IN THE SUPREME COURT OF FLORIDA

JUAN F. RAMOS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 63,444

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On June 11, 1982, the grand jury returned an indictment charging Appellant, JUAN F. RAMOS, with the first degree premeditated murder of Mary Sue Cobb, in violation of Section 782.04(1)(a), Florida Statutes (1981). (R 2232-2233) Several pre-trial motions were filed including three motions to suppress (R 2291-2292, 2293-2294, 2457-2458) and a motion for change of venue. (R 2395-2400) The change of venue motion was granted, (R 1749-1750) but the motions to suppress were all denied. (R 2443, 1741, 1768)

Appellant proceeded to jury trial on January 17-25, 1983 with the Honorable J. William Woodson, Circuit Judge presiding. (R 1-1611) Following deliberations, the jury returned a verdict finding Appellant guilty as charged, of premeditated murder. (R 1607, 2290) On January 26, 1983, the penalty phase of Appellant's trial was held resulting in a jury recommendation that Appellant be sentenced to life imprisonment without parole

for twenty-five (25) years. (R 2229, 2334) A motion for new trial was filed on February 4, 1983. (R 2286-2288) A hearing on the motion was held on March 10, 1983. (R 1614-1642) Judge Woodson denied the motion. (R 1642) Denying Appellant's motion for continuance of the sentencing proceedings (R 2261-2263, 1642-1657), Judge Woodson sentenced Appellant to death, overriding the jury recommendation. (R 1718, 2256-2260) In so ruling, Judge Woodson found four aggravating circumstances applicable and "very little of any specific mitigating circumstances." (R 1718, 2256-2260)

Appellant filed a timely Notice of Appeal on March 17, 1983. (R 2254) Appellant was adjudged insolvent for purposes of appeal and the Office of the Public Defender was appointed to represent Appellant in this appeal. (R 2252, 2234)

STATEMENT OF THE FACTS

A. GUILT PHASE

In August, 1981, Appellant and his wife moved to Brevard County. (R 1369) Appellant got a job working for Armorflite in September, 1981. (R 1372) From the rear of Armorflite, the workers would watch a woman sunbathing in her backyard. (R 553, 567) Occasionally, the workers would use a pair of cheap, toy binoculars to look at the woman. (R 552, 567) Appellant also used to look at the woman through the binoculars. (R 550, 563) Appellant commented that the woman was good-looking and he would like to make love to her. (R 550, 564) The last anyone could recall Appellant looking at the woman was in February 1982. (R 546, 561) The woman was Mary Sue Cobb.

Appellant and his wife met Marc and Sue Cobb sometime in January, 1982. (R 276, 1372) The Cobbs were both involved in Amway and interested Appellant in it also. (R 277, 464, 1408) Appellant expressed concern for the safety of Sue Cobb and warned her husband about it, even suggesting that the Cobbs buy a dog for protection. (R 292, 1392) The Cobbs' house had been burglarized about six months prior. (R 291, 1392)

On Thursday, April 22, 1982, neither Appellant nor his wife went to work. (R 1373-1374, 634) Appellant helped his brother-in-law and sister-in-law move to another house. (R 1374) Sometime on Thursday, Appellant stopped in to talk to Sue Cobb and to pay her part of what he owed for a bottle of Amway industrial cleaner. (R 737, 277) On Friday, April 23, 1982, Marc and

Sue Cobb got up at 6:00 A.M. and read the Bible. (R 249) Sue drove Marc to work because she needed the car that day. (R 250) Marc called Sue at 7:40 A.M. to remind her to bring the checkbook with her when she met him for lunch at 11:45 A.M. (R 250) Marc recalled that the telephone answering service was turned on that morning. (R 259) When Rebecca Stone called Sue at 9:40 A.M., the machine was not working. (R 465) When Sue failed to meet Marc at lunchtime, he got worried and called about five different places trying to locate her. (R 253-254, 398) Mike Tabeling, Marc's boss drove Marc home to look for his wife. (R 254, 399) While Mike waited outside, Marc went inside to look for Sue, stopping to pick up a United Parcel package which had been left on the porch. (R 257) Marc discovered the body of Sue in the doorway to the bedroom, with a large knife still protruding shoulder area. (R 257, 263) Marc yelled for Mike who came inside and also observed the body. (R 263, 401) Mike ran outside and eventually contacted some people at Armorflite who then called the police. (R 402) An autopsy was performed which revealed three major groupings of stab wounds, one in the left breast, one in the lover left neck and one in the clavicle. (R 303-305) There were seventeen stab wounds in all. (R 304) There were also rope marks on the victim's neck. (R 307) The cause of death was the knife wounds to the heart and lungs resulting in massive hemorrhaging. (R 308) Death occurred within two or three minutes. (R 313) The rope around her neck could have caused the victim to lose consciousness. (R 317) Although it was not possible to determine the order in which the

wounds were inflicted, most of the wounds were caused by a knife smaller than the one left imbedded in the victim. (R 314, 310) It is possible that the knife was imbedded in the victim after she was dead. (R 328)

When the police arrived, the house was secured and processed. (R 435-437) Latent prints were lifted from the doorway near the body (R 593), from the counter board at the kitchen sink (R 595), and from the door of the Cobbs' volkswagen. (R 594) Footprints were found, but because of the texture of the soil, it was impossible to make plaster casts of them. (R 623) The latent prints were taken to the Sanford Crime Lab, along with items of the victim's clothing, rectal and vaginal washings, pubic and head hair samples of the victim and a piece of bloody carpet. (R 333-334, 1020, 1063-1064, 1107) Tests revealed the presence of nonmotile spermatozoa in the vaginal washing and semen in both the vaginal and rectal washings. (R 333-334, 1020) These findings indicated that the depositor was a type - O secretor. (R 1020-1021) Appellant, Marc Cobb and Paul Hunter were type - O secretors. (R 1024, 1025, 1029) Marc and Susan had had intercourse Wednesday evening prior to Susan's death. (R 275) The medical expert was unable to determine how long or when the spermatozoa had been deposited. (R 336) One blond head hair was found in the victim's pubic area which was not Marc Cobb's, Appellant's or Paul Hunter's. (R 1064, 1066-1068)

An analysis of the latent prints revealed that they were not Appellant's. (R 766, 770, 771) The latent print

analyst was never given elimination prints of any other persons to which the latents could be compared. (R 773)

On April 23, 1983, Appellant awoke at 6:30 A.M. and went to work at 7:00 A.M. only to find that he had been laid off. (R 1379, 734) Appellant returned home at 7:10 A.M. and told his wife he had been laid off and got back into bed with her. (R 735, 1382) They remained in bed until Appellant's brother-in-law came by at 2:00 P.M. (R 1384, 706) Appellant went to a meeting at Armorflite at 3:30 P.M. (R 1384, 1388, 945, 634) Appellant's supervisor, Manny Ruiz did not see Appellant at 7:00 A.M. but gave him his lay-off letter around noon. (R 631, 632) Ruiz did not recall if he gave Appellant his paycheck. (R 634) Jim Bateman, another employee at Armorflite, did not see Appellant at 7:00 A.M., though it's possible he just missed him. (R 939, 942)

Doris Eastes, who lives next door to Appellant, recalled seeing Appellant run past her house toward his own house at 8:15 A.M. on Friday morning. (R 949, 958) Appellant was shirtless, with his shirt sticking out of his back pocket. (R 950, 957)

During the entire week leading up to April 23, 1982, Paul Hunter was clearing the orange grove next to the Cobb house. (R 980) On April 23, 1982, he drove his pick-up with a flat-bed attached for the purpose of hauling away the trash and shrubs cleaned out of the grove. (R 982) Hunter arrived no earlier than 8:30 A.M. (R 991) Sometime between 9:00 A.M. and 10:00 A.M. Appellant saw a Cuban-looking man running very fast past the orange grove. (R 983-984, 1004) Neither Doris Eastes nor Paul

Hunter immediately told the police of seeing either Appellant or this Cuban. (R 963-964, 986)

In December, 1982, Robert Eastes, while visiting his grandparents, was walking along the railroad tracks near the Cobb house. (R 483) He found a knife partially covered which he took to his grandparents' house. (R 484-485) The police were notified and came and took possession of the knife. (R 953, 485)

Michael Lukon, a cellmate of Appellant at the Brevard County Jail, recalled that after Appellant returned from court one day he appeared nervous and excited. (R 967-968) Appellant at first said he was nervous about the faucet where he washed his hands, but then changed it to "whoever washed their hands." (R 968) However, Appellant speaks broken English and gets mixed up all the time. (R 973) Lukon never mentioned this to anyone until he heard that the prosecutor was going to recommend that he be sentenced to two years in prison. (R 971, 972) Lukon subsequently was given straight probation. (R 972)

