IN THE FLORIDA SUPREME COURT

DERRICK TYRONE SMITH, :

Appellant, :

vs. : Case No. 64,670

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 24, 1983, a Pinellas County grand jury indicted Derrick Tyrone Smith for the first degree murder of Jeffery Songer. (R16-17) Smith pleaded not guilty. (R18) He proceeded to a jury trial (R227-233), and was found guilty as charged. (R262,2101) After hearing additional evidence at the penalty phase of the trial (R233,2131-2169), the jury recommended a death sentence by a seven to five vote. (R267,2186-2187)

Circuit Judge William L. Walker adjudged Smith guilty of first degree murder on November 10, 1983. (R268-269) Smith filed a motion for new trial (R270-278) which was denied. (R320) After receiving a PSI, Judge Walker sentenced Smith to death on November 29, 1983. (R304,333-336,2200-2238) The court found two aggravating circumstances: (1) the homicide occurred during an attempted robbery, and (2) Smith had previously been convicted for another violent felony--a subsequently committed robbery. (R333-335)(A1-3)[1/] The court found one statutory mitigating circumstance--no significant history of prior criminal activity. (R336)(A4) Additional character evidence was also noted in the court's findings of fact. (R336)(A4)

Smith timely filed his notice of appeal to this Court. (R348-349)

1/ Page numbers with the prefix "A" refer to the appendix to this brief.

STATEMENT OF FACTS

Milton Brech was a dispatcher for the Yellow Cab Company in St. Petersburg (R1133-1134), and he was on duty from midnight March 20, 1983 until 8:00 a.m. on March 21. (R1135) At 12:28 a.m., a male called for a cab (R1137) and Brech dispatched Jeffery Songer's cab, number 16, to the Hogley-Wogley Bar-B-Q restaurant. (R1137-1141) A few minutes later, Songer radioed a coded distress call. (R1142-1143) Brech immediately called the police and dispatched another cab driver, Charles Montgomery, to the area. (R1144) He was unable to contact Songer over the radio. (R1145)

Charles Montgomery arrived at the 3100 block of Fairfield Avenue at 12:40 a.m. (R1288) On the side of the street, he observed Songer's taxi cab. (R1288) The car was parked at an angle, the engine was running, the headlights were burning and the driver's door was open. (R1290) Further down the street, Montgomery discovered Songer's body lying on the ground. (R1290) Police Officer Lawrence Goodrich arrived within a couple of minutes. (R1230,1292) He called the medical examiner. (R1238)

The medical examiner, Joan Wood, examined Songer at the scene and also performed an autopsy. (R1246-1249,1256) She found an entrance gunshot wound in Songer's back and an exit wound in his chest. (R1248,1260) The bullet passed from a downward to an upward position (R1279), through the left eighth rib, the lower left lung, the aorta and the upper right lung.

(R1260) Injuries to the lungs and aorta caused bleeding into the chest cavity resulting in death. (R1261-1262) Based on the wounds, Woods believed a larger caliber weapon was used, at least a .32 caliber. (R1270-1271) She found no gunpowder residue on the clothing or wounds indicating the barrel of the gun was at least three feet away when fired. (R1257-1258)

Katherine Lewis lived on Fairfield Avenue with her two daughters and her 18-year-old son, Todd Pierce. (R1653,1853-1855) Between 12:35 a.m. and 1:00 a.m., she and her son were in the livingroom watching television. (R1653) During this time, they heard a gunshot. (R1654,1855-1856) After the gunshot, Lewis heard a loud moan and someone say something like, "Oh, my God." (R1655) That voice faded away, and then, she heard two voices. (R1635) One was a low, monotonous male voice, and the second was high pitched and excited or hysterical. (R1655) The voices lasted 30 to 45 seconds. (R1655) Lewis then heard footsteps running away. (R1656) Todd Pierce was not sure whether the footsteps ran away from or around behind their house. (R1856-1858) Lewis looked out of her window and saw a Yellow Cab taxi parked right behind her car. (R1656) No one was around the cab. (R1656) The car's lights were burning and the driver's door was open. (R1656) She watched the second Yellow Cab taxi drive up, and when the second cab's lights shone down the street, she saw a body lying partially on the street and partially on the sidewalk. (R1657-1658) She waited until the police arrived before leaving her house. (R1659)

Melvin Jones, who also lived on Fairfield Avenue, saw the homicide from a vacant lot. (R1673) He was returning home from a friend's house and arrived on Fairfield about 12:30 a.m. (R1672) He had taken an indirect route through an alley and the vacant lot because he knew there were outstanding warrants for his arrest on worthless check charges. (R1672) Just as Jones approached the curb, he saw the taxi cab headlights turning onto Fairfield. (R1673) At first thinking the car was a police car, Jones ducked into the shadows behind a tree. (R1673) From that vantage point he observed the homicide. (R1673) He saw the taxi stop on the right side of the street. (R1674) The front seat passenger was the first to exit the cab. (R1674) The passenger said something to the backseat passenger and then began walking toward the rear of the car. (R1674) At about the same time, the back seat passenger exited on the driver's side, and the driver exited and ran. (R1674) The back seat passenger had a gun. (R1674) He fired it, hitting the cab driver. (R1674) The front seat passenger looked back and began running toward 31st Street. (R1674) The back seat passenger, who had the gun, also ran. (R1675) As he ran nearer to Jones, Jones saw him placing a black and brown gun under his shirt. (R1675-1676) Jones recognized both passengers. (R1677-1678) He knew the front seat passenger as "New York" (R1677) and the back seat passenger as "Re-run." (R1678) "Re-run" had the firearm (R1678), and Jones identified him as Derrick Smith. (R1687)

Derrick Johnson was also arrested and charged for the first degree murder of Jeffery Songer. (R1505-1509) However,

he was allowed to plead guilty to second degree murder, and he testified against Derrick Smith. (R1506) Johnson denied that he was receiving beneficial treatment in exchange for his testimony. (R1511) At one point during cross examination the trial court prohibited defense counsel from asking Smith if he had received promises of beneficial treatment. (R1540-1541)

