IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS,

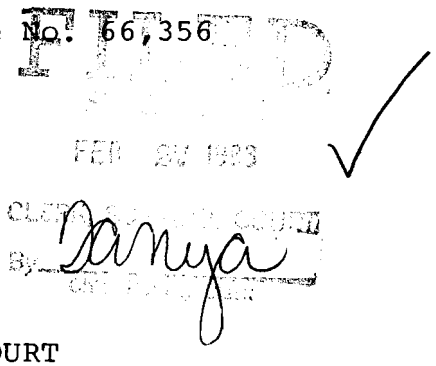
Appellant,

vs

STATE OF FLORIDA,

Appellee.

Case No. 66,356



APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE

On December 19, 1983, the Appellant, Jerry Layne Rogers, was indicted for the first degree murder of David Eugene Smith. (R1) An amended indictment was filed February 22, 1984. (R41) Rogers was arrested for this offense on January 5, 1984, with his first appearance the next day. (R4-5) Pursuant to Appellant's request, the trial court eventually allowed Rogers to proceed pro se with the assistance of two co-counsel unaffiliated with the Office of the Public Defender. (R12,35,39,42)

The state filed a notice of intent to use similar fact evidence on February 22, 1984. (R43) Appellant filed a motion in limine to exclude the similar fact evidence. (R765-767) On April 10, 1984, Appellant filed a motion to dismiss due to pre-arrest delay. (R592-595) On April 19, 1984, Appellant filed a motion to suppress certain physical evidence seized as a result of an unlawful search and seizure. (R636-640) This motion was supplemented and amended. (R1284-1285,4986-4988)

The state filed a written response to all of these motions. (R1767-1773) On July 19, 1984, the trial court rendered an order on the pending motions filed by the Appellant. (R2985-2995) The motion for discharge due to pre-arrest delay, the motion to suppress evidence based on an illegal search and seizure, and the motion in limine relating to similar fact evidence were all denied. (R2985-2995)

Appellant also filed a motion to suppress the in-court identifications of the victims scheduled to testify for the state

regarding similar fact offenses. (R3049-3058) This motion was based on the contention that the witnesses had an insufficient time period to adequately observe the perpretrators as well as the contention that the previous identifications of those witnesses were impermissibly tainted. (R3049-3058) A supplement to this motion was filed on August 8, 1984. (R3096) The trial court denied this motion and allowed the identification testimony. (R6729-6732,6744,6796-6799,6810-6833)

Appellant filed a motion for protective order relating to witnesses and possible tampering by the Office of the State Attorney. (R574) Appellant also filed a motion to require and authorize defense counsel or defendant to be present at any photographic lineup. (R3342-3343) The court granted said motion. (R3498) As a result of a violation of this order, Appellant filed a motion to suppress the in-court identification and pre-trial identification by Ketsey Day Supinger. (R3863-3866) After a hearing and following argument, the trial court rendered an order which precluded the state from initially offering evidence of Mrs. Supinger's pre-trial identification, but denied Appellant's request to exclude her in-court identification of the Appellant. (R5646-5754,6162-6178,6227)

On May 10, 1984, Appellant filed a motion to compel the state to furnish the names, addresses and telephone numbers of all the grand jurors. (R758-760) On the morning of trial, the state did eventually provide the names of the grand jurors. (R5755-5757) Appellant then filed a motion to dismiss the indictment based upon the relationship between a member of the

grand jury and the victim of the crime. (R6140-6146) This motion was denied by the trial court.

On May 10, 1984, Appellant filed a motion for the appointment of an expert witness, (relating to identification) and to allow that testimony at trial. (R761-764) The state filed a motion in limine to preclude that testimony. (R3693) Appellant's motion was granted in part and denied in part. (R7699-7725)

A jury was empaneled and death-qualified during voir dire. (R5768-6143)

The Appellant was precluded from presenting evidence several times throughout the trial. (R7373,7438-7448,7542-7549, 8055-8056)

At one point the trial court interrupted the Appellant and refused to allow Rogers to state the grounds for his objection. (R7898-7905)

On cross-examination of a defense witness, the state was allowed, over objection, to attempt to impeach the witness with accusations of prior bad acts. (R7252-7254)

On two occasions, the trial court admitted evidence over Appellant's timely and specific hearsay objection. (R7211-7212,7956-7958)

At the conclusion of the State's case, Appellant moved for a judgment of acquittal. This motion was denied. Appellant also renewed his previous motions which were also denied. (R6946-6950) Following extensive evidence and testimony presented by the defense, the state presented evidence in

rebuttal. (R7857-8028) This was followed by more evidence from the defense. (R8032-8066) At the conclusion of all of the evidence, Appellant renewed all of his previous motions which were denied. (R8075-8077)

The Appellant elected to waive all possible lesser included offenses so that the jury was given a choice of guilty of first degree murder or not guilty. (R8080-8081) At the charge conference, the Appellant took exception to the standard jury instruction on accomplices. (R8081-8082) A special jury instruction requested by the Appellant was denied. (R8082)

At the conclusion of the trial court's instruction to the jury, Appellant pointed out that it was mandatory to supply written instructions in capital cases. The trial court retorted that such a procedure was discretionary and the court refused to do so in the instant case. (R8246-8247) The jury returned with a verdict of guilty as charged. (R8252)

A penalty phase was conducted in order to determine a jury recommendation on sentencing. (R8257-8343) The defense objected to much of the evidence involving previous convictions. These objections were overruled.

