truthfulness in the community where he lived was that he was a liar (R 1318-1320, 1333-1336).

Sandy Cooper was Larry Brown's first cousin, and had known him all of her life (R 1337). Brown's father had been away from the family for as long as she could remember (R 1337). Brown's mother raised him (R 1337). He was the oldest of three boys (R 1337). Brown's mother died a few months before the crimes involved in this case (R 1338, 1393). He was hurt by his mother's death, as he was close to her (R 1338).

Cooper was not aware of Brown having a steady job, but he had picked tomatoes in season to obtain rent money for his mother and to help support her (R 1340).

Brown tried to keep his younger brothers from going to jail or hurting people, or getting into any other trouble (R 1338-1339).

Brown was the father of a child, whose mother was Bertha Dudley, George Dudley's sister (R 1339). Brown loved the child (R 1339). He gave Bertha money for the baby, and took the child to the park and elsewhere (R 1339-1340).

Ruby Turner was Larry Brown's aunt (R 1342). Since he had been arrested, Brown had called her to discuss church songs and the Bible (R 1342-1343).

After Turner testified, Brown moved the court to declare death not a possible penalty because the "Inman" [sic][2] case precludes imposition of the death penalty in the context of a felony-murder,

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2) Counsel was obviously referring to Enmund v. Florida, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 1140 (1982).

and to proceed immediately to sentence Brown to life imprisonment without parole for 25 years (R 1343-1345). The court denied the request (R 1345).

The court instructed the jury on the following aggravating circumstances they could find, if supported by the evidence (R 1374-1375):

> The Defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person.
> The crime of aggravated battery is a felony involving the use of violence to another person.
> The crime for which the Defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of the crime of sexual battery or burglary.
> The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> The crime for which the Defendant is to be sentenced was committed for financial gain.
> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.
> The crime for which the Defendant is to be sentenced was committed in a cold, calculating and premeditated manner, without any pretense of moral or legal justification.

After deliberating, the jury returned its life recommendation in the following form (R 199, 1381):

> The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Larry Donnell Brown, without possibility of parole for twenty-five years. So say we all, Carroll R. McCain, Foreperson.

The presentence investigation report prepared pursuant to the court's order included, among other things, a listing of Brown's prior arrests and convictions (R 1392-1393), and the parole and probation officer's own assessment as to which aggravating and

mitigating circumstances were applicable, and his recommendation that the court impose a death sentence (R 1394-1395).

During the sentencing hearing of November 15, 1982, which culminated in the imposition of the death penalty upon Larry Brown, the State pointed out that the presentence investigation revealed that Brown was on parole when he commited the offenses involved herein, and that this fact had not been disclosed to the jury (R 273-274).

Before passing sentence the court commented that there was "not one mitigating fact available for this defendant other than the fact that he's twenty-seven years old" (R 280). The court also noted that Brown had "led a parasitic existence since he has been on the face of this earth...." (R 280).

In his written findings in support of the death penalty, filed December 17, 1982, the court found the following aggravating circumstances to exist (R 209-211, Appendix, pp. 1-3): 1. Brown was on parole at the time of the offense. 2. Brown had been previously found guilty of a felony involving the use of threat or violence to the person (attempted second degree arson and aggravated battery). 3. The capital felony was committed while Brown was engaged in a burglary and rape. 4. The capital felony was committed for pecuniary gain. 5. The capital felony was especially heinous, atrocious and cruel. 6. The homicide was committed in a cold and premeditated manner without any pretense of moral or legal justification.

The court found the age of Larry Brown, 27, to be "[t]he only mitigating circumstance which could have been found as a result of the testimony presented in behalf of the Defendant and the Presentence

Investigation" but found this fact not to constitute a mitigating circumstance in this case (R 211, Appendix, p. 3).

ARGUMENTS

I.

THE COURT BELOW ERRED IN OVERRULING LARRY BROWN'S OBJECTION TO THE PROSECUTOR'S ASSERTION DURING CLOSING ARGUMENT THAT BROWN AND HIS COUNSEL DELIBERATELY INTIMIDATED KEY STATE WITNESS GEORGE DUDLEY, AND IN REFUSING TO INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S REMARKS.

During her closing argument to the jury the assistant state attorney alleged that defense counsel shouted at George Dudley, who was the main witness against Larry Brown, and situated Brown in a particular part of the courtroom for the purpose of intimidating the witness (R 1173). Said the prosecutor (R 1172-1173):

> That leaves them with George. And looking at George, folks, use your common sense in evaluating his testimony. George is dumb. Absolutely dumb. And that's being nice about it. I don't think he intentionally came in here and lied to anybody. The louder he talked to George and the more he yelled at George, the more he slunk. And if you noticed, they put the defendant right back there. They didn't leave him over there. They put him right over there where George could see him, where Larry could see him and where George could see him, trying to intimidate him.
>
> * * * *
>
> -- and he was intimidated --

Defense counsel promptly objected and asked to approach the bench (R 1173). During the bench conference defense counsel explained that he and Brown could not see the witness from their vantage point in the courtroom, as Dudley sat slumped in the witness box, and they changed position in order to afford Brown his constitutional right to face his accusers (R 1174). The court found the remarks of the prosecutor

to be "fair comment," and refused the defense request that the State be instructed to leave this line of argument, and refused to instruct the jury to disregard it (R 1174).

After the conference at the bench, the prosecutor continued in the same vein (R 1174-1175):

> MS. McKEOWN [the assistant state attorney]: As I was saying, where did Mr. Brown sit while Mr. Dudley was on the stand? Not over there, as he had for all the other testimony. He sat over there, right in a direct line where Mr. Dudley could see him. And if you saw Mr. Dudley, occasionally, looked over there. I'm sure Dudley is scared. Because he's, now, a snitch. He has, now, testified against someone else in a court of law, and he is, now, going to prison.

Florida courts recognize that among attorneys the prosecuting authorities must be especially circumspect in the comments they make within the hearing of the jury, because of the quasi judicial position of authority which prosecutors enjoy. Adams v. State, 192 So.2d 762 (Fla. 1966); Gluck v. State, 62 So.2d 71 (Fla. 1952); Stewart v. State, 51 So.2d 494 (Fla. 1951); McCall v. State, 120 Fla. 707, 163 So. 38 (Fla. 1935); Washington v. State, 86 Fla. 533, 98 So. 605 (Fla. 1923); Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975); Kirk v. State, 227 So.2d 40 (Fla. 4th DCA 1969). See also Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973).

Attorneys must confine their remarks to the evidence which is admitted. McCall and Washington, supra; Danford v. State, 53 Fla. 4, 43 So. 593 (Fla. 1907); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975); Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979). See also Kirk, supra. The record does not reflect any evidence to support the State's assertion that the defense repositioned Larry

Brown so that he would intimidate George Dudley; if anything the record evidence shows otherwise. Of course the record does not, unfortunately, apart from defense counsel's statements, reveal the physical posture Dudley assumed on the witness stand or whether he could in fact be seen from the defense counsel table. The record does show, however, that Dudley was something less than a forthright witness. Dudley answered many questions asked of him in monosyllables (R 913-968). The prosecutor himself had to ask Dudley twice to take his hand away from his mouth so he could be heard, and at least four times admonished him to "speak up" (R 913, 915, 924, 928, 932). Defense counsel could not hear his answers (R 932). As Dudley was the key State witness, the only one who provided concrete details of the role Larry Brown played in the events at Anna Jordan's house, it is obvious why Brown and defense counsel would be particularly concerned with seeing and hearing his testimony. For the prosecutor to make the unsupported allegation, in the presence of the jury, that Brown wished to intimidate the witness was highly prejudicial, and denied Brown a fair trial consistent with due process of law.