According to Johnson, he and Smith were in the Name of the Game Lounge on the evening of March 20, 1983. (R1467-1471) Johnson worked there part time as a disc jockey, and Smith tried out that evening for a job as a disc jockey. (R1470-1471) As Smith stepped out of the disc jockey booth, he asked Johnson, who was entering the booth, to hand him his pistol. (R1471) Smith had placed a black revolver with brown handles on a shelf in the booth. (R1471-1472) Johnson played records for about 45 or 50 minutes. (R1472) Then, he and Smith went to a couple of other bars together. (R1473-1474) At one point, they discussed committing a robbery. (R1474) Both of them were broke. (R1474-1475) They discussed the possibility of robbing someone, a motel, the Hogley-Wogley Bar-B-Q and finally, a taxi cab. (R1474-1480)

Robbing a taxi cab was Johnson's idea. (R1518) After abandoning the idea of robbing the Hogley-Wogley, Johnson said Smith used the pay telephone in the restaurant to call a taxi. (R1480-1482) When the cab arrived, Johnson got into the front passenger's seat in order to determine if the driver had a weapon. (R1482,1518-1519) Smith got into the back seat behind the driver. (R1482-1483) The plan was for Smith to hold the

pistol to the driver's head, take his money and keys, and then run away. (R1482) The taxi cab arrived at the Hogley-Wogley Bar-B-Q, and the two men entered the cab as planned. (R1483) They directed the driver to stop on Fairfield Avenue. (R1483-1487) The driver got out of the car, Smith got out of the back seat on the driver's side and Johnson said he exited the front seat on the passenger's side which was nearest the curb. (R1487-1488) Johnson said he thought the plan had been abandoned, but he noticed Smith had his pistol in hand. (R1487) Johnson said he walked around the rear of the cab. (R1488) The driver was holding his hands up in the air and said he did not want any trouble. (R1489) Johnson asked Smith what was going on, and the taxi driver ran. (R1489) Johnson ran too. (R1489) When he realized Smith was not with him, Johnson turned and looked back. (R1489) He saw Smith, who had been running behind the cab driver, slow down, raise his pistol and fire. (R1489) Johnson continued to run. (R1490) Smith caught up with Johnson and said, "I had to shoot him." (R1490) The two men then parted company. (R1490) Johnson went to the Name of the Game Lounge until 1:45 a.m. when the owner of the lounge gave him a ride home. (R1490-1491)

The following day, Johnson related his version of the crime and his involvement to his mother, Maxine Nelson, and one of his mother's friends, Octavia Jones. (R1492-1494,1738-1753, 1755-1772) Over defense objections (R1741,1760), the two women were allowed to testify Johnson's statements to them regarding the crime. (R1741-1746,1760-1768)

An employee of the Hogley-Wogley Bar-B-Q testified at trial. (R1600-1636) David McGruder operated the restaurant from 6:00 p.m. on March 20, 1983, until 3:00 a.m. on March 21, 1983. (R1602) He remembers that two men came into the restaurant around midnight. (R1605) The shorter and darker complected of the two asked for change for a twenty dollar bill which McGruder did not have. (R1605-1607) The taller, lighter complected man waited outside. (R1606-1607) The shorter man left and returned twice to use the pay telephone. (R1608-1610) A Yellow Cab taxi arrived, stopped in front of the building, and McGruder saw both men enter the cab. (R1610-1611) The shorter man entered the back seat and the taller man entered the front. (R1611) Police officers talked with McGruder later that night and the following day officers examined the telephone for fingerprints. (R1611-1612) One identifiable latent print was recovered from the telephone receiver which matched Derrick Smith's prints. (R1413,1428,1451-1456) McGruder identified a photograph of Smith as the shorter man, but he could not identify Smith at trial. (R1613-1618)

Although the gun was not recovered, several witnesses testified to Smith's possession of a gun before the homicide. First, Smith's uncle, Roy Cone, testified that he had owned a blue steel, .38 caliber pistol with brown handles. (R1171) He purchased the gun and one box of bullets in 1972. (R1171) The gun had been fired only a few times, and Cone kept the gun and the remaining bullets in his bedroom. (R1171-1175) Cone noticed that his gun was missing sometime in March 1983. (R1179)

Derrick Smith had lived with his uncle and aunt for eight years. (R1169-1170) He moved out of their house two years before the homicide occurred. (R1170) Neither Smith nor the other children in the home were allowed in Cone's bedroom which was kept locked. (R1177-1178) Cone said Smith occasionally visited, but he did not remember any visits in March. (R1178) An FBI expert in neutron activation analysis testified that the elemental composition of the lead bullets from Cone's box of ammunition was consistent with the elemental composition of the lead fragment recovered from Songer's body. (R1183-1205) Frank Bellamy, Regina Mathis and Caroline Mathis testified that they saw Derrick Smith in possession of a black and brown pistol in the afternoon of March 20, 1983. (R1553-1591) He tried to sell the gun to Frank Bellamy for $50. (R1558-1559) Caroline Mathis saw Smith with the gun again about 10:00 p.m. on the same day. (R1583) Ernest Rouse, the disc jockey at the Name of the Game Lounge said he also saw Smith with a pistol that night. (R1594-1596)

Officer Charles San Marco of the St. Petersburg Police Department transported Derrick Smith from the Hillsborough County Jail, where he was incarcerated on other charges, to the St. Petersburg Police Department. (R1777-1780) Smith asked why he was being transported, but San Marco refused to discuss the charges in the car. (R1780,1793) At the police station, San Marco formally arrested Smith, advised him of his Miranda rights and asked Smith if he wanted to talk at that time. (R1784,1797) Smith's response was "No." (R1785,1797-1798)

Since Smith had earlier indicated a desire to talk, San Marco asked why he changed his mind. (R1785,1799) Smith replied, "I'm in a lot of trouble, and I want to talk to a lawyer." (R1785,1799) San Marco said, "Well, fine, that's up to you. I'm only here to get your side of the story established." (R1785,1799) Smith then changed his mind and gave a statement. (R1785,1799,1801-1804) At trial, Smith moved for a mistrial because San Marco commented on Smith's assertion of his right to remain silent and also objected to the admission of the statement. (R1798-1799,1779-1835) The court denied the motion for mistrial (R1799,1800-1801), and admitted the statement into evidence. (R1789-1791) Smith asserted his right to a lawyer on two more occasions during San Marco's interview and further statements were obtained. (R1804,1819-1821) The court suppressed one statement, and the prosecution decided not to use the second. (R1831-1832)