Another cellmate, James Gilmore, claimed that Appellant told him that on the day of Sue Cobb's murder, he got up, went to work and found out he was laid off. (R 349) Appellant got mad, left and went to a lady's house to pick up some cosmetics. (R 349) Appellant knocked at her door, and she answered, looking good. (R 350) Appellant went inside, the woman became frightened and began to scream. (R 350) Appellant then made a gesture with his hands and said "pow, pow, pow." (R 350) Appellant then told Gilmore that "they" say he went the same way home as he had come, but that was wrong. (R 352) Appellant then

drew a diagram, showing Gilmore the path he took. (R 352) Appellant got home, washed up and went back to bed. (R 353) Gilmore never mentioned this to his attorney even though he was specifically asked if he knew anything. (R 875) Gilmore was a three-time convicted felon who had eight other felony charges pending. (R 365) Gilmore claimed the reason he did not tell his attorney what Appellant told him was because he was afraid he'd lose her as his attorney. (R 376) At one point, Gilmore heard that as far as his charges were concerned, the state attorney had revoked all deals and were going to seek habitual offender sentencing. (R 383) On December 10, 1982, after hearing this, Gilmore asked Glen Jenkins, a correctional officer at the jail whether information about the Cobb murder would help his sentence. (R 304) At this time, Gilmore gave his version of what Appellant supposedly told him. Gilmore immediately achieved trustee status at the jail. (R 385) The diagram was later found among Appellant's personal belongings in his cell. (R 445, 446, 450) At the bottom of the diagram, written in Spanish, was a phrase which literally translated into "places where I went the date prior that Susan died and it's understood, and I remember what I did the day that she died, and may she rest in peace." (R 442)

Appellant was interviewed by Investigator Wayne Porter on April 29, 1982, during which he denied any knowledge of where the victim's body was found. (R 738) However the next day, Appellant went up to Porter and told him that he had lied because his wife had read in the newspaper where the body was found and

had told him. (R 740, 649) When Appellant was questioned by Sergeant Rios, he initially denied knowledge of the knife left imbedded in the victim but later admitted he did know. (R 651-652) Although tape recorders were available, none were used when Appellant was questioned. (R 659, 671, 748) During the questioning of Appellant by Sergeant Rios, he was handling a pack of cigarettes which was later retrieved from the conference room after the interrogation ended. (R 677)

On April 30, 1982, two scent discrimination lineups were conducted at the Cocoa Police Department in the same room where Appellant had earlier been interrogated for nearly seven or eight hours. (R 813, 658) The first lineup consisted of five blue shirts, four of which belonged to the husband of the secretary of Police Chief Corlew. (R 1125, 1053) The fifth shirt was the one which the victim had been wearing when she was killed. (R 1125) This shirt was the only one with blood on it and was placed in the number five position. (R 1126) John Preston then brought his dog, Harass, into the room and scented him with the cigarette pack which had earlier been handled by Appellant. (R 1131, 1249) Beginning with shirt number one, the dog walked past each shirt. (R 1132, 1251) When the dog got to shirt number five, he put his head down and sniffed it. (R 1132, 1251) Preston led the dog away, turned him around , and the dog immediately returned to shirt number five, nearly sitting on it. (R 1133-1134, 1251, 909) The second lineup consisted of three knives received from the Dixie Diner, one knife from a police officer and the knife found imbedded in the victim's body. (R

1128) This knife was placed in position number three. (R 1129) Preston again brought Harass into the room and again scented him with the cigarette pack. (R 1137, 1252) The dog then began at number one and dropped his head when it got to number three. (R 1138, 1253) Preston led the dog away, turned around and the dog immediately returned to knife number three and began to lick it. (R 1139, 911)

B. PENALTY PHASE

While in Brevard County Jail, James Gilmore a cellmate of Appellant, sent a note to the guards telling them Appellant had weapons. (R 2116, 2117) A search of Appellant's cell, revealed homemade brass knuckles in his bed. (R 2112, 2125) Appellant thinks that Gilmore planted them in his bunk because of an argument they had. (R 2182, 2184)

Before coming to America from Cuba, Appellant spent some time in a Cuban jail as a result of a fight he had with a soldier which occurred when he refused to follow an order and work in the cane field for no pay. (R 2109-2153) While at work, Appellant say a young boy subjected to a homosexual attack by four men. (R 2155) The boy was screaming, so Appellant picked up a stick and hit one of the men. (R 2155) As he did this, someone approached Appellant from the rear and grabbed, causing Appellant to turn around swinging the stick. (R 2155) It turned out to be an officer and Appellant was taken to jail for disturbing the peace. (R 2156) Appellant was facing more than ten years in prison. (R 2158) Appellant's mother told him that a psychologist friend told her that Appellant should do something crazy which would keep him out of prison. (R 2158, 2159) Appellant cut off three fingers and was released. (R 2159-2160) Later, in order to escape from Cuba, Appellant claimed he was insane and his mother and brother claimed they were homosexuals. (R 2164-2165)

Appellant had never exhibited any signs of violence. (R 2134, 2137, 2141, 2145, 2151) Appellant has never been in

trouble at all. (R 2135, 2138, 2146, 2151) Appellant has never caused any problems in jail. (R 2143) Appellant is truthful and hard-working. (R 2135, 2138, 2139, 2142, 2145, 2149)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE TESTIMONY WITH REGARD TO THE DOG-SCENT DISCRIMINATION LINE-UPS.

Defense counsel filed a motion to suppress any evidence regarding dog scent discrimination lineups on the grounds that the state could not show a proper predicate for its admission in that no reliable controls were placed on the tests and the dog was subjected to testing to insure accuracy. (R2457-2458) At the hearing on the motion, the dog handler, John Preston, testified that he did not feel it was necessary to have his dog tested for accuracy and skill by any of the national organization such as the United States Police Canine Association, the American Kennel Club, or Schutzhund U.S.A. (R1879-1880) At the time the scent lineups were conducted no efforts were made to videotape them. (R1813-1814)

Florida has recognized the admissibility of dog trailing evidence to prove identity of an accused in a criminal prosecution. Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937). However, it is required that prior to allowing such evidence, a proper predicate must be laid. In Schell v. State, 72 Ga.App. 804, 35 S.E.2d 325 (1945), the court held that before evidence of the conduct of bloodhound alleged to have been put upon the trail of the defendant could be properly received in evidence, it must appear that the dog was able, at the time and under the circumstances, to follow the scent of a person, and that when such a foundation has been laid, the evidence could be used as a circumstance in determining the guilt of the accused.

In State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929), the Court adopted the following criteria in determining whether such evidence is admissible in a criminal case:

> (1) That they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party (who) . . . was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

Id. at 545, 146 S.E. at 411.

Many courts have refused to permit such evidence in criminal cases. In State v. Grba, 196 Iowa 241, 194 N.W. 250 (1923) the court stated:

> The evidence is in the nature of expert testimony, with no opportunity whatever to cross-examine the expert or find out from any source any reason for the conduct of the dogs, or why they should choose one direction, or one trail, rather than another, as was done in the instant case. Notwithstanding that the majority of the courts of the country, especially in the southern states, have sustained the admissibility of evidence of this character, we are disposed to the view that the better reasoning requires that such evidence should be excluded, and we are inclined to ally ourselves with the supreme courts of Nebraska, Illinois, and Indiana in rejecting such evidence. The life and liberty of any citizen should not be placed in jeopardy or be forfeited upon evidence of the conduct of a dog. The instant case furnishes an excellent sample of the inherent weakness of evidence of this character. All of the

> courts that admit such evidence concede that it is merely a circumstance and is "of the weakest character." If the bloodhound is infallible because of his animal instincts, then evidence of his conduct in tracing a human being would rather be of the highest character then "merely a circumstance of the weakest character." If invariable animal instinct guides him accurately in the matter, then his conduct in trailing an alleged criminal would be quite conclusive. It is conceded by all courts, and must be from the facts of the case, that the bloodhound is not infallible, that he does make mistakes, and that he does not invariably follow a trail without deflection therefrom and with absolute certainty; in other words, the bloodhound may be right in what he does, and he may by wholly wrong. How is it possible to know in any particular case whether he is right or wrong?

In the instant case, the procedural safeguards were not met and thus the evidence of the scent discrimination tests was inadmissible. Initially, it must be noted that although videotape equipment was available, none was used to preserve the lineup. Secondly, the dog handler had never submitted his dog, Harass II to independent testing. Thus, the only evidence concerning the reliability of Harass II came from its owner and one of the owner's students, Kenneth Stayer. The evidence belies the dog's ability.