The prejudice to Brown was exacerbated by the court in effect stamping its judicial approval upon the improper remarks of the prosecutor by overruling his objection. See Gluck, supra; Edwards v. State, 428 So.2d 357 (Fla. 3d DCA, Case No. 82-731, opinion filed March 22, 1983). Although the ruling was not made within the hearing of the jury, it must have been obvious to the jury that the defense objection had been overruled when the prosecutor continued her same line of argument after the bench conference.

Brown also notes that the prosecutor's remark that "I don't think he [Dudley] intentionally came in here and lied to anybody" (R 1173) was an improper assertion of her personal opinion as to the credibility of the main State witness. Fla. Bar Code Prof. Resp., DR 7-106(C)(4). See also Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976).

Where the prosecutor has indulged in improper argument, the question for the reviewing court is whether it can see from the appellate record that the accused was not thereby prejudiced. McCall and Thompson, supra. See also Grant v. State, 194 So.2d 612 (Fla. 1967); Pait v. State, 112 So.2d 380 (Fla. 1959). Particular attention must be given to the remarks where evidence of guilt is not overwhelming. Thompson, supra. See also Oglesby v. State, 156 Fla. 481, 23 So.2d 558 (Fla. 1945). Here the evidence of Larry Brown's guilt was far from overwhelming, resting as it did in so large a part on the testimony of a co-perpetrator.

The court noted in Flicker v. State, 296 So.2d 109, 113 (Fla. 1st DCA 1974) that when improper remarks of counsel to the jury

> are such as to cast an unfairly favorable light upon the State and an undeserved unfavorable light upon the defendant the prejudice is apparent and the entire trial is thereby tainted.

Larry Brown's trial was so tainted, and he is entitled to a new one as a result.[3]

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3) In addition to the remarks addressed in this issue, on at least two other occasions during her closing argument the prosecutor made comments which might be construed as improper comments on Brown's failure to present evidence (R 1162, 1167). However, there was no objection to these remarks.

II.

THE COURT BELOW ERRED IN FAILING TO GRANT LARRY BROWN MEANINGFUL RELIEF DUE TO THE STATE'S FAILURE TO COMPLY WITH FLORIDA'S DISCOVERY RULES, AND IN ALLOWING THE STATE TO INTRODUCE THE HEARSAY TESTIMONY OF GEORGE DUDLEY.

A. Discovery Violations

During the testimony of Detective Charles San Marco it was revealed that the State committed violations of the discovery rules by not disclosing to Brown the last name of the third suspect involved in the events at Anna Jordan's house (Ricky Brown) and by not telling Brown that George Dudley had identified Ricky Brown's picture from a photopack as being the third person involved (R 851-897). The prosecutors acknowledged that they had known Ricky's last name for some time, but represented that they had not known of the photopack until that very morning (R 856-859, 881). The latter assertion was refuted by Detective Gary Hitchcox, who testified that he informed the state attorney's office about the photopack identification the day after it took place, which was approximately four months before the trial (R 870).

The trial court found that a discovery violation had occurred, and excluded testimony that Ricky's last name was Brown, and that Dudley had identified Ricky Brown in the photopack (R 887-888). The court refused to continue the trial to allow the investigative staff of the public defender's office time to locate Ricky Brown to ascertain what information he might have about this case (R 896). The court did, however, agree to grant an overnight recess before defense counsel would have to cross-examine George Dudley, due to the new information that had been disclosed to counsel regarding the photopack

(R 891-893). Later, the court reversed himself and refused to allow the overnight recess (although he did permit a brief recess before defense counsel cross-examined Dudley) (R 907-912, 938). The court also permitted George Dudley to testify, over objection, that Ricky was Larry Brown's "son-in-law," and that Ricky was the son of Gloria Jean Brown, who was Larry Brown's wife (R 916-923, 925-926).[4]

Both sides in a criminal case are entitled to rely on full and fair compliance with the discovery rules in preparing their cases for trial. Kilpatrick v. State, 376 So.2d 386 (Fla. 1979). When a discovery violation by the State becomes known, the court must determine the impact of said violation on the defendant's ability to prepare for trial. Wilcox v. State, 367 So.2d 1020 (Fla. 1979). Here the impact is evident. If the defense had known Ricky's last name and had his picture from the photopack, investigators could have pursued Ricky and, if he were found, ascertained what he knew about this case. Ricky might have been able to refute the testimony of the only other eyewitness to the crimes, George Dudley, and establish that Larry Brown was not involved or, at the very least, that Brown's role was less than what Dudley described it to be. Thus the court should have granted the continuance Brown sought.

Also, Brown should have been allowed adequate time to prepare his cross-examination of George Dudley after learning that Dudley had picked out a picture of the third person involved in the instant offenses. The court initially recognized that the newly-disclosed

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4) Ricky was in fact Larry Brown's stepson, not his "son-in-law."

information could affect the cross-examination strategy of counsel by agreeing to an overnight recess, but inexplicably reneged on his agreement to permit such a recess and instead allowed counsel only a few minutes of additional preparation time. An overnight recess would have had but minimal impact on the progress of the trial, and the court should have adhered to his earlier ruling to allow it.

Anderson v. State, 314 So.2d 803 (Fla. 3d DCA 1975) is instructive. In Anderson the State had not furnished defense counsel with the current address of the key State witness, and so counsel was unable to depose her until the evening before trial. As a result counsel was hampered in his cross-examination of the witness, and did not have an opportunity to locate potential witnesses who were revealed during the deposition. The appellate court found that the trial court should have granted a continuance until the deposition of the witness was transcribed, and until defense counsel could locate and speak with the previously-unknown witnesses. Similarly, the court below should have allowed adequate time for defense counsel to prepare to cross-exam George Dudley in the face of the new information that came to light during the trial (especially as the court initially agreed to provide this time), and to enable counsel to find and question Ricky Brown, a material and potentially critical witness. (See also Valle v. State, 394 So.2d 1004 (Fla. 1981), in which this Court emphasized that the law requires that a criminal defendant have sufficient time to prepare a defense, including time to interview witnesses whose names are provided to him by the prosecutor pursuant to Florida's discovery rule, Rule 3.220 of the Rules of Criminal Procedure.)

The State bears the burden to show that its violation of a discovery rule did not prejudice the defendant. Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Clair v. State, 406 So.2d 109 (Fla. 5th DCA 1981). The State failed to make the required showing in the court below. Indeed, the prejudice to Brown became manifest when Dudley was permitted to testify over objection that Ricky was Larry Brown's "son-in-law," and was Larry Brown's wife's son. Dudley thus provided a link between Larry Brown and Ricky even more damaging than if the jury had been told that Ricky's last name was Brown, in violation at least of the spirit, if not the letter, of the court's earlier ruling that the jury would not be permitted to know Ricky's surname. [5]

For these reasons Larry Brown is entitled to a new trial.

B. Hearsay Testimony

In addition to objecting to the testimony of George Dudley as to the family relationships among the three Browns because of the State's discovery violations, Brown objected to this testimony because it was hearsay (R 917, 923).

Dudley's own testimony, proffered outside the presence of the jury, showed that he was aware of the relationships among Ricky, Larry Brown, and Gloria Jean Brown only because Ricky told him this

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5) Brown's testimony as to the familial relationship between Brown and Ricky and between Ricky and Brown's wife was also inadmissible as hearsay, as discussed in part B.

information (R 923). Thus Dudley's testimony was clearly hearsay and, as such, inadmissible. §§90.801(1) and 90.802, Fla. Stat. (1981).

The harm caused to Larry Brown by the admission of the hearsay testimony is apparent. The State's evidence establishing the identity of Larry Brown as one of the participants in the offenses against Anna Jordan was rather tenuous, resting as it did upon circumstantial evidence and the testimony of a co-participant who was allowed to plead to reduced charges. The hearsay testimony of Dudley bolstered the State's case considerably by providing a definite connection between Larry Brown and the third man in Jordan's house (Ricky).