In his statement, Smith at first denied any knowledge about the homicide. (R1801) When confronted with some information San Marco had obtained from Johnson, Smith then admitted that he and Johnson had planned a robbery. (R1802) The two men had met earlier that evening at the Name of the Game Lounge. (R1802) They went to a couple of other bars together. (R1802) And, since neither had money, they discussed a robbery. (R1802) After exploring alternatives, they decided to rob a taxi cab. (R1802-1803) Smith said Johnson called the taxi on the pay telephone in the Hogley-Wogley Bar-B-Q. (R1803) Smith said he used that telephone once to call his girlfriend. (R1803) Smith

also admitted that he had a gun which he had been trying to sell that day. (R1803) Before the taxi arrived, Smith sold the gun to Derrick Johnson. (R1803) The taxi arrived. (R1803) Johnson got in the front seat. (R1804) Smith said he opened the back door and started to enter the cab. (R1804) However, he changed his mind, slammed the door, and walked across the street. (R1804)

Dina Watkins testified for the defense at trial. (R1959-1980) She said that around 9:30 p.m. or 10:00 p.m., on March 20, 1983, she was in Norm's Inn playing video games. (R1960) Norm's Inn is across the street from the Hogley-Wogley Bar-B-Q. (R1960) Derrick Smith was also there, and she smoked marijuana with him. (R1961-1962) Smith was at Norm's Inn when it closed at midnight, and he stood outside talking with Watkins until 12:35 a.m. when she left. (R1962)

Over defense objections, the State introduced evidence of a robbery Smith committed at noon on March 21, 1983, approximately twelve hours after the homicide. (R155-157,1103-1105, 1109-1128,1432-1442,1453-1456) Marcelle Debulle testified that he and his wife were Canadians on vacation in Pinellas County on March 21, 1983. (R1110-1112) Around noon Derrick Smith walked into their motel room with a bluish black pistol and took their money and jewelry. (R1113-1115,1120-1122) Smith also struck Debulle with his hand causing Debulle's glasses to produce a cut under his eye. (R1114-1115) An evidence technician with the St. Petersburg Police Department testified that he lifted a latent fingerprint from Debulle's briefcase. (R1432-

1442) Technician Frank Reinhart compared the print and concluded it matched those of Derrick Smith's. (R1453-1456)

During the jury instruction charge conference, the State requested and obtained instructions on first degree premeditated murder and first degree felony murder. (R1885-1887) Smith asked for third degree felony murder as a lesser included offense of first degree felony murder. (R1892-1895) The court denied the request. (R1892-1895)

The State presented some additional evidence at the penalty phase of the trial. (R2131-2142) First, a photograph of Marcelle Debulle, the robbery victim, depicting the cut under his eye was introduced. (R2131-2132) Second, judgments for Smith's prior convictions for robbery, grant theft and obstructing an officer without violence were admitted. (R2133-2142) The State presented no further evidence in aggravation.

Derrick Smith presented three witnesses to testify in mitigation. (R2143-2161) His great aunt, Louis Cone, said that Derrick and his younger brothers and sisters came to live with her when Derrick was 11 years-old. (R2145) Derrick's father died when he was very young and his mother died when he was eleven. (R2145) Derrick was good to help around the house and treated his brothers and sisters well. (R2145-2146) Because of the number of children in the house, the Cones asked Derrick to leave when he was eighteen. (R2146-2147) He had not finished high school. (R2147) He had no marketable skills or training. (R2147) He did obtain some work washing dishes and cleaning at a cafeteria. (R2147-2148) When he was working, he

would occasionally bring money to his brothers and sisters who were still at home. (R2148)

The second witness to testify in mitigation was Thelma Crawford. (R2149-2153) Derrick Smith and her son were classmates. (R2150) Derrick would occasionally visit in her home and she remembered him as polite. (R2151) She never observed any examples of violence. (R2152)

Finally, Derrick Smith's minister, B.O. Walker, testified. (R2154-2160) He testified that Derrick was a member of his church. (R2155) Derrick's aunt was also an active member (R2156) and was a stabilizing influence. (R2157) Until highschool age, Derrick was active in the church and sang in the choir. (R2156) Walker believes that at that age peer pressure caused Derrick to change and he stopped coming to church. (R2157)

Smith also testified. (R2161-2167) He said he began living with his aunt and uncle in 1974. (R2162) Furthermore, after he left, he tried to help his brothers and sisters financially when he could. (R2162) He admitted robbing Marcelle Dubelle and his wife. (R2162) And, he admitted slapping Debulle. (R2162) Finally, he said he pleaded guilty to obstructing justice in 1981 when he gave an incorrect name upon his arrest for auto theft. (R2162-2164)

The trial court refused to instruct the jury on four of the mitigating circumstances listed in Section 921.141, Florida Statutes. (R2117-2122) Counsel requested instructions on age, impaired capacity, mental or emotional disturbance,

and minor participation in a homicide committed by another. (R2117-2122) The court denied the requests. (R2117-2122)

At the close of the penalty phase instructions, the court deviated from the standard jury instructions. Instead of advising the jury that a vote of 6 or more was sufficient for a life recommendation, the court stated that a majority vote was necessary. (R2183-2185)

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN DENYING SMITH'S MOTION FOR MISTRIAL WHEN OFFICER SAN MARCO COMMENTED ON SMITH'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Officer Charles San Marco testified that he arrested Derrick Smith on April 8, 1984, and transported him to the St. Petersburg Police Department. (R1777-1781) Once inside an interview room, San Marco advised Smith of his Miranda rights from a written form. (R1793-1794) According to San Marco, Smith had earlier indicated a desire to talk to the officer. (R1799) San Marco related to the jury the questions asked on the form and Smith's responses. (R1793-1798) At one point, his testimony proceeded as follows:

> Q. Next question, having these rights in mind, do you wish to talk to us now. Did you ask him that question?
>
> A. Yes, ma'am, I did.
>
> Q. And what was his initial response to that question?
>
> A. No.
>
> Q. All right. Did you at that time write that response in on this form?
>
> A. Yes, ma'am, I did.
>
> Q. What occurred at that time?
>
> A. I said to him, I says, what's the problem. I said when you first came in here --

(R1797-1798) At that point, defense counsel moved for a mistrial because the officer had commented on Smith's exercise of

his right to remain silent. (R1798-1799) The trial court denied the motion on the ground that Smith later changed his mind and gave a statement to the officer. (R1799,1800-1801)

The law is well established that a witness cannot comment on a defendant's exercise of his right to remain silent. E.g., Clark v. State, 363 So.2d 331 (Fla.1978); Shannon v. State, 335 So.2d 5 (Fla.1976); Bennett v. State, 316 So.2d 41 (Fla.1975). When properly preserved for appeal, as Smith did in this case via a motion for mistrial, any such comment constitutes reversible error; the harmless error rule does not apply. Clark v. State, 363 So.2d at 335. Furthermore, the fact that a defendant later changes his mind and gives a statement does not render a comment on his initial silence any less objectionable. Roban v. State, 384 So.2d 683,685 (Fla.4th DCA 1980); accord, Donovan v. State, 417 So.2d 674 (Fla.1982); In Re M.E.G., 353 So.2d 594,595-596 (Fla.4th DCA 1977).

The trial court should have granted Smith's motion for mistrial. Smith urges this Court to reverse his case for a new trial.

ISSUE II.

THE TRIAL COURT ERRED IN ADMITTING STATEMENTS SMITH MADE PURSUANT TO CUSTODIAL INTERROGATION AND AFTER HE ASSERTED HIS RIGHT TO COUNSEL, SINCE THE STATE FAILED TO DEMONSTRATE THAT SMITH WAIVED HIS RIGHT TO COUNSEL BEFORE GIVING THE STATEMENTS OR THAT THE STATEMENTS WERE VOLUNTARY.

On April 8, 1983, Officer Charles San Marco of the St. Petersburg Police Department transported Derrick Smith from the Hillsborough County Jail to Pinellas County. (R1777-1780) San Marco possessed a warrant for Smith's arrest for the murder charge. (R1778) However, he did not formally arrest Smith until they reached the St. Petersburg Police Department. (R1780) Furthermore, neither before nor during the drive did San Marco advise Smith of his rights under Miranda. (R1780) San Marco did not question Smith at this time. (R1780,1792) Smith asked San Marco why he was picked up and if the reason concerned the taxi driver. (R1780,1792-1793) San Marco refused to respond, stating they could discuss the matter when they arrived at the police department. (R1780,1793)

Once at the police department inside an interview room, San Marco formally arrested Derrick Smith and advised him of his rights. (R1781,1793-1794) Smith said that he understood his rights. (R1783-1784,1794-1797) San Marco then asked Smith if he wanted to talk to the officers at that time. (R1784, 1797) Smith said "No." (R1785,1797-1798) San Marco asked Smith if there was a problem since he had earlier indicated a desire to talk. (R1785,1799) Smith replied, "I'm in a lot of

trouble, and I want to talk to a lawyer." (R1785,1799) San Marco said, "[W]ell, fine, that's up to you. I'm only here to get your side of the story established." (R1785,1799) According to San Marco, Smith then changed his mind and agreed to talk. (R1785,1799) A statement was obtained which was introduced into evidence at trial. (R1801-1804)

Smith's statement was obtained in violation of his constitutional rights. Amends. V, VI, XIV, U.S.Const.; Art. I, §9, 16, Fla.Const. The State failed to establish that Smith, who had asserted his right to counsel, later waived counsel before responding to custodial interrogation or that Smith's statement was freely and voluntarily made without any taint of undue influence or coercive tactics on the part of law enforcement.

In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court reaffirmed and clarified the strict standard announced in Miranda v. Arizona, 384 U.S. 436 (1966) and held that a valid waiver of counsel, after a request for one during custodial interrogation, cannot be demonstrated by merely showing that the defendant voluntarily responded to further police-initiated interrogation. Accord, e.g., Drake v. State, 441 So.2d 1079 (Fla.1983). The Edwards court reiterated and emphasized the Miranda standards as follows:

> First, the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but

> constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. [Citations omitted]
>
> Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North Carolina v. Butler, supra, at 372-376, 60 L.Ed.2d 286, 99 S.Ct. 1755 the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Edwards, 451 U.S. at 482,484-485.

Smith's statement should have been suppressed on the basis of Edwards. Upon being advised of his rights, Smith unequivocally asked for a lawyer. (R1785,1797-1799) Officer San Marco's initial reaction was to ask Smith why he refused to talk since he had earlier expressed a willingness to talk. (R1785,1799) Smith's reply was another clear reaffirmation of his desire for a lawyer: "I'm in a lot of trouble, and I want to talk to a lawyer." (R1785,1799) San Marco should have

honored Smith's request at that time.[2] Instead, he continued his interrogation in a subtle form. (R1785,1799) He said "Well, fine, that's up to you. I'm only here to get your side of the story established." (R1785,1799) San Marco's statement was improper interrogation designed to elicit information about the crime in violation of Smith's constitutional rights.[3]

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[2] Through this point, San Marco's actions could be characterized as being aimed at clarifying Smith's assertion of his right to remain silent and request for a lawyer. See, Jennings v. State, 413 So.2d 24 (Fla.1982).

[3] Smith reasserted his desire for counsel on two more occasions after this interrogation began. (R1804,1819-1821) After each of those, San Marco again employed subtle interrogation methods to coerce Smith into changing his mind. (R1804-1805,1819-1831) These latter incidents were more blatantly improper and the trial court suppressed one of the statements produced, and the prosecutor decided not to use the second. (R1831-1832) Although not directly in issue, a review of San Marco's subtle interrogation techniques in those instances reflects his motives in the instance in issue on this appeal.