The scent discrimination lineups were conducted in a courtroom at the Cocoa Police Department. (R 641) The scenting arcile was a cigarette pack taken from Appellant. (R 677) The evidence was clear that if Captain Pickel had touched the pack, once Harass sniffed it he immediately would have approached Pickel in the courtroom and nuzzled him in the groin. (R 1452,

1454) However, the dog instead alerted on one of the items in each lineup. What is somewhat surprising is that the room where the lineup was conducted is the same room in which Appellant had spent approximately eight hours being questioned. (R 657-658) However, Harass II apparantly did not alert anywhere in the room except on the two items in the lineups, not even the chair in which Appellant sat for eight hours that very day! Certainly, this brings into question not only the ability of the dog but also the credibility of its trainer.

In attempting to qualify the dog, Preston testified that Harass's tests have been affirmed by appellate courts all over the country. However, it has recently come to light that in several cases in which Harass II was used to secure criminal convictions, the dog is being proven wrong. The July 26, 1983 Daytona Beach Morning Journal newspaper carried an Associated Press wire Story[1] wherein it was noted that the reliability of Harass II as well as the testimony of John Preston has been seriously attacked. It noted that in Cleveland, Dale Sutton was released from prison after serving two years of a 25 year sentence for armed mail robbery. He had been convicted after Harass II's identification of a scent from a bedsheet placed Sutton at the scene. However, Sutton was cleared when another person confessed to committing the offense. Similarly, the reliability of Harass II has been attacked in New York and Virginia.

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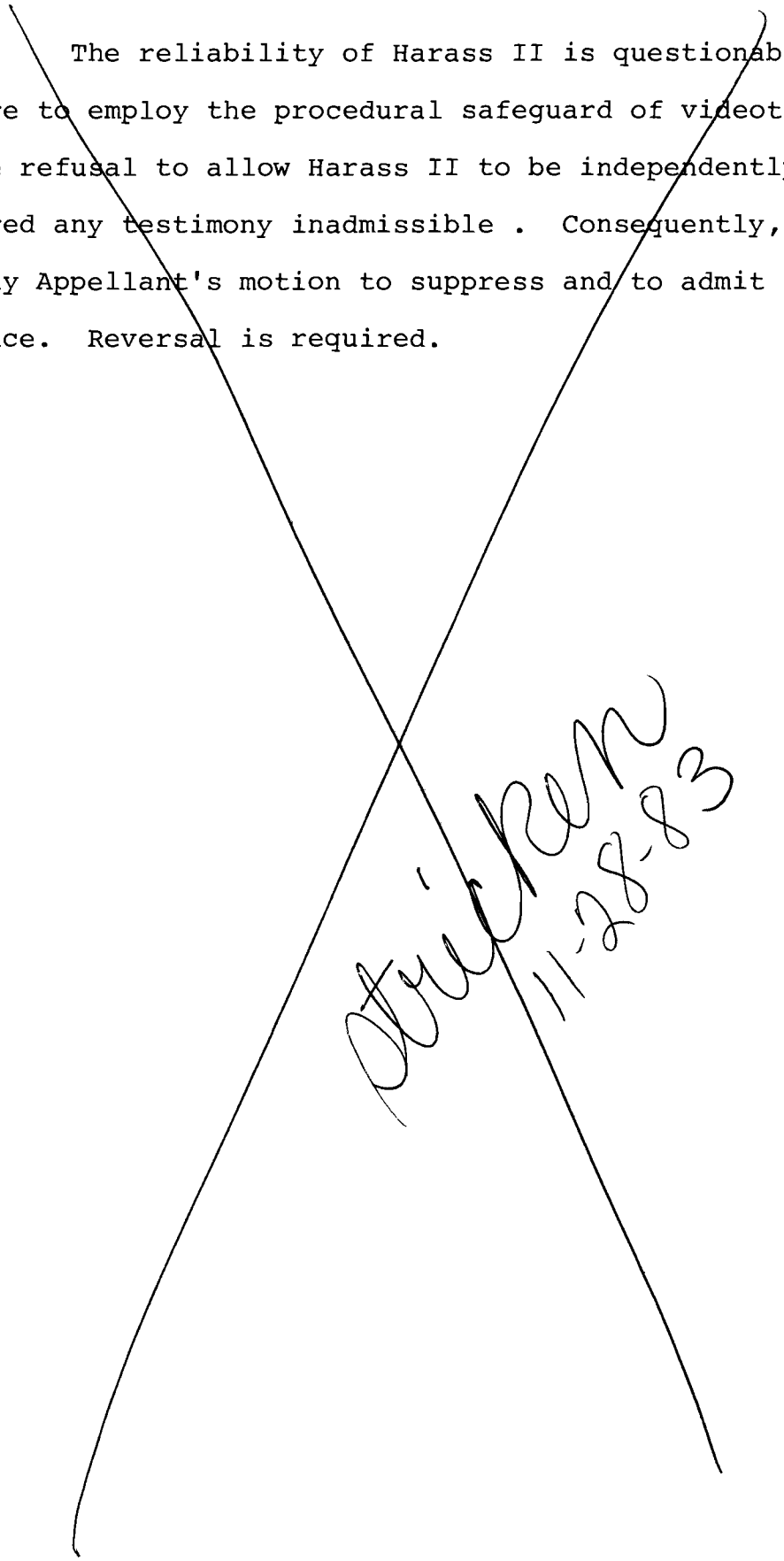
[1] ~~The full text of the newspaper story is included in Appendix A attached hereto.~~ Stricken 11-28-83

The reliability of Harass II is questionable. The failure to employ the procedural safeguard of videotaping as well as the refusal to allow Harass II to be independently tested rendered any testimony inadmissible . Consequently, it was error to deny Appellant's motion to suppress and to admit this evidence. Reversal is required.



POINT II

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE STATE'S KEY WITNESS REGARDING CRUCIAL MATTERS CONCERNING MOTIVE, BIAS AND LACK OF CREDIBILITY.

At trial, one of the State's chief witnesses was James Gilmore, a cellmate of Appellant at the Brevard County Jail. (R 342-396) Initially, defense counsel objected to the state calling Gilmore at that particular time because defense counsel had not received an errata sheet to Gilmore's pre-trial deposition. (R 338-341) Defense counsel requested that the State delay in calling Gilmore until the errata sheet could be received. (R 34) Defense counsel further stated that it would be impossible to effectively cross-examine or impeach the witness without the errata sheet. (R 339-340) The trial court overruled the objection and Gilmore testified. (R 341) On the day following Gilmore's testimony, the errata sheets were received, at which point defense counsel requested that Gilmore be recalled so that he could be cross-examined with the complete deposition. (R 426) Defense counsel was not permitted to question Gilmore about his prior incarcerations. (R 362) Nor was defense counsel permitted to elaborate the special treatment that Gilmore was receiving from the state. (R 386)

The right of cross-examination of witnesses is a fundamental right encompassed within the confrontation clause of the Sixth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment to the

United States Constitution. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 29 L.Ed.2d 347 (1974); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1085, 13 L.Ed.2d 923 (1965); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Coco v. State, 62 So.2d 892 (Fla. 1952); Art. I, §16, Fla. Const.

This fundamental right of confrontation includes the right to cross-examine a witness so that the jury may be afforded the opportunity to judge the demeanor and credibility of the witness or to ascertain bias or impartiality:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness.
>
> * * *
>
> ...to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. at 316, 318. It is well-settled that a criminal defendant should be afforded wide latitude on cross-examination of a key prosecution witness to show bias or motive. Coxwell v. State, 361 So.2d 148 (Fla. 1978); Lutherman v. State, 348 So.2d 624 (Fla. 3d DCA 1977); Kirkland v. State, 185 So.2d 5 (Fla. 2d DCA 1966).

In Coxwell, supra, at 152, the Court articulated a

standard by which appellate courts must review a trial court ruling restricting cross-examination:

> [W]here a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquiries of a key prosecution witness regarding matters are both germane to that witness' testimony on direct examination and possibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

In Morrell v. State, 335 So.2d 836, 838 (Fla. 1st DCA 1976), the Court stated:

> Two main functions of cross examination are: 1) to shed light on the credibility of the direct testimony, and 2) to bring out additional facts related to those elicited on direct examination. As to the first function, the test of relevancy is whether it will, to a useful extent, aid the court or the jury in appraising the credibility of the witness and assessing the probative value of the direct testimony.

In the instant case, James Gilmore was a key witness and consequently his credibility was a crucial issue. In situations like this, limitation of cross-examination to impeach the witness' credibility is error of a constitutional magnitude. In Stradtman v. State, 334 So.2d 100, 101 (Fla. 3d DCA 1976) approved, 346 So.2d 67 (Fla. 1977) the Court held:

> [I]t is a well recognized rule that limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error, especially where the cross-examination is directed to the key prosecution witness.