Dudley's hearsay testimony should not have been admitted, and Larry Brown should be granted a new trial.

III.

THE COURT BELOW ERRED IN DENYING BROWN'S MOTION TO DISMISS COUNT II OF THE INDICTMENT, WHICH FAILED TO ALLEGE THE FACTUAL ELEMENTS OF THE ASSAULT MADE UPON ANNA JORDAN.

Count II of the indictment filed against Larry Donnell Brown alleged that during the course of the burglary Brown "did make an assault upon the said Anna Jordan," without further specifying the nature of the assault (R 28).

Brown filed a pre-trial motion to dismiss Count II because of its failure to allege the factual elements of the alleged assault (R 151). The motion was denied on October 25, 1982 (R 155).

The general rule is that an indictment or information must state "the essential facts constituting the offense charged," Fla.

R. Crim. P. 3.140(b). With regard specifically to a burglary charge, the factual elements constituting an alleged assault must be alleged where the assault is used to aggravate the degree of the burglary. If, as here, these facts are not alleged, the charging document is subject to dismissal. Oliveria v. State, 417 So.2d 1004 (Fla. 4th DCA 1982); Lindsey v. State, 416 So.2d 471 (Fla. 4th DCA 1982).

It was particularly important in the instant case that Brown know the nature of the assault with which he was charged, in view of the rather confusing and contradictory evidence. For example, there were quite a few bruises and other marks on Anna Jordan, but Dudley testified he saw only one blow struck, by Brown (R 930, 933). The medical examiner testified that the bruises on Jordan's face were consistent with one grabbing and one striking of her (R 1099-1100). Was the assault that was alleged the single blow which Dudley saw? Was it several blows? Or was it the grabbing Dr. Wood referred to? Or the grabbing and the striking? Or was the assault the sexual battery upon Jordan, which George Dudley initially told police was committed by Brown, but later admitted was committed by Ricky (R 931-932, 942)?[6]

The general nature of the assault allegation in Count II rendered it impossible for Brown to prepare his defense, as the charge did not adequately apprise him of the facts with which he would be confronted at trial. In accordance with the cases cited above, Brown's motion to dismiss Count II therefore should have been granted.

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6) Lindsey suggests that sexual battery cannot constitute an "assault" in the context of the burglary statute. McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980) is contrary to this position.

IV.

THE COURT BELOW ERRED IN REFUSING TO GRANT IN THEIR ENTIRETY BROWN'S MOTIONS TO REQUIRE THE STATE TO PROVIDE PARTICULARS CONCERNING THE CHARGED OFFENSES.

Larry Brown filed two motions in attempts to have the State provide particulars concerning the offenses with which he was charged (R 83-84, 114-115). Although the court granted one of Brown's motions in part, he refused to require the State to specify the precise manner in which Anna Jordan was killed, the alleged facts which showed premeditation, whether the State intended to prove that a theft was committed during the burglary at Jordan's residence or whether the State intended to prove that a sexual battery was committed, and what facts the State intended to use to prove either the theft or the sexual battery (R 91, 154).

Florida Rule of Criminal Procedure 3.140(n) reads as follows:

> (n) **Statement of Particulars.** The court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Such statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

The information Brown sought was necessary to enable him to prepare his defense, and, pursuant to the above-mentioned rule, the court should have ordered the State to provide this information.

The exact way in which Anna Jordan died was not established through the testimony below. Dr. Wood opined that asphyxiation was the cause of death, but could not pinpoint which of several alternative methods was used to accomplish the asphyxiation (R 1082, 1083-1084). The only one of these methods which might have been attributable to Brown (and which was only attributable to him if one believed the testimony of co-participant George Dudley) was pressure upon Jordan's neck from the strip of material which was tied around it (R 963-964). It was thus vital to the defense that the State be required to confine its case to proving the single precise act by which Jordan was killed. If this act was not the act committed by Brown, his guilt would be negated or, at least, the degree of his culpability lessened.

The State also should have been ordered to tell Brown what facts it would use to prove premeditation. When the State charges premeditated first-degree murder it may prosecute under both a theory of premeditation and a theory of felony-murder. Adams v. State, 412 So.2d 850 (Fla. 1982). However, if the State charges premeditation, it should be prepared to prove premeditation. Due process of law entitles the defendant who is facing a sentence of death to be informed as to what facts the State will represent to show premeditation, especially as a finding of premeditation is likely to increase the chances that the death penalty will actually be assessed.

To be valid, a burglary charge must allege that the defendant entered or remained in a structure or conveyance with the intent to commit a specific named offense. Lee v. State, 385 So.2d 1149 (Fla. 4th DCA 1980); State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980);

Kane v. State, 392 So.2d 1012 (Fla. 5th DCA 1981); Rozier v. State, 402 So.2d 539 (Fla. 5th DCA 1981); §810.02(1), Fla. Stat. (1981). Count II of the indictment filed against Larry Brown did not charge that he intended to commit a single specific offense, but alleged that he intended to commit either theft or sexual battery when he entered Anna Jordan's house (R 28). Contrary to the spirit, if not the letter, of the aforementioned cases, the State was thus able to lessen its burden of proof, while increasing the burden on the defense. The State should have been required to elect (by filing a statement of particulars) whether it intended to prove that Brown intended to commit the theft or the sexual battery. If the State is permitted to allege more than one offense as that which the defendant intended to commit, then there is nothing to prevent the State from alleging a long list of crimes which the defendant might conceivably have intended to commit, thus placing the defense in a wholly untenable position.

Finally, the State should have been required to say what facts it would introduce to prove either the sexual battery or the theft. This is particularly true with regard to the sexual battery, in view of the fact that George Dudley initially told the police that Larry Brown committed the sexual battery, but later recanted and acknowledged that Ricky was the perpetrator of this act (R 931, 932, 942-943). Without a statement of particulars, Brown could not have known pre-trial whether (if indeed the State was going to prove his involvement in a sexual battery) the State intended to show that Brown was the actual perpetrator of the offense, or was only liable as a principal.

For the foregoing reasons the court below erred in refusing to grant Brown's motions for statements of particulars in their entirety, and Brown should be granted a new trial.

V.

THE COURT BELOW ERRED IN REFUSING BROWN'S REQUEST TO PROVIDE THE JURY WITH VERDICT FORMS WHICH WOULD INDICATE, IF THE JURY FOUND BROWN GUILTY OF FIRST-DEGREE MURDER, WHETHER THE VERDICT WAS BASED UPON A FINDING OF PREMEDITATION OR FELONY-MURDER.

Larry Brown asked the trial court to provide the jury with verdict forms which, if the jurors found Brown guilty of first-degree murder, would show whether the verdict rested upon a finding of premeditated murder or felony murder (R 1135-1139). The court denied the request (R 1139), and Brown objected to the denial (R 1207-1208).

Use of the proposed special form of verdict was important here for at least two reasons. As discussed in Issue VI, a finding of felony-murder would preclude the court from also imposing sentence for the underlying felony of burglary.

More importantly, a verdict of felony-murder would have a great impact upon whether a death sentence could validly be imposed upon Brown in consideration of Enmund v. Florida, ___ U.S.___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). (See Issue IX for the applicability of Enmund under the facts of this case.)

In the absence of the verdict forms proposed by Brown, appellate counsel and this Court are left to examine the evidence to see if it is sufficient to support a finding of premeditation, without ever knowing whether the jurors in fact found premeditation. This is an

unacceptable state of affairs. Even if the evidence is theoretically adequate to support a finding of premeditation, the jurors may have found that only felony-murder was proven beyond a reasonable doubt. Due process of law should require, in a case in which a man's life is at stake, that the jury be required to state with unmistakable clarity whether they find that the State has shown premeditated murder or only felony-murder. Amend. V, XIV, U.S. Const.; Art. I, §9, Fla. Const.