In the first of those two instances, San Marco made the following statement after he stopped formal questioning when Smith asked for a lawyer. The statement was clearly designed to prompt Smith to reinitiate the discussion:

> Q. All right. Now, at that time did you do any additional questioning of Mr. Smith pertaining to the robbery and the murder of Mr. Songer?
>
> A. I didn't do any more. He kept talking with us. I says I wasn't asking him any questions. I kept telling him, I says, you know, someplace out there is a gun, and says, you know, it sure would be nice if we can recover that gun because one of these days some little kid is going to pick up that and is going to shoot somebody or maybe shoot himself.

(R1805)

On the final occasion, after Smith's third request for a lawyer, San Marco reviewed the facts given to him with Smith prompting admissions and some changes. (R1828-1831) Again, another form of impermissible, subtle interrogation. E.g., Jones v. State, 346 So.2d 639 (Fla.2d DCA 1977).

Brewer v. Williams, 430 U.S. 387 (1977); Jones v. State, 346 So.2d 639 (Fla.2d DCA 1977); Beuhler v. State, 381 So.2d 746 (Fla.4th DCA 1980). San Marco reinitiated the interrogation after Smith's assertion of his rights, and Miranda and Edwards compelled the suppression of the subsequently obtained statement.

In addition to failing to establish a valid waiver of counsel, the State also failed to demonstrate that the statement was voluntary. Officer San Marco's statement of his purpose--"to get [Smith's] side of the story established" (R1785, 1799) was misleading. Its import was that if Smith did not tell his story, his version would never be known. The statement lead Smith to believe that talking to San Marco would lead to beneficial results. See, e.g., Brady v. United States, 397 U.S. 742,754 (1970); Bradley v. State, 356 So.2d 849 (Fla.4th DCA 1978); Fullard v. State, 352 So.2d 1271 (Fla.1st DCA 1977); Jarriel v. State, 317 So.2d 141 (Fla.4th DCA 1975); M.D.B. v. State, 311 So.2d 399 (Fla.4th DCA 1975); State v. Chorpenning, 294 So.2d 54,56 (Fla.2d DCA 1974).

The trial court erred in admitting Smith's statement which was obtained in violation of his constitutional rights. Amends. V, VI, XIV, U.S.Const.; Art. I §9, 16, Fla.Const. This Court must reverse this case for a new trial.

ISSUE III.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE SMITH'S PROPENSITY TO COMMIT CRIMES.

Over defense objections (R155-157,1103-1105), the trial court allowed the State to introduce evidence of an armed robbery Smith committed approximately twelve hours after the homicide in this case. (R1109-1128) In fact, the first witness to testify in this trial was the victim of that robbery. (R1109-1128) Marcelle Debulle testified that he and his wife, who were Canadian residents, were vacationing in Pinellas County. (R1110-1112) Around noon on March 21, 1983, a man, later identified as Derrick Smith, walked into their motel room through the unlocked door, pulled a bluish black pistol and demanded money. (R1113) Smith also struck Debulle with his fist causing Debulle's glasses to produce a small cut under his eye. (R1114-1115) In addition to cash and traveler's checks, Smith took rings, jewelry and a watch. (R1115,1120-1122) Debulle, who is not familiar with firearms, said the weapon appeared to be similar in size to the ones carried by Canadian police officers. (R1118-1119) He did not notice the handle of this pistol or its color. (R1126)

Evidence of the robbery proved nothing in this case but Smith's propensity to commit crimes. Its admission violated Smith's rights to due process and a fair trial. Amend. V, VI, XIV, U.S.Const.; Art.I, §§9,16, Fla.Const.; §90.404(2)(a), Fla.Stat.; Drake v. State, 400 So.2d 1217 (Fla.1981); Williams

v. State, 110 So.2d 654 (Fla.1959). Aside from both cases involving an armed robbery or attempted armed robbery, there were no similarities between the two crimes. One was a robbery of a couple in a motel by a sole perpetrator, while the other was the attempted robbery of a taxi driver by two perpetrators. One occurred at midday, while the other occurred at midnight. In both a gun was carried, but in only one was the gun fired. The circumstances of each were completely different; no common pattern or similarity exists. And, certainly there is no unique factor present in both so as to demonstrate the perpetrator's "signature" or "fingerprint." See, Drake v. State, 400 So.2d at 1219. The evidence was irrelevant to prove identity or common plan of criminality.

The State argued that the robbery was relevant to show the entire context of the criminal conduct. (R1103-1110) Relying on Smith v. State, 365 So.2d 704 (Fla.1978) and Ruffin v. State, 397 So.2d 277 (Fla.1981), the State urged that the motel robbery was part of the continued course of criminal activity and was, therefore, relevant. That position is untenable and is not supported by Smith or Ruffin. In this case, the attempted robbery and homicide of the taxi cab driver was distinctly separate from the later robbery at the motel. The State's evidence showed that Derrick Smith and Derrick Johnson planned the robbery of the taxi and acted in concert in attempting its execution. When the plan went awry, Smith and Johnson parted company. The criminal episode and the relationship of the perpetrators ended. The motel robbery was

committed several hours later by Smith acting alone. It was a distinct and unrelated incident. A break in time and a change in participants had occurred.

In Smith and Ruffin, this Court approved the admission of evidence of collateral homicides which occurred on the same day as the one being tried. However, in those cases, unlike the circumstances of the instant case, the crimes were connected by time sequence and common participants; the crimes occurred in a prolonged, unbroken criminal episode. Smith v. State, 365 So.2d at 706-707; Ruffin v. State, 397 So.2d at 279-281. Such is not the situation in this case. The motel robbery was distinct in time, place, method and participants.

The State also argued that the motel robbery evidence was admissible to show Smith in possession of the firearm after the homicide. (R1104-1105) This theory of relevancy also fails. The pistol seen in Smith's possession before the homicide was described as black with brown handles. (R1558-1559,1582,1595) During the motel robbery Smith was seen with a bluish black pistol. (R1117,1126) The gun was never identified as being the same one. This is unlike the circumstances in Ruffin v. State, where the weapon used in the first murder was actually recovered at the scene of the second. Ruffin v. State, 397 So.2d at 279.