Accord, Williams v. State, 386 So.2d 25 (Fla. 2d DCA 1980). As the cases further recognize, this right is particularly important in capital cases where a defendant's right to cross-examine witnesses is carefully guarded, and limiting cross-examination on any matter plausibly relevant to the defense may constitute reversible error. Coxwell, supra; Williams, supra.

In the instant case, forcing defense counsel to cross-examine this key witness without benefit of the errata sheet to his deposition, put defense counsel in a position of not knowing what the witness would say. It also left him unable to effectively impeach Gilmore with a prior inconsistent statement since it was impossible to know if the prior statement had been changed by the errata sheet. Further, refusing to allow defense counsel to question Gilmore about his prior incarceration and about the special treatment being given him by the state, denied Appellant his right to inform the jury of matters which would directly influence Gilmore's motives for giving his testimony. This restriction denied Appellant his constitutional right to confront the witnesses against him and ultimately denied him a fair trial.

POINT III

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF THE STATE'S KEY WITNESS REGARDING CRUCIAL MATTERS CONCERNING MOTIVE, BIAS AND LACK OF CREDIBILITY.

At trial, the state presented the testimony of John Preston, the dog handler, as to the results of the scent discrimination lineups. This testimony was crucial to the state's case. On cross-examination, the defense sought to elicit the possible pecuniary motive for Preston's participation in the instant case. The following colloquy transpired:

> Q. How much do you charge for your services?
>
> MR. MOXLEY: Objection on the grounds of relevance.
>
> THE COURT: I sustain the objection.
>
> Q. (By Mr. Russo) Are you getting paid for your appearance here today?
>
> A. Yes, sir.
>
> Q. How much?
>
> MR. MOXLEY: Objection on the grounds of relevance.
>
> THE COURT: I sustain the objection.

Q. (By Mr. Russo) Do you get paid when you do scent discrimination work?

A. Yes.

Q. Do you get paid by the case or by the number of line-ups that you do?

A. Neither, really.

Q. How do you get paid, then?

A. On a daily basis.

Q. You get paid by the day, per diem?

A. Yes.

Q. It doesn't matter whether you do ten line-ups or one line-up, it would be the same amount of money?

A. That's correct.

Q. Do you get expenses other than a per diem?

MR. MOXELY: Objection on the grounds of relevance,

your Honor.

THE COURT: Sustain the objection.

Q. (By Mr. Russo) Do you get expenses other than per diem for testifying?

MR. MOXLEY: Objection on the grounds of relevance.

THE COURT: I sustain the objection.

Q. (By Mr. Russo) How much money have you received for your testimony in this particular case in scent discrimination work and testifying?

MR. MOXLEY: Objection on the grounds of relevance.

THE COURT: Sustain the objection. (R 1260-1261)

In interest of brevity, the argument on this point is the same as presented in Point II, supra. The restriction denied Appellant his right to full cross-examination. Reversal is required.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE, OVER OBJECTION, TO ELICIT TESTIMONY REGARDING THREATS MADE TO A STATE WITNESS WHERE NO CONNECTION WAS MADE BETWEEN THE THREATS AND APPELLANT.

On redirect examination of James Gilmore, the former cellmate-turned-informer of Appellant's, the following colloquy took place:

BY MR. MOXLEY:

Q. James, you have spent hard time before, is that right?

A. Yes, sir.

Q. Now, do you know what the term "Snitch" means?

A. Yes.

Q. When you are a snitch and you are spending hard time, do you have reason to fear for your safety?

A. Yes.

Q. From the time that it was discovered that you were going to be a witness in this case --

MR. WOLFINGER: Objection, may we approach the bench?

Mr. MOXLEY: No, it goes both ways, your Honor.

(Thereupon, a benchside conference was held out of the hearing

of the Jury as follows:)

MR. WOLFINGER: Only if he calls it directly.

MR. MOXLEY: No. No, it goes both ways.

MR. WOLFINGER: These are threats, you can talk about threats on him, and you cannot do that unless it's directly tied to the evidence.

THE COURT: Unless it's to get back his credibility, he can do it. Objection overruled.

(Thereupon, the benchside conference was concluded, after which the following proceedings were had in the hearing of the Jury:)

Q. (By Mr. Moxley) Now, from the time it was discovered that you were going to be a witness, have people stopped talking to you over in the Brevard County Jail?

MR. WOLFINGER: Your Honor, I am going to object, it's irrelevant and immaterial.

Q. (By Mr. Moxley) Have people --

THE COURT: Objection over-ruled.

Q. (By Mr. Moxley) Have people expressed threats to you as a result of your testifying in this case?

A. Some of them, yes.

MR. WOLFINGER: I object strenuously, it's immaterial.

THE COURT: Objection overruled

Q. (By Mr. Moxley) Have you expressed fear for your safety as a result of being a State witness in this case?

A. Yes.

Q. And, even now, even today, you were fearful in testifying in this Courtroom, is that right?

A. Yes.

Q. What are your feelings with regard to being placed in the State Prison system, once it has been discovered that you have, in fact, testified in the manner in which you testified in this case?

MR. WOLFINGER: Objection, it's irrelevant and immaterial.

THE COURT: Objection overruled, it goes towards credibility. (R

388-390)

This situation is practically identical to the situation in Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980) wherein the prosecutor questioned a witness about threats made to her in regard to her trial testimony. The witness denied any threats, yet the Court still found reversible error stating:

> The clear impression from the above examination of the witness by the prosecutor was that appellant, or someone connected with him, had made threats against the witness to keep her from testifying against appellant. There was no attempt to show appellant had either made such threats or was aware that threats had been made against the witness. Moreover, the evidence was presented in such a way as to insinuate in the minds of the jury that appellant was guilty because someone had threatened the witness.

385 So.2d at 1043. The Court continued, holding:

> [1] An attempt by a defendant or third person to induce a witness not to testify or to testiy falsely is admissible on the issue of defendant's guilt, provided it is shown that the attempt was made with the actual participation, knowledge, or authorization of the defendant. Duke v. State, 106 Fla. 205, 142 So. 886 (1932) Absent a link to the defendant, the issue of whether a witness is subject to improper influence is irrelevant and collateral to the issue of whether the defendant committed the crime for which he is charged and its admission over objection is grounds for the granting of mistrial and the denial thereof would be reversible error. Johnson v. State, 355 So.2d 200 (Fla. 3d DCA 1978). Furthermore, the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused. Coleman v. State, 335 So.2d 364 (Fla. 4th DCA 1976)

385 So.2d at 1043. Accord, Reeves v. State, 423 So.2d 1017 (Fla. 4th DCA 1982). In the present case, it was not proven that Appellant ever threatened Gilmore or was in any way connected to anyone who had threatened Gilmore, therefore it was reversible error to allow such testimony into evidence. A new trial is mandated.

POINT V

THE TRIAL COURT ERRED BY ALLOWING OVER OBJECTION AN OVERSIZED COLOR PORTRAIT OF THE VICTIM AND HER HUSBAND INTO EVIDENCE WHERE IT WAS IRRELEVANT TO ANY ISSUE AND SERVED ONLY TO AROUSE THE SYMPATHY OF THE JURY.

Prior to the presentation of evidence, defense counsel objected to the anticipated admission into evidence of a large color portrait of the victim and her husband with their arms around each other. (R 244) Defense counsel argued that the photo was not relevant to any issue at trial and that the only effect such a photo would have is to evoke sympathy for the victim and prejudice the defendant. (R 245) The defense noted that several autopsy photos would be admitted so that this particular photo was completely unnecessary. (R 244) The only ground argued by the state for its admission was the following:

> MR. WHITE: We won't accept the stipulation. We need it, so the Jury can see what she looked like before she was subjected to this crime, number one. It's going to be relevant to that issue. They are going to look at pictures of her from the autopsy, from the crime scene that are much different from what she normally appeared as, and they are going to need to know how she changed by what happened to her. (R 245)

The trial court denied the objection. (R 247) At trial the state successfully procured its admission into evidence as

State's Exhibit #22 over the objection of Appellant. (R 398)

Photographs should be received in evidence with great caution. Thomas v. State, 59 So.2d 517 (Fla. 1952) The test for admissibility of photographs is relevancy. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978) A photograph is admissible if it properly depicts factual conditions relating to the crime and if it is relevant in that it aids the court and jury in finding the truth. Booker v. State, 397 So.2d 910, 914 (Fla. 1981).