VI.

THE COURT BELOW ERRED IN IMPOSING A LIFE SENTENCE FOR BURGLARY UPON LARRY BROWN AFTER FAILING TO IMPOSE ANY SENTENCE AT THE SENTENCING HEARING, AND BECAUSE THE BURGLARY WAS THE OFFENSE USED TO SUPPORT BROWN'S CONVICTION FOR FELONY-MURDER.

The written sentence filed herein on November 15, 1982 imposed a life sentence upon Larry Brown for the burglary charged in Count II of the indictment, to run consecutive with the sentence of death (R 206). Inexplicably, however, the burglary conviction was mentioned at the beginning of the sentencing hearing held that same day, but no sentence was orally imposed for this offense (R 268-281).

It is mandatory for the court to hold a sentencing hearing before imposing sentence. Mask v. State, 289 So.2d 385 (Fla. 1973); Small v. State, 371 So.2d 532 (Fla. 3d DCA 1979); Mason v. State, 366 So.2d 171 (Fla. 3d DCA 1979); Fla. R. Crim. P. 3.720. Brown was denied a hearing before sentence was imposed on the burglary charge, as no discussion was held concerning the sentence to be assessed for this offense at the November 15 hearing.

Furthermore, a court's written sentence must conform with his

oral pronouncements. Swanson v. State, 399 So.2d 469 (Fla. 2d DCA 1981); Sandstrom v. State, 390 So.2d 448 (Fla. 4th DCA 1980); Wooten v. State, 382 So.2d 842 (Fla. 2d DCA 1980). As Judge Farnell's oral pronouncements did not include any sentence for the burglary, neither should the written sentencing document have included any sentence for the burglary.

Finally, it was error to impose a sentence for the burglary because Brown's murder conviction was necessarily based upon a felony-murder theory, and the burglary was the underlying felony.

The premeditation required for first-degree murder is more than merely an intent to commit homicide. Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980). In McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957), which was cited with approval in Littles, this Court defined premeditation as requiring

> ... a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide....

(See also Sireci v. State, 399 So.2d 964 (Fla. 1981).) The State did not prove that Larry Brown had this requisite purpose. George Dudley stated that if he and Ricky and Larry Brown talked of anything on the way to Anna Jordan's house, they talked of stealing the television set; there was no discussion about killing anyone (R 929, 948-949, 958). Furthermore, Brown never threatened Jordan (R 958). Although Dudley's testimony was not entirely consistent, he did say on cross-examination that the woman appeared to be alive when he left the house (R 956). If Brown intended to kill Jordan, he would not have left her alive.

The method used to accomplish the homicide, asphyxiation by

using hands or material found inside is less consistent with a premeditated murder than, for example, a homicide committed with a firearm which the perpetrator brought to the scene.

Finally, the fact that the jury returned a life recommendation indicates that in all likelihood the jury found no premeditated design to kill.[7]

Because the State did not prove premeditation, Brown's murder conviction can only be justified on the basis of felony-murder. See §782.04(1)(a), Fla. Stat. (1981). The court instructed the jury that the burglary was the crime which could justify convicting Brown of felony-murder (R 1211). It constitutes double jeopardy for Brown to be sentenced for the burglary which was also used to support his felony-murder conviction. Amend. V, XIV, U.S. Const.; Art. I, §9, Fla. Const.; State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). Brown's life sentence should therefore be vacated, in accordance with this Court's decision in Hegstrom.

VII.

THE COURT BELOW ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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7) If the court below had granted Brown's request for a special verdict form which would indicate whether the jury found premeditated murder or felony murder (R 1135-1139, 1207-1208), there might be no need for counsel or this Court to analyze whether the evidence could support a finding of premeditation. See Issue V.

Section 921.141 of the Florida Statutes was improperly applied in this case. These misapplications reinject into the sentencing process the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which Florida's sentencing scheme was designed to remedy. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). A sentence imposed under the statute in an incorrect manner violates the Eighth and Fourteenth Amendments to the United States Constitution just as much as one imposed before the current law was enacted. Specific misapplications of Section 921.141 of the Florida Statutes, regarding aggravating and mitigating circumstances, are treated separately in the remainder of this argument.

A.

THE COURT BELOW ERRED IN CONSIDERING THE NON-STATUTORY AGGRAVATING CIRCUMSTANCE THAT LARRY BROWN HAD LED A "PARASITIC EXISTENCE" ALL HIS LIFE.

At the sentencing hearing of November 15, 1982, moments before he sentenced Larry Brown to die, the judge remarked that Brown had

> led a parasitic existence since he has been on the face of this earth, and I feel that it was my responsibility when I took the oath of office to do what I felt to be right in situations like this ... (R 280).

The court's consideration of Brown's alleged "parasitic existence" was in error for two reasons. In the first place, such a comment does not bear any relation to the aggravating circumstances enumerated in §921.141(5) of the Florida Statutes. Only those circumstances enumerated in this subsection may be considered by the sentencer, in

assessing the penalty of death. §921.141(5) Fla. Stat. (1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Purdy v. State, 343 So.2d 4 (Fla. 1977).

Secondly, the record provides no evidentiary support for the conclusion that Brown had led a "parasitic existence." On the contrary, Sandy Cooper testified during the penalty phase of the trial that Brown had worked as a tomato picker to help support his mother (R 1340). This is hardly indicative of Brown being a "parasite."

B.

THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT BROWN WAS ON PAROLE FOR BURGLARY AT THE TIME OF THE INSTANT CAPITAL OFFENSE.

In his written sentencing order the judge found the following to constitute an aggravating circumstance (R 209), Appendix, p. 1:

> 1. The Defendant was on parole for Burglary at the time of this offense having been sentenced to four (4) years in the Department of Corrections on March 14, 1978.

He did not relate this finding to any of the aggravating circumstances set forth in §921.141(5), but presumably he meant to find that "[t]he capital felony was committed by a person under sentence of imprisonment." §921.141(5)(a), Fla. Stat. (1981).

Aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). However, the court's knowledge that Brown was on parole consisted solely of hearsay statements to that effect in the presentence investigation report (R 1392, 1394). This is not proof beyond a reasonable doubt.

Furthermore, this aggravating circumstance was never presented to the jury for its consideration, through the fault of the state

attorney's office (R 273-274). If all relevant admissible evidence on aggravating and mitigating circumstances is not submitted to the jury for its consideration, the sentencing weighing process will be distorted. Cf. Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) and Cooper v. State, 336 So.2d 1133 (Fla. 1976). In the instant case, for example, the State will undoubtedly argue that the court below properly overrode the life recommendation of the jury because the court possessed information that the jury did not, such as the fact that Brown was on parole. Had the State presented this evidence to the jury, as it could have and should have, this argument would be unavailable.

C.

THE COURT BELOW ERRED IN FINDING THAT BROWN HAD BEEN PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OF THREAT OR VIOLENCE TO THE PERSON, BASED UPON A 1977 CONVICTION FOR ATTEMPTED SECOND DEGREE ARSON AND A 1981 CONVICTION FOR AGGRAVATED BATTERY.

Attempted second degree arson is not a felony involving the use of threat or violence to the person. Under §806.01(2) of the Florida Statutes, second degree arson essentially involves damaging a structure (other than certain types of structure listed in §806.01(1), the first-degree arson subsection) by fire or explosion when the perpetrator does not know or have reasonable grounds to believe the structure is occupied by a human being.

Also, as discussed above with reference to the fact that Brown was on parole, this alleged aggravating circumstance was not proven beyond a reasonable doubt, as the court was only aware of it through the presentence investigation report (R 1392, 1394), which was hearsay.