Evidence of th collateral murder should not have been admitted in this trial. Derrick Smith asks this Court to reverse his conviction for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR CONSISTENT STATEMENTS MADE BY KEY STATE WITNESS AND CO-DEFENDANT DERRICK JOHNSON.

Derrick Johnson testified for the State at trial as a key prosecution witness. (R1466-1552) He had also been charged with the murder and pleaded guilty to second degree murder. (R1505-1506) Johnson testified that he and Derrick Smith planned a robbery of a taxi cab driver, that Smith had the firearm and that Smith shot the taxi driver. (R1477-1490) Over defense objections (R1741,1760), Johnson's mother, Maxine Nelson, and a friend of his mother's, Octavia Jones, were allowed to testify that Johnson related a consistent version of the crime to them the day after the night of the homicide. (R1755-1765,1738-1746)

Evidence of Johnson's prior consistent statements was improperly admitted warranting a reversal of this case for a new trial. §90.801(2)(b), Fla.Stat.; Van Gallon v. State, 50 So.2d 882 (Fla.1951); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Brown v. State, 344 So.2d 641 (Fla.2d DCA 1977); Roti v. State, 334 So.2d 146 (Fla.2d DCA 1976). The State attempted to justify the evidence of prior consistent statements under the exception allowing its use "to rebut an express or implied charge against [the declarant] of improper influence, motive, or recent fabrication." §90.801(2)(b), Fla.Stat. However, this exception was not applicable because the prior consistent State merits were not made before the event prompting

the improper influence, motive or fabrication. E.g., McElveen, 415 So.2d at 748. Johnson's motive to fabricate was his participation in the homicide. Consequently, his statements made to his mother and Octavia Jones the next day occurred after, not before, this motivating event.

The State was allowed to improperly corroborate Johnson's testimony via prior consistent statements. Johnson's credibility was a critical issue in this case, and this error was not harmless. Smith urges this Court to reverse this case for a new trial.

ISSUE V.

THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S CROSS EXAMINATION OF PROSECUTION WITNESS AND CO-DEFENDANT DERRICK JOHNSON BY INCORRECTLY RULING COUNSEL'S QUESTIONS TO BE BEYOND THE SCOPE OF DIRECT EXAMINATION.

On recross examination of State witness and Smith's co-defendant in this case, Derrick Johnson, defense counsel asked the following question:

> Q. Are you telling us here in this courtroom today under oath that you have received no benefits whatsoever for testifying in this case?

(R1540) The prosecutor objected to the question as beyond the scope of direct examination. (R1540) Agreeing with the prosecutor, the court sustained the objection. (R1540) Defense counsel argued that on redirect the State had asked "if [Johnson] received any benefit or did anyone promise him anything" (R1540) which would have justified defense counsel's question. (R1540-1541) The prosecutor disagreed stating that the question on direct had been limited to any promises of benefits from Detective San Marco. (R1541) The court agreed with the prosecutor and prohibited defense counsel's question. (R1541)

The trial court erred in sustaining the State's objection and restricting the cross examination of this key prosecution witness. Defense counsel's question was within scope of redirect since, contrary to the prosecutor's assertion when arguing the objection (R1540-1541), questions on redirect were not limited to promises from Detective San Marco:

Q. Did the Detective San Marco promise you anything at all to get you to make that statement?

A. No, he didn't.

* * * *

Q. Were you promised anything to elicit your complete confession on April 1st?

A. No, I wasn't. In fact, from my confession was what prompted them to charge me with first degree murder.
(Emphasis added.)

(R1537)

In improperly restricting cross examination, the trial court deprived Smith of his right to confront a key prosecution witnesses in his case. Amend. VI, XIV U.S.Const.; Art.I §16, Fla.Const.; Pointer v. Texas, 380 U.S. 400 (1965); Coxwell v. State, 361 So.2d 148 (Fla.1978); Coco v. State, 62 So.2d 892 (Fla.1953). What could be more prejudicial than having the trial court prevent defense counsel from asking a co-defendant turned State witness if he had received promises of beneficial treatment for his testimony? E.g., Morrell v. State, 297 So.2d 579 (Fla.1st DCA 1974). Such a line of inquiry is essential to a fair trial and always an appropriate subject for cross examination.

The trial court's application of Section 90.612(2), Florida Statutes requiring cross to be limited to the scope of direct was too strict. It infringed upon Smith's constitutional right to confront his accuser, and this Court must reverse this case for a new trial.

ISSUE VI.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY, PURSUANT TO SMITH'S REQUEST, ON THIRD DEGREE FELONY MURDER AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE FELONY MURDER.

The indictment in this case charged Smith with first degree premeditated murder. (R16-17) On this charge, the State elected to proceed on both premeditation and felony murder as methods of proving the crime. (R1885-1887) Jury instructions on both alternate theories of prosecution were correctly given. (R2079-2081) See, e.g., Knight v. State, 338 So.2d 201 (Fla. 1976). However, the court refused to instruct the jury on third degree felony murder as a lesser included offense of first degree felony murder. (R1892-1895) This Court must reverse this case for a new trial. See, Lomax v. State, 345 So.2d 719 (Fla.1977).

Third degree felony murder is defind as:

> (4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:
> (a) Trafficking offense prohibited by s.893.135(1),
> (b) Arson,
> (c) Sexual battery,
> (d) Robbery,
> (e) Burglary,
> (f) Kidnapping,
> (g) Escape,
> (h) Aircraft piracy,
> (i) Unlawful throwing, placing, or discharging or a destructive device or bomb, or
> (j) Unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven

> to be the proximate cause of the death of the user,
>
> is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

§782.04(4), Fla.Stat. The evidence in this case supported a third degree felony murder. There was evidence of an attempted robbery of the taxi cab driver of his money which was over $100. (R1333-1337) That same evidence necessarily supported the crime of grand theft. See §812.014, Fla.Stat.; State v. Sykes, 434 So.2d 325,327 (Fla.1983). Grand theft is not one of the enumerated felonies supporting a first degree felony murder charge §782.04(4), Fla.Stat. Consequently, the jury could have concluded, if given the appropriate instruction, that the homicide occurred during a grand theft--a third degree murder.