In the instant case, what the victim and her husband looked like prior to April 23, 1982 was totally irrelevant to any issue involved in Appellant's trial for first degree murder. At the very least, no reason whatsoever existed to admit a portrait of the victim's husband. Identity was not an issue. Defense counsel forcefully argued to the judge that the only purpose for this portrait was to evoke the jury's sympathy and consequently prejudice the defendant. The state's only response was a somewhat convoluted argument that the photo was necessary so the jury could see what the victim looked like before the murder. While it is true that the photo would accomplish the stated purpose, the fallacy of this argument is that for purposes of proving first degree murder the physical appearance was irrelevant especially since self-defense, or pre-existing injuries were not advanced as possible defenses. The prejudice to Appellant is apparent since the photograph shows an All-American type husband and wife, very good-looking, with their whole lives ahead of them. The fact that Sue Cobb was murdered meant not only was she a victim, but also her husband was a victim. The sympathy this photograph evoked is equally apparent.

Where the cause of death has been clearly established and there is no fact or circumstance in issue which necessitates or justifies the introduction of a photograph, its admission is error. Reddish v. State, 167 So.2d 858, 863 (Fla. 1964) Inasmuch as the large color portrait of the victim with her arms around her husband was irrelevant and the only purpose for its admission was to evoke sympathy for the victim and to prejudice Appellant, it was reversible error for the court to admit it. Saxon v. State, 225 So.2d 925 (Fla. 1969); Dyken v. State, 89 So.2d 866 (Fla. 1956).

POINT VI

THE TRIAL COURT ERRED IN ALLOWING AN INCOMPETENT STATE WITNESS TO TESTIFY CONCERNING IRRELEVANT, INACCURATE INFORMATION, AND IN NOT DISSPELLING THE IMPRESSION THAT THE JURY RECEIVED AS A RESULT, THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Officer Kenneth Stayer, a expert in the field of scent discrimination and tracking, was asked by the prosecutor if the fact that every person exudes their own particular scent was a recognizable fact in many appellate courts throughout this land. (R 1182) Officer Stayer replied affirmatively before a defense objection was sustained by the trial court. A second, similar question regarding affirmance by appellate courts in cases in which Officer Stayer had testified was objected to by the defense, which the trial court also sustained. (R 1182) The prosecutor refrained from other such improper questions until the testimony of John Preston, another expert in the field presented by the state. Shortly after Mr. Preston's direct examination began, the prosecutor asked the following:

> Q. Have Appellate Courts in any state affirmed convictions based upon your testiomony?
>
> MR. RUSSO: Objection, your Honor, there's many reasons for affirmance, and it might be affirming over the error of his dog, we don't know.

THE COURT: Objection overruled, he can testify. (R 1238)

The prosecutor was then permitted to elicit from Mr. Preston that his dog's name had been mentioned by the Supreme Court of Virginia, the Court of Appeals and Federal Court. (R 1238) The jury was left with the clear impression that appellate courts had affirmed convictions based upon Mr. Preston and his dog's testimony in numerous cases across the country. This becomes very clear when one considers the jury questions which came two and one-half hours before their guilty verdict. (R 1605-1607)

The jury question was two-fold. First, they wished to learn if scent identification by a dog had ever been proved to be in error in a court of law in the United States. Secondly, they asked if testimony in a court of law had ever proved that scent identification by a dog was in error. (R 1605) Over defense objection, the court instructed the jury that they were to be concerned with facts and the court was to be concerned with the law. The judge stated that the questions involved matters of law with which the jury was not to be concerned. (R 1605-1606) Defense counsel objected to the court's answer, pointing out the inconsistency with the previous ruling by the court on the defense objection to the state's questions on this issue during the trial. Appellant's counsel explained that the court's answer to the jury constituted an instruction as a matter of law, when, during the trial, the court's overruling of the defense objection constitued a ruling that the jury could consider this testimony as a matter of fact. (R 1607) As a result, Appellant contends

that the jury was left with the erroneous impression that scent identification evidence by a dog had always been upheld by appellate courts and never disapproved. This clearly denied Appellant his constitutional right to a fair trial and due process of law. Amend. V and XIV, U.S. Const.; Art. I, Sec. 9, Fla. Const.

Appellant's objections as to the competency of the witnesses to answer questions concerning appellate court rulings was indisputably correct. During the testimony of Officer Stayer, defense counsel objected to the questioning, pointing out that the witness was not a lawyer and had not studied the law. Defense counsel objected to a question concerning affirmances by appellate courts, contending that the reason for affirmance was unknown. The trial court properly sustained these objections as he should have done. (R 1182) Appellant is mystified as to the reason for the trial court's change of heart in later ruling that Mr. Preston could testify as to appellate courts' affirming convictions based upon his testimony. (R 1238) Defense counsel again pointed out that there are many reasons for affirmance, including harmless error, but his objection was for naught. (R 1238) Mr. Preston was clearly incompetent to testify on this issue. He was not a lawyer and, even if he were, he could never be sure of the reasons for an appellate court's ruling. In this area, Mr. Preston was a lay witness and therefore unqualified to testify. §90.701, Fla. Stat. (1981).

The testimony was also completely irrelevant to the trial of the instant case. Whether or not convictions in other

cases had or had not been affirmed on appeal was in no way applicable to the guilt or innocence of Juan Ramos. In Florida, even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. §90.403, Fla. Stat. (1981). Appellant contends that this evidence certainly falls within this prohibited category.

The prejudice to the appellant was compounded by the trial court's handling of the jury questions. The jury had already received the impression that appellate courts had affirmed criminal convictions based upon the testimony of Mr. Preston and his dog in other states. This issue loomed largely in their deliberations as evidenced by their questions. They wanted to know if this type of evidence had ever proved to be incorrect. The trial court's refusal to answer the questions left the jury with their first impression that convictions had only been upheld while none were reversed. In fact, this is not the case. A few recent cases on this general issue which reversed convictions where similar type evidence was utilized at trial include O'Quinn v. State, 153 Ga.App. 467, 265 SE.2d 824 (1980); State v. Taylor 395 A.2d 505 (N.H. 1978); and People v. Norwood, 70 Mich.App. 53, 245 NW.2d 170 (1976). In fact, the reliability of Mr. Preston and his dog, Harass II, has recently been the focus of much attack. Harass II has recently been proven incorrect on several occasions. An Associated Press article from the July 26, 1983, Daytona Beach Morning Journal reported that, "In Cleveland, Dale Sutton was released after serving two years

of a 25 year sentence for armed mail robbery. He was convicted after the dog's [Harass II] identification of a scent from a bedsheet placed Sutton at the robbery scene. Someone else confessed to the crime in late 1982, and Sutton was freed from prison earlier this year.." See Appendix A. An article from The Plain Dealer about the same case quoted a University of Georgia expert, "The Sutton case will act as watershed. I hate to say it, but the jail doors will spring open all over the country." Id. Other experts quoted in the article also expressed grave doubts about Harass II's credibility. If the jury had been aware of these cases, Appellant seriously doubts that they would have convicted Juan Ramos within two and one-half hours after receiving no help from the trial court regarding their questions.

Appellant contends that the trial court's completely inconsistent rulings at trial resulted in a denial of his constitutional right to due process and a fair trial. The jury was left with the impression that appellate courts had only given their stamp of approval to Mr. Preston and his dog. Since this was the primary evidence implicating Juan Ramos, justice demands that a new trial be granted.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Appellant was convicted of the first degree murder of Sue Cobb. The evidence of this murder was purely circumstantial. The following evidence was adduced:

1) Appellant had been at the victim's house the day before paying for an Amway order; (R 277, 737)

2) On the day of the murder, Appellant was laid off from his job at Armorflite; (R 1379, 734, 631)

3) Appellant was seen running toward his house by his neighbor Mrs. Eastes at 8:15 A.M. on the day of the murder; (R 949, 958)

4) Paul Hunter observed a Cuban-looking man running by the orange grove next to the victim's house between 9:00-10:00 A.M.; (R 983-984, 1004)

5) James Gilmore, a cell-mate, testified that Appellant told him that after being laid-off, he went to the lady's house, she began to scream at which point Appellant gestured with his hands saying "pow, pow, pow;" (R 349-350)

6) A scent discrimination test puported to reveal Appellant's scent on the knife left imbedded in the victim's body as well as on the shirt worn by the victim; (R 1132, 1138, 1252, 1253)

7) Lab tests revealed that the victim had engaged in sexual intercourse with a person who had blood type-O and was a secretor; (R 333-334, 1220-1021) Appellant was a type-O secretor. (R 1024)

Appellant asserts that the evidence while possible suggesting guilt, is legally insufficient to sustain a conviction.