Although the report claimed that the attempted arson occurred after Brown had a physical fight with a woman and later returned and tried to burn her apartment (R 1394), this Court held in Mann v. State, 420 So.2d 578 (Fla. 1982) that one must look to the judgment of conviction itself, not the underlying facts, to determine whether the offense fits this aggravating circumstance.

Furthermore, again this aggravating circumstance was not presented to the jury. (See discussion under B. above.) It was excluded by the court at Brown's behest, because the State failed to disclose the attempted arson conviction to defense counsel in compliance with the court's order that the State provide discovery with regard to aggravating circumstances (R 1255-1258).

The jury did have before it the aggravated battery conviction, which was for the attack on Claude Hudson on March 11, 1981 (which was after the homicide and burglary at Anna Jordan's residence) (R 197, 1311-1312).

D.

THE COURT BELOW ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A BURGLARY AND RAPE.

As his third written finding in aggravation, the court stated as follows (R 210, Appendix, p. 2):

> 3. The jury has found by its verdict that this capital felony was committed while the Defendant was engaged in the commission of a burglary and rape.

The jury made no such finding as to the "rape" (sexual battery). Although the indictment charged that Brown intended to commit theft

and/or sexual battery when he entered Anna Jordan's house (R 28), the court instructed the jury that the State had to prove that Brown entered or remained there with the intent to commit theft (R 1215). Therefore the jury could not have found by its verdict that Brown was engaged in "rape."

Additionally, the evidence showed that it was Ricky, not Brown, who sexually assaulted Jordan (R 931-932). For purposes of deciding whether the death penalty should be imposed, the acts committed by Ricky should not be imputed to Brown. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 1140 (1982) emphasizes the need for the sentencer to focus upon the individual culpability of the particular defendant who is being considered as a candidate for a death sentence. See also Menendez v. State, 368 So.2d 1278 (Fla. 1979).

It is true that the jury apparently found that Brown was engaged in a burglary at the time of the capital felony. However, to use the same fact--occurrence of the murder during a burglary--to both support Brown's felony-murder conviction (see Issue VI) and to form part of the justification for his death sentence violates due process and equal protection of the laws. Amend. XIV, U.S. Const.; Art. I, Sections 2 and 9, Fla. Const. The person who is sentenced as a felony-murderer starts the process with "one strike against him" while the person sentenced as a premeditated murderer does not suffer such a disadvantage. Furthermore, the requirement of examining the individual responsibility and moral guilt of the defendant (see, for example, Enmund v. Florida and Menendez, both supra) is eroded where the defendant may be condemned to death merely because a killing occurred during certain felonies.

In State v. Cherry, 257 S.E.2d 551 (N.C. 1979),U.S. cert. den. sub nom. Cherry v. State, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980), the Supreme Court of North Carolina held that an aggravating circumstance very similar to the Florida provision in question could not be applied to support a death sentence in a felony-murder situation.[8]

James is aware that this Court has rejected arguments similar who? to those advanced here in White v. State, 403 So.2d 331 (Fla. 1981) and Menendez v. State, 419 So.2d 312 (Fla. 1982), but asks the Court to reconsider its position, particularly in light of the continuing impact of Enmund v. Florida.

E.

THE COURT BELOW ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN, AS THIS CONSTITUTED AN IMPROPER DOUBLING WITH THE CIRCUMSTANCE THAT THE CAPITAL FELONY OCCURRED DURING A BURGLARY.

As discussed in D. above, by finding Brown guilty of burglary, the jury necessarily found that he intended to commit a theft within Jordan's house. By finding both that the capital felony was committed during the course of the burglary and that it was committed for pecuniary gain, the court below improperly "doubled up" the aggravating circumstances, contrary to Provence v. State, 337 So.2d 783 (Fla. 1976) and Maggard v. State, 399 So.2d 973 (Fla. 1981).

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8) North Carolina's capital sentencing scheme is similar to Florida's in that it requires the jury to consider statutorily listed aggravating and mitigating circumstances. However, in North Carolina the vote for death must be unanimous, and the judge is bound by the jury's decision.

F.

THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The trial court used the following words in his written sentencing order to find this aggravating circumstance (R 210), Appendix, p. 2:

> 5. That the capital felony was especially heinous, attrocious [sic] and cruel in that the victim, an eighty-one (81) year old semi-invalid woman, was beaten, raped and found choked to death. The evidence shows that the victim's hands had been tied behind her back and she had been strangled and a gag had been placed in her mouth. The cause of death having been asphyxiation. The medical examiner was not able to positively indicate whether it came about as a result of either the garrote or the gag that had been placed in the victim's mouth for the purpose of silencing her so that the Defendant and his fellow perpetrators could accomplish their evil deeds.

In <u>Dixon</u>, supra, this Court recognized that only a select few homicides would qualify as <u>especially</u> heinous, atrocious or cruel within the meaning of the aggravating circumstance under consideration. At page nine of the opinion the Court defined this circumstance in the following terms:

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

The murder of Anna Jordan, while not pleasant, does not meet the requirements set forth above.

The trial court's conclusion that Jordan was beaten is not in conformity with the evidence. It is true she was struck, but according to eyewitness George Dudley, by only one blow (R 930, 933). Dr. Wood testified that the marks on Jordan's face could have been made by a single holding of her and a single blow (R 1099-1100). There was no evidence of any type of severe beating or torture.

The fact that Ricky raped Jordan should not be used in aggravation of Larry Brown's sentence. Again, Enmund v. Florida requires the sentencer to examine the actual participation of the defendant whose sentence is under consideration.

The trial court's assertions that Jordan was "choked to death" and "strangled," and that a gag was placed in her mouth all require somewhat strained interpretations of the evidence introduced at trial. The medical examiner was not able to say exactly how Jordan was asphyxiated (R 1083-1084), and so it was not definitely established that she was "choked" or "strangled" (terms which themselves seem to imply two different types of acts). And the piece of cloth which Dr. Wood deemed "strongly suggestive" of a gag (R 1080-1081) was not shown to be a gag, and was not even found in Jordan's mouth, but was found two to three feet from her body (R 757, 772).

Thus the court's finding that this capital felony was especially heinous, atrocious and cruel rested upon factual premises not supported by the evidence, and the capital felony was not so remarkable that it should be singled out from other capital felonies to allow this aggravating circumstance to apply.

G.

THE COURT BELOW ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The court's last finding in aggravation read as follows (R 210-211), Appendix, pp. 2-3):

> 6. Based upon the facts elicited and the manner in which death was inflicted, it is apparent this homicide was committed in a cold and premeditated manner without any pretense of moral or legal justification, in that the victim was in her home and the evidence showed that she had made every effort to properly secure her residence prior to the Defendant breaking and entering, taking her by surprise, beating her and either choking or strangling her to death before leaving the home. The medical evidence further showed that prior to leaving the victim's home that the gag had been removed from her mouth as was evidenced by the fact that it was found several feet from her body and there was evidence of fingernail scratches on the roof of her mouth and as her hands were tied behind her back, it is clear that this was done by the Defendant or one of the perpetrators of this offense and showed further the callous, premeditated manner with which the crime was accomplished and the Defendant's intent to insure that the victim was dead before departing the grisly scene.

Brown would first note that the court did not find the capital felony to be "calculated," which is one of the elements of this aggravating circumstance as set forth in §921.141(5)(i) of the Florida Statutes.

For this aggravating factor to exist, there must be something more than merely a premeditated murder. See Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981).

As discussed in Issue VI, the State did not even prove that Jordan's killing was premeditated, and so this circumstance cannot apply.

Furthermore, this aggravating circumstance ordinarily applies to executions or contract murders. McCray v. State, 416 So.2d 804 (Fla. 1982). The death of Anna Jordan involved neither of these.