Refusing to instruct upon third degree felony murder was not harmless error. Under the facts of this case, third degree felony murder was the next lesser included offense of first degree felony murder. Second degree felony murder did not apply because of the requirement that an innocent party actually kill the victim. §782.04(3), Fla.Stat. Therefore, third degree felony murder is the next lesser included offense of first degree felony murder. The two steps removed rule of Abreau v. State, 363 So.2d 1063 (Fla.1978) does not apply. Since the State requested and obtained instructions on first degree felony murder, Smith was entitled to instructions on the lesser felony murder offenses supported by the evidence in this case.

ISSUE VII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A MAJORITY VOTE OF SEVEN OR MORE WAS REQUIRED TO RETURN A RECOMMENDATION OF LIFE IMPRISONMENT.

At the close of the penalty phase jury instructions, the court instructed as follows:

> ...In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determining of whether the majority of you render a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings....
>
> * * * *
>
> On the other hand, if by a majority of the jury your determination is that Derrick Tyrone Smith should not be sentenced to death, your advisory sentence will be:
>
> The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Derrick Tyrone Smith without possibility of parole for twenty-five years.
>
> You will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court. [Emphasis added]

(R2183-2185) This instruction improperly directed the jury that a life recommendation could be returned only upon a vote of seven or more. A vote of six or more is sufficient. E.g., Rose v. State, 425 So.2d 521 (Fla.1982). The jury was mislead on an essential ingredient of Florida's death penalty sentencing law. Smith's sentence of death is, therefore, unconstitutionally

imposed. Amends. V, VI, VIII, XIV, U.S.Const. He urges this Court to vacate his sentence.

The trial judge deviated from the standard jury instructions on the issue of the vote required for a life recommendation. (R2183-2185) Fla.Std.Jury Instr. (Crim.) Penalty Proceedings--Capital Cases at pages 78-82. Although the standard instruction is ambiguous and has been the subject of litigation, Harich v. State, 437 So.2d 1082,1086 (Fla.1983), it, in at least one place, told the jury that a vote of six was adequate for a life recommendation:

> On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:
>
> > The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole for 25 years.

Fla.Std.Jury Instr. at 82. By ignoring the standard instruction, the court clearly instructed the jury that a vote of seven or more was required; the ambiguity was resolved the wrong way. Harich v. State, 437 So.2d 1082 (Fla.1983); Rose v. State, 425 So.2d 521 (Fla.1982).

A written copy of the penalty phase jury instructions apparently used by the judge to instruct the jury appears in the record. (R263-266) They were not submitted to the jury. (R2185-2186) They appear to comport with the standard jury instructions, and at one point refer to "six or more votes" being sufficient for a life recommendation. (R266) Although the

record is not clear, the trial court must have read the "six" as a typographical error and "corrected" it to read "by a majority of the jury." (R2184) The colloquy between the court and counsel following the instructions support this conclusion:

> THE COURT: Any error in giving that?
>
> MR. DONNELLY: Excuse me?
>
> THE COURT: Any error?
>
> MR. DONNELLY: No.
>
> THE COURT: There is a typographical.
>
> MR. DONELLY: You did correct it.

(R2185)

With a jury vote of 7 to 5 this error is not harmless. (R267,2187) A life recommendation could have easily changed the outcome of the sentencing process. Only two aggravating circumstances were found. (R333-335) Neither of those--during the commission of an attempted robbery and a previous conviction for an unrelated robbery--reflect on Smith's past character. The attempted robbery was part of the homicide episode (R334-335) and the unrelated robbery occurred after the homicide. (R333-334) The trial court found as a mitigating circumstance that Smith had no significant history of prior criminal activity. (R336) A life recommendation factored into these findings could have easily tipped the balance in favor of a life sentence. See, e.g., Washington v. State, 432 So.2d 44 (Fla.1983); McCampbell v. State, 421 So.2d 1072 (Fla.1982); Tedder v. State, 322 So.2d 908 (Fla.1975). This is particularly true if other mitigating circumstances which should have been considered by

the sentencing judge and jury are also included. (See, Issue VIII, infra.) An accurate instruction on the law could have changed the jury's recommendation which would have changed the sentence.

Smith is aware that counsel failed to object to this erroneous instruction of law. (R2185) However, such an error in the penalty phase of a capital case is fundamental. What can be more important than advising the jury of the correct vote required for a life recommendation?[4/] Because death is a uniquely different sentence, errors in its application cannot go uncorrected because the contemporaneous objection standard was not strictly followed. In fact, sentencing errors in any felony case are deemed fundamental. See, State v. Rhoden, 448 So.2d 1013,1016 (Fla.1984). This Court has reached the merits of claims in death penalty cases in the interest of justice even though appropriate objections were not made. E.g., Jacobs v. State, 396 So.2d 713,717-718 (Fla.1981); Goode v. State, 365 So.2d 381,384 (Fla.1978); LeDuc v. State, 365 So.2d 149,150 (Fla.1978); State v. Dixon, 283 So.2d 1,10 (Fla.1973). This error must be addressed. As discussed above, this error is not

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[4/] This case is not comparable to those cases where the ambiguous standard jury instruction was given and asserted as fundamental error on appeal. Rembert v. State, 445 So.2d 337,340 (Fla.1984); Harich v. State, 437 So.2d 1082,1086 (Fla.1983). In this case, the court deviated from the standard and clearly instructed the jury that only a vote of seven or more would suffice for a life recommendation. Such an error requires no objection to be preserved for appeal. It strikes the foundation of the penalty proceedings and must be corrected.

harmless. It taints the propriety of the death sentence in this case. Smith urges this Court to reverse his sentence.

ISSUE VIII.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SEVERAL STATUTORY MITIGATING CIRCUMSTANCES.