This Court in Jaramillo v. State, 417 So.2d 257 (Fla. 1982) recognized that a special standard of review of the sufficiency of the evidence applies where a conviction is wholly

based on circumstantial evidence. Citing to McArthur v. State, 351 So.2d 972 (Fla. 1977), this Court once again stated that "where the only proof guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence in inconsistent with any reasonable hypotheseis of innocence." Jaramillo, supra. The evidence, while possibly suggesting guilt, falls far short of being inconsistent with a hypothesis of innocence.

The testimony of Doris Eastes and Paul Hunter is contradictory. One would have Appellant running to his home at 8:15 A.M. while the other observed a Cuban man running from the Cobb home sometime between 9:00 A.M. and 10:00 A.M. The murder had to occur sometime after 8:30 A.M. because the banker Camp left a message on the victim's telephone answering machine, which was apparently turned off by the murderer. Camp did not arrive at work until 8:30 A.M. (R 415-417)

Gilmore's testimony is clearly suspect especially in that he claimed Appellant had indicated that either he shot the victime or hit her as evidenced by the phrase "pow, pow, pow" when describing what had occurred. (R 349-350) Clearly this is not what occurred. Furthermore, Gilmore's testimony is suspect given the motives which were exposed. What is more important is that inasmuch as Appellant is not fluent in the English language, what he may have told Gilmore is certainly subject to interpretation. Indeed, another cell-mate admitted that this was true. (R 973) The alleged diagram that Appellant drew for Gilmore supposedly showing the direction he traveled on the day

of the murder (R 354) contained a statement written in Spanish at the bottem which translates into English as "places where I went the date prior that Susan died, and it's understood, and I remember what I did the day that she died, and may she rest in peace." (R 441-442)

Even if the dog-scent evidence was properly admitted into evidence, this is not of itself sufficient to support a conviction People v. McPherson, 85 Mich.App. 341, 271 N.W.2d 229 (1978); State v. Taylor, 395 A.2d 505 (N.H. 1978).

It is also important to note that there was no scientific evidence linking Appellant to this crime - no fingerprints, no hair samples, no blood comparisons. Although the testimony indicated that the perpetrator inflicted the stab wounds in such a manner as to cause a good deal of blood spotting, no blood stains were found on any of Appellant's belongings. A blond head hair was found in the pubic area of the victim - this was definitely not the Appellant's. (R 1064)

Simply put, the evidence presented by the State, being entirely circumstantial, was woefully insufficient to sustain a conviction. At best, the evidence raises an inference that Appellant committed the murder. However, equally, if not more, consistent is that someone else committed the murder. Appellant's conviction must be reversed.

POINT VIII

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF SENTENCING.

Appellant was convicted on January 25, 1983. (R 1607, 2290) On the following day, the jury returned its advisory recommendation of life. (R 2229, 2334) Immediately thereafter, the trial court remanded Appellant to the custody of the Seminole County Sheriff's Department and ordered preparation of a presentence investigation report. (R 2230) Appellant filed a timely motion for new trial on February 4, 1983. (R 2286-2288)

On March 4, 1983, Judge Woodson issued a notice to appear for sentencing on March 10, 1983. (R 2267) On March 7, 1983, Judge Woodson signed an order to transport Appellant to Brevard County to await a Motion for New Trial on March 14, 1983 and sentencing on March 10, 1983. (R 2266) On March 10, 1983, defense counsel filed a motion for continuance of sentencing on the grounds that he had just returned from vacation two days earlier and had just learned that a brief in support of a death sentence had been filed by the state attorney and he had been unable to respond to it. (R 2261-2263) The short notice was also insufficient to permit Appellant's mother to travel from Miami to be present at sentencing. (R 2262)

On March 10, 1983, a hearing on the motion for new trial was held, resulting in a denial of the motion. (R 1615-1642) Immediately thereafter, the court held a hearing on the motion to continue sentencing. (R 1642-1657) Defense counsel based his requests on the following reasons: 1) the

fact that defense counsel was out of state from February 24, 1983 until March 8, 1983, and during this time the state filed a lengthy brief in support of a sentence of death over the jury's recommendation of life. (R 1643-1644); 2) the attorney who handled the penalty phase, Mr. Sonny Kutsche, was unavailable for sentencing since he was involved in another trial. (R 1645-1646); 3) the defendant's mother had insufficient time to travel from Miami to be present at her son's sentencing. (R 1646) The court denied the motion (R 1657) and proceeded immediately with the sentencing.

A motion for continuance is addressed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980). The trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So9.2d 1024, 1028 (Fla. 1981). In the instant case, the denial of the motion for continuance was a palpable abuse of discretion.

Defense counsel left for an out-of-state vacation on February 24, 1983. (R 1643) At that time no sentencing date had been set. (R 2267) Defense counsel did not return from vacation until March 8, 1983, learning for the first time on March 9, 1983 that Appellant was to be sentenced on March 10, 1983. (R 1643) During defense counsel's absence, the prosecutor filed a brief in support of the imposition of the death sentence over the jury's life recommendation. (R 2268-2285) Defense counsel first received the brief the day prior to sentencing and was unprepared to adequately respond to the arguments. (R 1664) As to the

matter of the brief submitted by the state, the court stated:

> I've heard all their facts. They filed a brief, but the brief itself, you know, it just gives you law, but, it doesn't influence you as to what you are going to do. (R 1644)

However, the record before this Court belies this statement by the trial court. Initially it must be noted that the brief of the state below did not just contain law but also delineates the facts in a biased form. (R 2268-2285) A simple comparison of the trial court's findings in support of the death penalty are almost identical in language to the brief of the state. (R 2256-2259, 2268-2285) Both are set forth in the appendix to this brief. This almost identical similarity clearly shows that the trial court places a great reliance on it. Consequently, the need for defense counsel to have the opportunity to respond to it was paramount. The brief of the prosecutor provided an in-depth review of fifteen cases in which this Court has affirmed a death sentence imposed after a jury life recommendation. (R 2270-2277) However, the brief very conspicuously omits analysis of more than thirty cases wherein this Court reversed a death sentence imposed over a life recommendation including Gilvin v. State, 418 So.2d 996 (Fla. 1982) in which the trial court had found six aggravating and no mitigating circumstances. Certainly defense counsel if given sufficient time could have adequately responded to the state's brief. (See Points IX, X, XI, infra)

The state presented no compelling reason for proceeding to sentencing on March 10, 1983. Indeed, there was none. The denial of a continuance constitutes a palpable abuse of

discretion warranting a reversal of the death sentence and a remand for resentencing.

POINT IX

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF ANY AGGRAVATING CIRCUMSTANCES.

A. Introduction

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation of life imprisonment. Judge Woodson sentenced Juan Ramos to death and in support of this sentence filed written finding of fact. (R 2256-2260) In imposing the death sentence, Judge Woodson found four aggravating circumstances: (1) that the capital felony was committed while the defendant was engaged in the commission of or the attempt to commit a rape; (2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (3) that the capital felony was especially heinous, atrocious and cruel; and (4) the capital felony was a homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Inasmuch as none of these aggravating circumstances can be sustained, the death sentence imposed upon Juan Ramos must be vacated.

B. The Trial Court Erred In Finding The Aggravating Factor That the Murder Was Committed During The Commission Of A Felony To Support The Imposition Of The Death Penalty.

It is well-established that aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The trial court's basis for this

aggravating circumstance was an alleged "rape" of the victim. However, the evidence does not support such a finding. There was evidence that the victim had engaged in sexual intercourse due to the present of non-motile spermatozoa in the victim's vagina. (R 330-334) Although lab tests indicated that the depositor was a type-O secretor (R 1020-1021) and Appellant was a type-O secretor (R 1024), it was also proven that the victim's husband was a type-O secretor. (R 1025) The victim and her husband had in fact engaged in sexual intercourse on the Wednesday evening preceding the victim's death. (R 275) The medical expert was unable to determine how long or when the spermatozoa had been deposited. (R 336) None of Appellant's body hairs were found. Where the only proof of guilt is circumstantial, not matter how strongly the evidence may suggest guilt, it must be sufficient to exclude any reasonable hypothesis except that of guilt. Jaramillo v. State, 417 So.2d 257 (Fla. 1982). The evidence, sub judice, is equally consistent with a finding that the only sexual intercourse the victim had experienced was with her husband. Of special note is that in considering their verdict in the guilt phase, the jury was instructed on and given the opportunity to convict Appellant of felony murder premised on an alleged sexual battery. (R 1598-1599, 2290) However, the jury specifically rejected this as evidenced by their verdict, thus determining that the sexual battery or attempted sexual battery had not been proven beyond a reasonable doubt. By their recommendation of life imprisonment, the jury also determined this aggravating factor had not been proved.