Also, the facts used to justify the court's finding either were not proven or do not support his conclusion that the capital felony was cold and premeditated. Brown has discussed in subsection F. above the fact that the proof did not establish that Jordan was beaten, and did not show how Jordan was asphyxiated, or whether a gag was in fact employed. The court's conclusion that there was a gag, and it was removed by the perpetrators before they departed to make certain Jordan was dead, is highly speculative. Even if one assumes, arguendo, that the burglars did remove the gag before they left, they could have done so to see if she was dead, not expecting that they had killed her, or even in an attempt to allow her to breathe more easily.

The court's assertions that Jordan took steps to secure her residence and was taken by surprise are irrelevant to the issue of whether the capital felony was cold and premeditated, without pretense of moral or legal justification.

H.

THE COURT BELOW ERRED IN FAILING TO CONSIDER ALL EVIDENCE IN MITIGATION OF THE SENTENCE TO BE IMPOSED UPON LARRY DONNELL BROWN.

At the sentencing hearing of November 15, 1982, the court discussed the mitigating circumstances of the instant offense as follows (R 280):

> When the facts all come down, there's not one mitigating fact available for this defendant other than the fact that he's twenty-seven years old.

In his written sentencing order, the court discussed mitigating factors thusly (R 211), Appendix, p. 3:

> The only mitigating circumstance which could have been found as a result of the testimony presented in behalf of the Defendant and the Presentence Investigation, was that the Defendant was 27 years old at the time the crime was committed. However, this Court does not feel that this constituted a mitigating circumstance in this case.

The record contains no evidence that the sentencing court considered mitigating circumstances other than as set forth above (R 1-1396).

During the penalty phase of his trial Larry Brown presented testimony of three witnesses in mitigation (R 1313-1343). Detective Hitchcox established that Brown had given the police reliable information concerning various crimes committed in Brown's neighborhood over a period of time, and that Brown had even supplied information which enabled the police to go forward with their investigation into the burglary and homicide at Anna Jordan's residence (R 1315-1318). Sandy Cooper testified that Brown was raised in a home without a father (R 1337). Brown was very close to his mother, and was upset by her death a few months before the crimes involved herein took place (R 1338). While his mother was alive, Brown helped her financially by picking tomatoes (R 1340).

Cooper also testified that Brown tried to keep his two younger brothers from getting into any trouble (R 1337-1338).

Cooper also established that Brown was the father of a child whom he loved (R 1339). He provided money for the child's support, and took him to the park and elsewhere (R 1339-1340).

Ruby Turner described Brown's interest in church songs and the Bible (R 1342-1343).

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) emphasizes the need for the sentencer to consider all relevant mitigating evidence. See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In her separate concurring opinion in Lockett, Justice O'Connor noted that the Supreme Court could not speculate as to whether the judge and the state appellate court had actually considered all mitigating factors and found them to be insufficient to offset the aggravating circumstances. It was necessary for the Court "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court" (71 L.Ed.2d at 14). See also Mann v. State, 420 So.2d 578 (Fla. 1982).

The record here does not clearly reflect that the court considered the legitimate evidence Brown presented in mitigation, or other mitigating factors that emerged at the trial.

Because the court considered only the statutory mitigating circumstance of Brown's age (§921.141(6)(g)), he may have felt that he was not authorized to consider any mitigating circumstances not enumerated in the statute. In fact, however, mitigating circumstances are not limited to those set forth in §921.141 of the Florida Statutes.

Perry v. State, 395 So.2d 170 (Fla. 1980); Songer v. State, 365 So.2d 696 (Fla. 1978).

Decisions of this Court have suggested that at least three of the facts which emerged during Brown's trial may be legitimate considerations which can support a life sentence rather than a sentence of death: (1) The defendant's parenthood. Jacobs v. State, 396 So.2d 713 (Fla. 1981). (2) The defendant's troubled home life or family background. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). (See also Eddings, supra.) (3) That a co-perpetrator received a lesser sentence. Slater v. State, 316 So.2d 539 (Fla. 1975).

The court below should have found these nonstatutory mitigating circumstances to exist, and considered them in the sentencing process, or at the very least discussed the substantial mitigating evidence that was brought forth and what part this evidence played in the court's sentencing decision.

VIII

THE COURT BELOW ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH WHEN HIS CO-PERPETRATOR, GEORGE DUDLEY, HAD NEGOTIATED A LIFE SENTENCE FOR HIS PART IN THE SAME OFFENSES.

George Dudley was originally charged with the same crimes as Larry Brown, the first-degree murder of Anna Jordan and the burglary of her residence (R 924). Unlike Brown, however, Dudley pleaded guilty to burglary and second-degree murder in anticipation of receiving a life sentence (R 924-925).

In Slater v. State, 316 So.2d 539 (Fla. 1975) this Court held that imposition of the death penalty upon only one of two or more defendants of similar culpability is an unconstitutional denial of

equal justice under the law. The Court has followed this decision in subsequent cases. E.g. Messer v. State, 330 So.2d 137 (Fla. 1976); McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

Of the three men involved in the offenses against Anna Jordan, only Larry Brown has been sentenced to die.

A superficial examination of the facts might lead one to the conclusion that Larry Brown was much more blameworthy in these crimes than George Dudley. However, further analysis must be undertaken.

Dudley admitted being present both inside Anna Jordan's house, and at the bar when Brown sold the television (R 927-929, 936-938). According to Dudley, Brown struck Jordan only once (and this was the only time Jordan was hit) and tied her up, with a loop around her neck (R 930-931). Other evidence showed substantially more criminal activity than that which Dudley attributed to Brown. For example, Dr. Wood's testimony indicated that Jordan had quite a few bruises and other marks on her body (R 1072-1076). As Dudley testified that Brown struck but one blow, and Dudley had no reason to minimize Brown's involvement in the crimes, one of the other perpetrators must have been responsible for causing at least some of the injuries to Anna Jordan. Also, the court below found that a gag had been put in Jordan's mouth (R 210-211). If so, it must have been put there by someone other than Brown, as Dudley never attributed this act to Brown during his testimny (R 913-968).

In addition, the method by which Jordan was asphyxiated was never determined with certainty. According to Dr. Wood, the asphyxiation could have come about through: (1) obstruction of the airway by

fingers, or (2) obstruction of the airway by a gag, or (3) pressure on the neck by a person's hand, or (4) pressure on the neck by some other object (R 1083-1084). Dudley said only that Brown tied some cloth around Jordan's neck (R 931), which might correspond with the fourth possibility for asphyxiation. Yet Dr. Wood said the material was only loosely tied around Jordan's neck when Wood examined the body (R 1084, 1096). If the asphyxiation was by one of the other means, it was not the result of anything Larry Brown did to Anna Jordan, and one of the other two men must be responsible.

It seems likely that the jury, in returning their life recommendation, disbelieved Dudley's assertion that he merely stood there while his companions proceeded with the crimes (R 959-960), and believed that at least some of the activity Dudley attributed to Brown was performed by Dudley himself. After all, Dudley had already attempted to implicate Brown in a crime he did not commit. He initially told the police it was Brown, rather than Ricky, who raped the woman (R 942). Dudley had ample motive to implicate Brown fully, so that Dudley could insure that his plea bargain would be consummated, and he would not be implicated any more than was absolutely necessary, and as revenge against Brown for his statement to the police that it was Dudley who killed Anna Jordan (R 942-943). Furthermore, it defies logic to believe that anyone would risk a lengthy prison term for participating in a burglary and yet take no active part in the crimes that occurred.[9]

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9) Brown would remind the Court that, as discussed in Issue II, he was deprived of the potentially critical testimony of the only other eyewitness to the offenses, Ricky Brown, by the trial court's refusal to permit a continuance to allow the defense to try to locate Ricky through the investigative resources of the

In accordance with Slater, then, the court should not have treated Larry Brown differently from George Dudley and imposed the sentence of death upon Brown when Dudley was going to receive only a life sentence.