Defense counsel requested jury instructions on four mitigating circumstances enumerated in Section 921.141(6), Florida Statutes which the trial court refused to give. (R2117-2122) First was the circumstance provided for in subsection (6)(b) that the defendant was under the influence of an extreme mental or emotional disturbance (R2117-2118); second was the one provided for in subsection (6)(d) that the defendant was an accomplice in the homicide and his participation was relatively minor (R2118-2120); the third, provided for in subsection (6)(f), was that the defendant suffered from an impaired capacity at the time of the crime (R2121); and the fourth, provided for in subsection (6)(g), was the defendant's age at the time of the crime. (R2121-2122) Each request was denied on the basis that the evidence did not support the instruction. (R2117-2122) Denial of these requested instructions rendered Smith's death sentence unconstitutional. Amends. V, VI, VIII, XIV, U.S.Const.

Initially, the trial court should have instructed the jury on all the mitigating circumstances; failure to do so violates due process. Cooper v. State, 336 So.2d 1133 (Fla. 1976). Limiting instructions on mitigating circumstances to those which the trial court deems appropriate distorts the death penalty sentencing scheme:

> If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating cir-

> cumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Cooper, 336 So.2d at 1140. The sentencing scheme was distorted in this case, and Smith's death sentence should be reversed.

Apparently, the trial judge was attempting to follow the Florida Standard Jury Instructions when he refused to instruct on the three mitigating circumstances requested. Notes to the trial judges in the standard instructions directs that instructions should be given only upon the aggravating and mitigating circumstances for which there is evidence. Before the aggravating circumstances instructions the following note appears:

> Give only those aggravating circumstances for which evidence has been presented.

Fla.Std.Jury Instr. (Crim.) Penalty Proceedings--Capital Cases at page 78. A similar note appears before the instructions on mitigating circumstances:

> Give only those mitigating circumstances for which evidence has been presented.

Fla.Std.Jury Inst. at 80. However, the trial court failed to properly follow these directions. Evidence existed on each of the four mitigating circumstances for which instructions were denied. The court improperly usurped the jury's function by denying these instructions. It was not within the trial judge's authority to instruct only upon those mitigating circumstances which he believed established. Just as a defendant has the

right to a theory of defense instruction which is supported by any evidence, e.g., Bryant v. State, 412 So.2d 347 (Fla.1982), he is also entitled to an instruction on mitigating circumstances supported by any evidence. A trial judge cannot substitute his opinion for that of the jury and deprive the defendant of the jury's consideration of the issue by denying requested instructions. As will be discussed below, each of the requested instructions were supported by the evidence.

Age

Derrick Smith was 20 years old at the time of the crime. (R2122) The trial judge concluded as a matter of law that Smith's age did not qualify for this mitigating circumstance and did not even justify an instruction to the jury. (R2121-2122) His conclusion was premised on the erroneous assumption that this circumstance only applied to someone who was not of legal adult age. (R2122) This conclusion was wrong. As this Court said in Peek v. State, 395 So.2d 492 (Fla.1981), there is no per se rule as to when age is mitigating. Furthermore, old age as well as youth can be mitigating. Agan v. State, 445 So.2d 326,328 (Fla.1983). Age 20 has been deemed a mitigating factor in other cases. E.g., Lightbourne v. State, 438 So.2d 380,390 (Fla.1983); Foster v. State, 436 So.2d 56,58 (Fla.1983); Hitchcock v. State, 413 So.2d 741,747 (Fla.1982); Adams v. State, 412 So.2d 850,854 (Fla.1982).

Although the trial judge was not bound to find Smith's age a mitigating factor, see, Mason v. State, 438 So.2d 374 (Fla.1983), he was not entitled to remove this circumstance

from the jury's consideration. With a seven to five vote on the sentencing recommendation, the failure to instruct on age as a mitigating factor cannot be deemed harmless. Smith urges this Court to reverse his sentence.

Impaired Capacity And Under The Influence Of Emotional Disturbance

Impairment of a defendant's mental capacity due to the use of drugs or alcohol can be considered a mitigating circumstance under Section 921.141(6)(b) and (f), Florida Statutes. See, e.g., Stone v. State, 378 So.2d 765 (Fla.1979); Kampff v. State, 371 So.2d 1007 (Fla.1979). There was some evidence that Smith consumed alcohol and marijuana on the night of the homicide. (R1960-1965) While the trial court was not compelled to find this mitigating circumstance, Smith was, nevertheless, entitled to a jury instruction on that factor. It is not within the trial court's power to substitute its view on the merits of the issue for the jury and then to deprive the defendant of the jury's decision on the matter by denying appropriate instructions. Smith asks this Court to vacate his death sentence which has been tainted by the omission of proper instructions to the jury.

Minor Participation

Finally, the trial court should have instructed the jury on the mitigating circumstance that the defendant was an accomplice in the crime and his participation was relatively minor. §921.141(6)(d), Fla.Stat. The jury could have believed Smith's version of the events that he helped plan the robbery

but did not participate. (R1801-1804) Alternatively, the jury might have concluded that Smith was present during the attempted robbery but was not the triggerman. Evidence supported the instruction. See, Hawkins v. State, 436 So.2d 44 (Fla.1983). Again, the trial court was not entitled to weigh the evidence, reach a conclusion on the merits adverse to Smith and then deny a jury instruction. This usurped Smith's right to a jury recommendation guided by instructions covering every aspect of the case; the judge prevented a jury's decision on the issue.

CONCLUSION

Upon the reasons and authorities expressed in Issues I through VI of this brief, Derrick Tyrone Smith asks this Court to reverse his case for a new trial. For the reasons presented in Issues VII and VIII, Smith asks, alternatively, that his death sentence be reduced to life.

Respectfully submitted,

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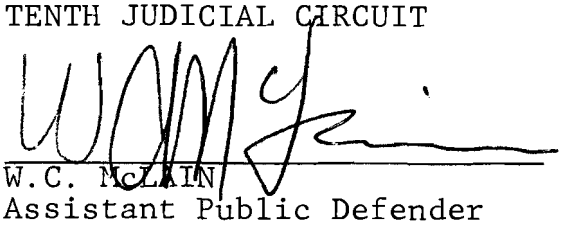
TENTH JUDICIAL CIRCUIT

BY: 
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