C. The Trial Court Erred In Finding The Aggravating Factor (5)(e), That The Capital Felony Was Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest.

As with all aggravating circumstances, this one must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This aggravating circumstance is typically found where the evidence clearly demonstrates that the defendant killed a police officer who was attempting to apprehend him. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Ford v. State, 374 So.2d 496 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). This aggravating circumstance also applies where a police officer is killed to effect an escape from custody. Holmes v. State, 374 So.2d 944 (Fla. 1979). However, this circumstance is not limited to those situations and has been found to exist where civilians were killed. Riley v. State, 366 So.2d 19 (Fla. 1978). This Court, in Riley, supra, held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses.

In Armstrong v. State, 399 So.2d 953 (Fla. 1981), this Court rejected an application of this circumstance despite a finding by the trial court based upon the pathologist's testimony that the victims, after the initial shooting, were laid out prone and then "finished off."

In Demps v. State, 395 So.2d 501, 506 (FLa. 1981), this Court held evidence that Demps helped hold the victim while another prison inmate stabbed him in order to eliminate a snitch

was not sufficient to establish the purpose of avoiding arrest beyond a reasonable doubt.

The facts utilized by the trial court in finding this aggravating circumstances are basically that the victim was raped, she knew the defendant and therefore she was killed to eliminate her as a witness. While it is true that Mary Sue Cobb's death eliminated her as a witness, this fact is woefully insufficient to support a finding of Section 921.141 (5)(e), Florida Statutes (1981). Consequently, this must be stricken.

D. The Trial Court Erred In Finding The Aggravating Factor (5)(h), That The Capital Felony Was Especially Heinous, Atrocious And Cruel.

This Court has defined "heinous, atrocious, and cruel in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious and cruel. In light of this, the facts enumerated by the trial court do not support the finding of this factor.

The evidence showed that the victim was stabbed seventeen times. (R 304) There were also rope marks on the victim's neck to indicate that she had been strangled. (R 307) It was impossible to determine the order that the wounds were

inflicted. (R 314) The rope around her neck could have caused the victim to lose consciousness prior to the infliction of any of the knife wounds. (R 317) Death occurred within two or three minutes. (R 313)

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great. State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977). A comparison to other cases wherein this Court had reduced death sentences to life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977) (36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976) (severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under he left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976) (38 "significant" lacerations on rape victim),

involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The Appellant's death sentence must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238 (1972). See also Godfrey v. Georgia, 446 U.S. 420 (1980).

Because the evidence does not establish that the capital felony was heinous, atrocious, and cruel, this aggravating circumstance must be stricken.

E. The Trial Court Erred In Finding The Aggravating Factor (5)(i), That The Capital Felony Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court declared that Section 921.141(5)(i), Florida Statutes (1981) authorizes a finding of aggravation for premeditated murder where the premeditation is "cold, calculated and ... without any pretense of moral or legal justification." Id. at 421. This Court further stated that "Paragraph (i) in effect adds nothing new to the elements" of premeditated murder, but does add "limitations to those elements for use in aggravation." Id. (emphasis added). Subsequently, in Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court held:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the

> sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification." (emphasis supplied)

In Middleton v. State, 426 So.2d 548, 553 (Fla. 1982), this Court approved the finding of (5)(i) where according to the defendant's own confession, he sat with the shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her. In light of these facts, the Court stated:

> This is clearly the kind of intentional killing this aggravating circumstance was intended to apply to. The cold-blooded calculation of the murder went beyond mere premeditation. (emphasis supplied)

Very recently, in Harris v. State, ___ So.2d ___, 8 FLW 345 (Fla.Sup.Ct. Case No. 61,343, Opinion filed 9/8/83), this Court struck down a finding of (5)(i) where the defendant killed a seventy-three year old woman by repeatedly stabbing her an beating her with a blunt instrument. The evidence also showed that the victim tried to escape and suffered numerous defensive wounds. This Court stated:

> We must, however, agree that the state failed to establish beyond a reasonable doubt that this murder met the requirements of having been committed in a cold, calculated, and premeditated manner, as we have defined this aggravating circumstance. This aggravating circumstance was not, in our view, intended by the legislature to apply to all premeditated-murder cases. [citations omitted] In this instance the state presented no evidence that this murder was planned and, in fact, the instruments of the death were all from the victim's premises.

8 FLW at 348. The evidence in the instant case falls short of proving this aggravating circumstance beyond a reasonable doubt and thus must be stricken.

POINT X

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17, OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IGNORING VALID MITIGATING FACTORS AND IMPOSING A SENTENCE OF DEATH.

Aggravating circumstances to be considered in sentencing are limited to those enumerated in the statute. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). And, before one can be considered, it must be proven beyond a reasonable doubt. Id. at 9. At least one listed, aggravating circumstance must be proven before death is a possible penalty. Id. at 9.

If at least one aggravating circumstance is proved[2/], the jury or sentencing judge is then to consider mitigating circumstances to determine if the mitigating factors in the case outweigh the aggravating ones. Section 921.141(2)(3), Florida Statutes (1981); State v. Dixon, 283 So.2d 1 (Fla. 1973). However, unlike aggravating circumstances, mitigating circumstances are not limited to those listed in the statute. Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978). Furthermore, unlike aggravating circumstances, mitigating factors are not required to be proven to any certain standard; all evidence in mitigation must be considered. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

2/ As discussed in Point IX, supra, Appellant contends that no aggravating circumstances have been sufficiently proven, but assuming, but not conceding, the valid application of one aggravating circumstance, Appellant asserts that this is outweighed by mitigating factors.

Appellant lacked a significant history of prior criminal activity. Section 921.141(6)(a), Florida Statutes (1981). In construing this section, this Court stated in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

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

In the sentencing order, the trial court failed to conclude whether this mitigating factor was present. The order recites only the following with respect to (6)(a):

(a) Did the defendant have a significant history of prior criminal activity?

1. Wayne Porter, a witness for the State, testified that the defendant told him he had received eighteen months in a Cuban prison for assaulting a government soldier and while there the defendant assaulted another inmate with a sharpened food tray.

2. While the defendant was in the Brevard County Jail, James E. Gilmore, a witness for the State, testified he observed the defendant in violation of Section 951.22 Florida Statutes, make a brass knuckle knife, which knife was recovered by the correctional officer at the Brevard County Jail.

(R 2258) From this recitation, there is no finding by the trial court. Assuming, arguendo, that the court rejected the

mitigating factor, such was clearly error. As to Appellant's experiences in a Cuban jail, no proof whatsoever was offered to show any convictions. The only evidence of these activities came from Appellant himself, either directly or through Wayne Porter. The so-called assault on a government soldier was in reality a fight which occurred when Appellant refused to work for free for the Castro government on Revolution Day. (R 2109, 2153-2154) The fight was instigated by the government soldier. (R 2153) Porter admitted that the characterization of the incident as an assault was not Appellant's but his own. (R 2109) The other incident resulted from a homosexual attacked on a young boy by four other inmates which Appellant attempted to prevent. (R 2155) As to Appellant's possession of a homemade brass knuckle knife in the jail, Appellant was never arrested or charged with any criminal offense in this regard. The facts surrounding the search of Appellant's cell and the finding of this knife are certainly susceptible to a very real possibility that James Gilmore, Appellant's cell-mate-turned-informer, planted it in Appellant's mattress. After Appellant and Gilmore sent a note to the jail guards informing them that Appellant had weapons. (R 2175, 2182-2184, 2116-2117) Even Gilmore admitted he was hoping for some kind of reward for testifying. (R 2131) Correctional Officer Thomas Johnson testified that Appellant had been no problem at the jail, even despite this incident. (R 2143) Evidence was presented to show Appellant had never been in trouble in the United States. The state with all their resources, could offer no credible proof to rebut this mitigating factor.

In rejecting Appellant's age as a mitigating factor the trial court stated:

(g) What was the age of the defendant at the time of the crime?

> 1. The defendant was twenty-five years of age and had been in a Cuban jail or work release. Also, the defendant was married for several years prior to this offense and therefore, age was not a mitigating circumstance.

(R 2258) Appellant asserts that while his physical age was indeed twenty-five, this is misleading because it does not take into consideration the fact that only recently had Appellant been forced to adopt to an entirely new culture by virtue of his defection from Cuba. Being thrust into this strange environment, Appellant was unfamiliar with the customs of his newly-adopted country. Even, today, he still has difficulty in expressing himself in English. These unusual circumstances must be considered so at to put Appellant's age in its proper perspective. Hence, this mitigating factor is present.