IX.

SENTENCING LARRY DONNELL BROWN TO DEATH WHEN IT WAS NOT PROVEN THAT HE INTENDED TO KILL ANNA JORDAN CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Enmund v. Florida, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 1140 (1982) bars imposition of the death penalty upon a defendant who did not himself kill, attempt to kill, or intend to kill. The primary focus in Enmund is upon the defendant's intent. The Court noted:

> American crimnal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to "the degree of [his] criminal culpability," [citation omitted] and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.

73 L.Ed.2d at 1153.

From the evidence presented below, there is at least some doubt as to whether Anna Jordan's death resulted from any actions taken by Larry Brown. Dr. Wood expressed the view that the asphyxiation of Jordan could have resulted either from obstruction of the airway by fingers or a gag, or from pressure on the neck by a person's hand or some other object (R 1083-1084). Of these possibilities, the only one that can possibly be attributed to Brown is pressure on the neck by the strip of material George Dudley said Brown tied around Jordan's

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9) (continued) public defender's office. Ricky could have shed much light upon the respective roles played by the people who went into Jordan's house.

neck in a loop (R 931). If Jordan was in fact asphyxiated by one of the other three means mentioned by Dr. Wood, then it must have been one of the other men, rather than Brown, who brought about her death.

Even if one concludes that it was some act on the part of Larry Brown which caused Jordan's death, in accordance with Enmund, death would still be an illegal sentence to impose upon Brown if he did not intend that Anna Jordan die.

Brown discussed in Issue VI the absence of proof that he deliberately killed Anna Jordan. There was no discussion among the three men who went to Jordan's house about killing anyone (R 958). Nor did Brown ever threaten Jordan (R 958). Especially significant is George Dudley's testimony that Jordan appeared to be alive when he exited her house (R 956). If Brown intended to kill Jordan, there was nothing to prevent him from doing so.

One reasonable hypothesis based upon the facts of this case is that, rather than her death being intended, Jordan was asphyxiated when she struggled against the bonds encircling her throat. Brown is entitled to the benefit of this hypothesis. See McArthur v. State, 351 So.2d 972 (Fla. 1977); Mayo v. State, 71 So.2d 899 (Fla. 1954).

It seems likely that the jury considered Jordan's death to be unintentional (or decided that Brown did not himself perform the acts that led to her death) in returning their recommendation that he receive a life sentence.[10]

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10) As discussed in Issue V, use at the guilt phase of the trial of the special verdict form proposed by Brown would have eliminated any doubt as to whether the jury considered Brown to be guilty of premeditated murder, or merely liable for an unintentional death which occurred during the course of the felony of burglary.

As the Enmund Court discussed, no valid penological purpose is served by a death sentence for one who did not intend to kill. For example, one who begins a criminal episode with no intention of killing will not be deterred by the fact that death is a potential penalty for murder, as murder is not in his plans. Thus the goal of deterrence, a much-used justification for the death penalty, is in no way furthered.

Pursuant to Enmund, because the State did not show that Larry Brown intentionally killed Anna Jordan, his death sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

X.

THE TRIAL COURT ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

At the penalty phase of Brown's trial, the jury deliberated approximately two hours (R 209), and then returned the following recommendation (R 199, 1381):

> The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Larry Donnell Brown, without possibility of parole for twenty-five years. So say we all, Carroll R. McCain, Foreperson.

The life recommendation of a jury must be followed if there is a reasonable basis therefor. Malloy v. State, 382 So.2d 1190 (Fla. 1979); Walsh v. State, 418 So.2d 1000 (Fla. 1982).

The jury's recommendation of life must be given great weight, and

> [i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

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

The recommendation of the jury represents the judgment of the community as to whether death is the appropriate penalty under the facts of the case being considered. Odom v. State, 403 So.2d 936 (Fla. 1981).

Under the facts of this case, the court below should not have sentenced Larry Brown to die after the jury recommended that he live.

There were a number of rational bases to support the jury's life recommendation. For example, the jury may have considered the substantial mitigating evidence Brown presented (which was uncontradicted) including:

1. His interest in religion (R 1342-1343).
2. The aid Brown had given to police in other criminal cases, and the fact that Brown even gave the police information which allowed them to solve the instant case (R 1315-1318).
3. Brown was a father who loved and cared for his child (R 1339-1340). See Jacobs v. State, 396 So.2d 713 (Fla. 1981).
4. Brown's family background, involving as it did a fatherless home, the upsetting death of Brown's mother only a few months before the crimes involved herein, and Brown's efforts to guide his two younger siblings to stay clear of trouble (R 1337-1338, 1393). See

McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L. Ed.2d 1 (1982).

5. Brown was a supportive son to his mother while she was living (R 1340).

The jury may also have considered the fact that George Dudley was permitted to plead to a lesser charge for a lesser punishment. See Slater v. State, 316 So.2d 539 (Fla. 1975); McCampbell, supra. The jury logically could have concluded, from the physical evidence and Dr. Wood's testimony, and the fact that Dudley was not a credible witness, that there was no legitimate justification for treating Brown and Dudley differently. See Malloy v. State, 382 So.2d 1190 (Fla. 1979). (This argument is developed further in Issue VIII.)

As discussed in Issue IX, the jury may also have been influenced by the lack of proof that Brown intended to cause Jordan's death. See Enmund v. Florida, ___ U.S. _____, 102 S.Ct. ___, 73 L.Ed.2d 1140 (1982).

Taking all these matters into consideration, one cannot say that the jury lacked a rational basis for returning a life recommendation.[11]

Nor was the jury misled or not fully informed when they made their recommendation. Here, as in Neary v. State, 384 So.2d 881 (Fla. 1980), in which the Court found error in the trial court's override of the jury's life recommendation, the only additional factor before the judge that was not before the jury was the presentence

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11) See also Issue VII. H., in which Brown discusses the mitigating circumstances which the trial court should have considered.

investigation report, containing a subjective evaluation and opinion of the parole and probation officer. Unlike in Neary, the report here contained two facts not before the jury: Brown's status as a parolee, and his conviction for attempted second-degree arson (R 1392, 1394). As discussed in Issue VII. B. and C., neither of these facts could properly by used by the court in aggravation. Nor would either or both be sufficient to justify overriding the jury's recommendation.

This Court has reversed death sentences imposed over jury recommendations of life in cases involving murders which were at least as heinous as the murder committed in this case. For example, in Brown v. State, 367 So.2d 616 (Fla. 1979), the victim was beaten about the head, shot, and finally drowned. In McKennon v. State, 403 So.2d 389 (Fla. 1981), the defendant murdered his employer by beating her head against the floor and wall, strangling her, slicing her throat, breaking ten of her ribs, and stabbing her. The only mitigating circumstance was the defendant's age of eighteen. This Court found that there was a rational basis for the jury's recommendation and reduced the sentence to life imprisonment. In Welty v. State, 402 So.2d 1159 (Fla. 1981), the defendant stole the victim's car and stereo, then returned, struck the victim several times in the neck and set fire to his bed. The trial court found no mitigating factors, but there was evidence of nonstatutory mitigating factors which could have influenced the jury to return its life recommendation. This Court vacated the death sentence with directions to resentence the defendant to life.

Swan v. State, 322 So.2d 485 (Fla. 1975) is perhaps factually the closest case to the one presently before this Court. The victim in *Swan* was found badly beaten in her home and tied in such a way that struggling to free herself caused strangulation. She died seven days after the beating from the injuries. The motive was robbery or burglary since several items of value were missing, and the trial judge found the murder heinous, atrocious or cruel. A jury recommended a life sentence for Swan. This Court reversed Swan's death sentence holding that the trial judge should have followed the jury's recommendation of life.

Based upon the foregoing considerations, it is impossible to say that reasonable persons would necessarily conclude that death is the only possible penalty for Larry Brown. Therefore, his death sentence must be vacated and this cause remanded with directions that Brown be resentenced to life imprisonment.

XI.

THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE UPON BROWN AFTER THE JURY RECOMMENDED LIFE IMPRISONMENT BECAUSE SUCH A SENTENCE PLACED BROWN IN DOUBLE JEOPARDY, VIOLATED HIS RIGHT TO DUE PROCESS AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. Double Jeopardy

Brown realizes that this Court has previously rejected this double jeopardy issue in *Douglas v. State*, 373 So.2d 895 (Fla. 1979). However, there is no definitive ruling from the United States Supreme Court, and Brown asks this Court to reconsider its previous position.

In _Douglas_, this Court announced two reasons for holding that double jeopardy does not bar a death sentence after a life recommendation: one, that the United States Supreme Court approved the procedure of a judge's overriding a jury recommendation of life in _Proffitt v. Florida_, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and; two, that a binding jury recommendation of life would violate _Furman v. Georgia_, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Norris submits that these two reasons do not form an adequate basis to reject his double jeopardy claim. First, a double jeopardy issue was not before the United States Supreme Court in _Proffitt_ and it is axiomatic that issues not raised in that court on certiorari are not decided. _E.g._, _Mazer v. Stein_, 347 U.S. 201, 208, 74 S.Ct. 460, 98 L.Ed. 630 (1954). Second, a binding jury recommendation for mercy would not conflict with the mandate of _Furman_. Only the arbitrary infliction of _death_ is forbidden. _See_, _Gregg v. Georgia_, 428 U.S. 153, 203, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (approving a system with a binding jury determination of life imprisonment).

Recently, the United States Supreme Court held that double jeopardy principles prevented a Missouri capital defendant from being subjected to the possibility of a death sentence upon retrial where the first jury returned a sentencing verdict of life imprisonment. _Bullington v. Missouri_, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The Court distinguished earlier cases in which it held that the Double Jeopardy Clause did not apply to sentencing on the basis of the unique character of a penalty hearing in a capital case; the jury has to consider new facts in a separate proceeding under a

burden of proof of beyond a reasonable doubt. Because the Missouri sentencing proceeding had all the features of a trial to determine guilt, the Supreme Court reasoned that double jeopardy principles applied.

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.
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> * * *

68 L.Ed.2d at 278-279.

> By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, however, Missouri <u>explicitly</u> requires the jury to determine whether the prosecution has "proved its case." Both Burks and Green, as has been noted, state an exception to the general rule relied upon in North Carolina v. Pearce. That exception is applicable here, and we therefore refrain from extending the rationale of Pearce to the very different facts of the present case. Chief Justice Bardgett, in his dissent from the rulng of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." 594 S.W.2d, at 922. We agree.

> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die: [quotation omitted]
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> * * *

68 L.Ed.2d at 282-283.

> Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial.

68 L.Ed.2d at 284.

The rationale in Bullington applies equally to Florida's procedures. Like Missouri, Florida has a separate hearing before the jury in a capital trial regarding sentencing. §921.141(2), Fla. Stat. Like Missouri, Florida law also requires that the State prove aggravating factors byond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Like Missouri, Florida's capital sentencing procedures are in every material respect a trial resembling the one to determine guilt or innocence. Bullington v. Missouri controls this case, and double jeopardy bars the imposition of a death sentence after a jury recommendation of life imprisonment.

The trial judge's imposition of death after the jury recommended life violates double jeopardy provisions of the United States and Florida Constitutions. Amend. V, XIV, U.S. Const.; Art. I, §9, Fla. Const. Brown urges this Court to reverse.

B. Due Process

As stated by the Supreme Court in Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." For a revocation of parole or probation one of the minimum requirements of due process is a written statement by the fact finders as to the evidence relied upon and the reasons for the revocation. Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The interests of a capital defendant are even greater than a parolee's or probationer's, since the death penalty is possible. Consequently, the minimum requirements of due process for imposition of the death peanlty are at least as stringent as for revocation of parole or probation. Thus, due process must require a written statement by the factfinders as to the evidence relied upon and the reasons for imposing the death penalty.

Under the Florida procedure for imposing the death penalty there are two distinct finders of fact, the jury and the trial judge. Yet, only the judge is required to set forth his reasons for imposing the death penalty in writing. As a result, when the jury recommends life imprisonment, but the judge imposes a sentence of death, only the judge's reasoning is made known to this Court for purposes of review. Since the jury's findings concerning aggravating and mitigating circumstances are never reduced to writing, neither the defendant nor this Court can ever know the basis for the jury's recommendation. When the jury's findings are unknown, it is impossible

to compare the jury reasoning with that of the trial judge to determine whose judgement was the more reasonable on the basis of the trial record.

Under the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), a sentence of death imposed following a jury recommendation of life cannot be sustained unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. But, application of the Tedder standard always involves a situation where the jury differs with the judge. To sustain a death sentence under the Tedder standard necessarily requires a determination that the jury's recommendation was unreasonable. Yet, no such determination can properly be made when the jury's reasons for recommending life are unknown. In the absence of written findings by the jury, this Court can only guess at whether the jurors chose to ignore the evidence and the law and recommend life on the basis of emotion, or whether they reasonably disagreed with the judge as to the aggravating and mitigating circumstances shown by the evidence or the weight to be given to such circumstances. Thus, application of the Tedder standard to uphold a sentence of death despite a jury recommendation of life vioaltes due process for two reasons: (1) The absence of written findings by the jury regarding aggravating and mitigating circumstances makes rational review of the reasonableness of their recommendation and the judge's decision to override it impossible. (2) The standard itself is irrational because reasonable persons can and virtually always do disagree over whether a particular defendant should be sentenced to death.

right!

C. Cruel and Unusual Punishment

In Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630, 642 (1958), the United States Supreme Court declared,

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

The assessment of contemporary values necessary for determining whether the death penalty is prohibited as cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution requires an examination of objective indicia reflecting the public attitude toward that penalty, including jury determinations. Gregg v. Georgia, supra; Woodson v. North Carolina, 428 U.S. 280, 288, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). "[I]t is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." Coker v. Georgia, 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

While the Florida death penalty statute may be constitutional on its face, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), that does not mean that it may not be applied in an unconstitutional manner in a given case. When the death penalty is imposed, as it was in this case, in contravention of a jury recommendation of life imprisonment, it has been imposed without regard for those evolving standards of decency from which the Eighth Amendment draws its meaning. In fact, the jury's recommendation

constitutes the single most important indicator of whether the death penalty comports with community standards of decency in a given case. This is true because "a jury that must choose between life imprisonment and capital punishment can do little more--and must do nothing less-- than express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519, 520, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). As this Court recognized in McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), "Juries are the conscience of our communities."

Since juries are the conscience of our communities, a jury recommendation of life imprisonment reflects a determination that the death sentence does not comport with contemporary community standards in a particular case. To impose the death penalty in disregard of such a jury determination constitutes cruel and unusual punishment and violates the Eighth and Fourteenth Amendments.

CONCLUSION

Larry Donnell Brown asks this Honorable Court to reverse his convictions and remand this case for a new trial for the reasons expressed in Issues I. through IV. of this brief. If a new trial is not granted, Brown asks that his death sentence be reduced to life imprisonment or that it be remanded for new sentencing proceedings, for the reasons discussed in Issues V., and VII. through XI. Brown also requests that his life sentence for burglary be vacated, for the reasons set forth in Issues V. and VI.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: [signature]
Robert F. Moeller
Assistant Public Defender
Courthouse Annex
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Defendant, Larry Donnell Brown, #042359, P. O. Box 747, Starke, Florida, 32091, this 5th day of May, 1983.

[signature]
Robert F. Moeller