Numerous non-statutory mitigating facts were presented. The trial court basically acknowledged this evidence but disregarded it. Appellant's family testified that Appellant was not a violent person. (R 2134, 2137, 2141, 2145, 2151) In fact, Appellant had never been in trouble before. (R 2135, 2138, 2146, 2151) All his life, Appellant has been a steady, industrious worker. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Another non-statutory mitigating factor present in this case, and not even mentioned in the trial court's order, is the difficult upbringing which Juan Ramos had to endure. Juan was

born in Cuba. His mother was left to raise two sons on her own. (R 2149) Because of this, Juan started working at a very young age, to help his mother. (R 2149) Because of a disagreement with the Castro government policy requiring compulsory work for the state on Commemoration Day, Juan got into a fight with a soldier, at his instigation. (R 2153) For this Juan was required to work for the state for four hours a day for eighteen months without pay. (R 2154) During his field work, Juan observed four men sexually attacking a young boy. (R 2155) In an effort to protect the boy, Juan picked up a stick to stop the men. (R 2155) While in process of assisting the young boy, someone grabbed Juan from behind. (R 2156) Thinking that he is in for trouble, Juan swings the stick at the person, cutting his head. (R 2156) This person turned out to be an officer and Juan was charged with disturbing the peace and assault. (R 2157) Facing ten years or more in Castro's prison, Juan, at the suggestion of his mother and a psychologist, cut off three of his fingers in order to get a psychiatric release from jail. (R 2158-2159) By feigning insanity, Juan was able to escape Cuba and seek his new life in America. (R 2161-2162) The final non-statutory mitigating factor which exists in this case is the weak nature of the circumstantial evidence used to convict Appellant. (See argument Point VII, supra) Appellant submits that the jury considered this factor in arriving at their recommendation of life. Such a factor is recognized by Model

Penal Code §210.6 (1962)[3/] which sets forth certain situations in which a death sentence is prohibited:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> > (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
> >
> > (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
> >
> > (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
> >
> > (d) the defendant was under 18 years of age at the time of the commission of the crime; or
> >
> > (e) the defendant's physical or mental condition calls for leniency; or
> >
> > (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(emphasis supplied).

3/ See Proffitt v. Florida, 428 U.S. 242, 247-248 (1976), noting that Florida's death penalty statute is patterned in large part on the Model Penal Code; see also Gregg v. Georgia, 428 U.S. 153, 189-191, 193-194 (1976); Jurek v. Texas, 428 U.S. 262, 270-271 (1976); Straight v. Wainwright, 422 So.2d 827, 832 (Fla. 1982).

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

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

In the instant case, the evidence of guilt stands or falls on the accuracy of a dog - Harass II. Indeed, that this evidence is the linchpin in Appellant's conviction is borne out by the questions asked by the jury during their deliberations concerning whether such dog evidence had ever been proven wrong in a case. (R 1606, 2335)

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

> Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly

> established are convicted and sentenced to death.
>
> * * * * *
>
> No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.

Consequently, Appellant asserts that the trial court initially erred by not explicitly setting forth what factors, if any, he found in mitigation. If the order is construed as rejecting all mitigating factors, to that extent it is clearly erroneous. Coupled with the absence of any sustainable aggravating factors, Appellant's death sentence cannot be upheld.

POINT XI

THE TRIAL COURT ERRED IN SENTENCING RAMOS 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.

On January 26, 1983, the jury reconvened for the penalty phase of Appellant's trial. (R 2103-2230) After deliberating for one hour and fifty minutes, the jury returned with the recommendation that Juan Ramos be sentenced to life imprisonment without possibility of parole for twenty-five years. (R 2228-2229, 2290) On March 10, 1983, the trial court, ignoring the jury recommendation, sentenced Appellant to death. (R 1718, 2256-2260) In so doing, the judge found four aggravating circumstances: (d) the crime was committed while the defendant was engaged in the commission of or in the attempt to commit rape on Mary Sue Cobb; (e) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (h) the crime was especially heinous, atrocious and cruel; and (i) the crime was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification. (R 2256-2258) The trial judge further found "very little, if any, specific mitigating circumstances after considering all the statutory and also the nonstatutory circumstances." (R 1718, 2258-2259)

The critical role of the jury's advisory sentencing verdict in determining the appropriateness of the death sentence has long been recognized by this Court. Lamadline v. State, 303

So.2d 17 (Fla. 1974). Because it represents the judgment of the community as to whether the death penalty is appropriate, the jury's recommendation is entitled to great weight. Odom v. State, 403 So.2d 936 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court articulated the standard to be applied when it reviews a death sentence imposed over a jury recommendation of life imprisonment:

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

Accord, Washington v. State, 432 So.2d 44 (Fla. 1983). This Court in Tedder, supra held that, even though the trial court had found no mitigating circumstances, under the facts and circumstances of that case there was no reason to override the jury's recommendation. This result was obtained even though the defendant had allowed the victim to lanquish without assistance or the ability to obtain assistance. Thus, this Court apparently recognized that the jury must have considered and weighed the aggravating and mitigating circumstances and found sufficient mitigation to recommend life imprisonment.

In the penalty phase of the instant case, the state presented the testimony of four persons and the additional "fact" that a homemade "brass-knuckles" type of weapon had been found in Appellant's mattress in the jail. (R 2112) The defense

presented members of Appellant's family, most of whom had previously testified during the guilt phase. The notable exception was the testimony of Appellant himself who testified mainly as to his life in Cuba as a political prisoner. (R 2152-2193) After due deliberation, the jury recommended that the court impose a life sentence. (R 2229) No additional information was presented to the trial court to sustain his override. Smith v. State, 403 So.2d 933 (Fla. 1981). As discussed in Points IX and X, supra, none of the aggravating circumstances can be sustained and numerous mitigating circumstances, both statutory and non-statutory are present. Thus it follows, legally and logically, that there is no compelling reason justifying the sentencing judge's decision to override the life recommendation.

This Court has reversed death sentences imposed over jury recommendation of life in cases which were more, or at least as, heinous as the murder of Sue Cobb. 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 rationale basis for the jury's recommendation and reduced the sentence to life imprisonment.

In Chambers v. State, 339 So.2d 204 (Fla. 1976), a sentence of death was reversed despite the trial court's findings of one aggravating circumstance and no mitigating circumstances.

The victim was beaten to death and died as a result of cerebral an brain stem contusion. The victim was bruised all over the head and legs, her face was unrecognizable, and she had several internal injuries. These factors notwithstanding, this Court found the imposition of the death penalty unwarranted and determined that the jury's recommendation was appropriate. Justice England, specially concurring for three members of the Court, amplified the reasons for reversing the death sentence. In light of the respective functions of the judge and jury in death penalty cases, the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason.

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

In Gilvin v. State, 418 So.2d 996 (Fla. 1982), this Court again reversed a sentence of death despite a finding by the trial court of six aggravating circumstances and no mitigating circumstances. The victim, an Episcopal priest who had befriended the defendant, was physically beaten with a claw

hammer. While the victim lay face-down on the floor, the defendant administered several blows to the back of the victim's head with the claw hammer. The victim had suffered at least fifteen blows to the head. Without elaboration, this Court held that there was evidence of nonstatutory mitigating factors upon which the jury could have based its life recommendation and therefore there was a rational basis which the trial court should have accepted.

On the record in this case, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended a sentence of life imprisonment. Thus, the trial court clearly erred when it deregarded it and sentenced Juan Ramos to death. The sentence must be reduced.

POINT XII

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

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

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." The statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized

sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the Defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the State will seek the death penalty deprives the Defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. I, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), if interpreted to automatically hold as harmless error

any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the 8th and 14th Amendments to the United States Constitution.

The Amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute in violation of the 8th and 14th Amendments to the United States Constitution because it results in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

It is a denial of equal protection to allow as an aggravating circumstance the fact that the defendant committed a capital felony while on parole and legally not incarcerated, but to prohibit a finding of an aggravating circumstance in the same circumstances for a defendant on probation.

Additionally, a disturbing trend has become apparent in this Court's recent decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, ____ U.S. ____, 32 C.L. 4016 (U.S. Sup.Ct. Case No. 82-5096, Oct. 4, 1982) (Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death

sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra, at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833,834 (1978) cert. denied, 414 U.S. 956 (1979) (emphasis added).

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing reasons and authority, Appellant respectfully requests this Honorable Court to reverse his judgment and sentence and to grant the following relief:

As to point I-VII remand for a new trial.

As to point VIII remand for re-sentencing.

As to point IX-XI remand for imposition of life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal, and to Mr. Juan F. Ramos, Inmate No. 088561, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 14th day of November, 1983.

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