Appellant presented evidence in mitigation consisting of testimony from him and his wife. (R8300-8306) The state followed with rebuttal. (R8307-8312) At the conclusion of the sentencing hearing, the jury returned with a recommendation for imposition of death by a vote of 12 to 0. (R8340-8342) The trial court adjudicated the Appellant guilty and ordered a pre-sentence investigation. (R8342-8343)

Appellant filed a motion for a new trial which was the subject of a hearing. (R4546,8349-8378) Appellant renewed his previous motions and objections many of which are the subject of the instant appeal. The motion was denied. (R8373-8378)

The trial court imposed the sentence of death finding five (5) aggravating circumstances and rejecting all mitigating circumstances. (R4591-4598,8392-8393)

A timely notice of appeal was filed on January 3, 1985. (R4609) This brief follows.

## STATEMENT OF THE FACTS

Thomas McDermid, a seven (7) time loser and admitted perjurer who was given complete immunity for the murder of David Smith, was the undisputed star witness for the State of Florida in the instant case. (R6570-6578) McDermid also benefited by receiving a concurrent fifteen (15) year sentence for armed robbery in exchange for his testimony against Jerry Layne Rogers. (R6571-6575) At the time of his testimony, McDermid had not been sentenced for his participation in this offense. (R6602) At the time of trial, McDermid had completed two years and eight months of his total sentence of twenty five years on five different cases. (R6522,6601) Bearing this critical background information in mind, McDermid's testimony, viewed in a light most favorable to the state, established the following:

Thomas McDermid is married to Debbie Young, who is the cousin of Jerry Rogers' wife. During the early afternoon of January 4, 1982, McDermid and Rogers rented a car from the Hertz dealer in Orlando where they resided. Rogers signed for the car and the two then proceeded to their counter top shop where they picked up two .45 caliber Star handguns and one Barretta. The Appellant bought two .45 caliber Star semi-automatic handguns from an Orlando gun shop in 1981. (R6615-6625) One gun was purchased in October while the other was purchased in November.

They arrived in St. Augustine during the mid-afternoon hours. They drove around for approximately thirty (30) minutes during which time they "cased" the A & P grocery store as well as the Winn-Dixie. After eating dinner at Quincy's, McDermid and

Rogers went back to the A & P and prepared to rob that store. This plan changed when they realized that there was a nearby Mason meeting that evening. They returned to the Winn-Dixie and parked in the adjoining Holiday Inn parking lot at approximately 7:00 P.M. They noticed that a police car drove by at thirty (30) minute intervals during the next couple of hours.

After donning rubber gloves and nylon stocking masks, the pair entered the store with McDermid going to the only open cash register, while Rogers jumped up on the service counter. McDermid ordered the customer in the checkout line to lay prone on the floor and instructed the cashier, Ketsey Day Supinger, to open her register. Supinger had extreme difficulty opening her register and was, in fact, unsuccessful in doing so. After a few seconds, the pair fled the store empty-handed removing their masks after leaving the store. As they ran toward the Holiday Inn parking lot, McDermid, who was leading the way, testified that he heard an unknown voice say, "no, please don't." He then heard a gunshot followed by a short pause before two more shots. McDermid ran through the second story breezeway of the Holiday Inn, down the stairs and into the car where he crouched on the floor of the back seat. When Rogers arrived at the car, he allegedly told McDermid that he saw a man go out the rear door during the robbery. McDermid testified that Rogers told him, "He was playing hero and I shot the son of a bitch."
(R6205-6354,6521-6614)

The body of David Smith, assistant manager for the Winn-Dixie, was found face down in the parking lot. Two spent

slugs were found on the asphalt underneath Smith's chest, another nearby. Tatooing on the skin indicated that the gun was within a few inches of the skin when one shot was fired. The other two shots were from a greater distance. The medical examiner was unable to determine in what order the wounds were inflicted. The cause of death was due to perforation of the lungs from two of the wounds causing massive internal bleeding. (R6241-6242, 6382-6480,6545-6554) Three .45 caliber shell casings were also found in the general vincinity of the body. (R6451-6454) A stocking mask was found on Holiday Inn property. (R6497-6498)

The bullets that killed David Smith were initially determined to be fired from a .45 caliber semi-automatic pistol manufactored by Star or Llama. Since that initial determination, the list of possible weapons from which the bullets could have been fired had widened to eleven (11) manufacturers. The projectiles had the same class characteristics, but the ballistics expert could not be certain that they had all been fired from the same weapon. (R6665-6671)

A .45 caliber Star pistol and shell casings were among items seized from Appellant's home. (R6639-6656)
Of the one hundred and ninty two (192) cartridge cases seized from Appellant's home, sixty-nine (69) of them were fired from the same weapon that fired the casings found near Smith's body. One hundred and fourteen (114) of them were fired from the gun seized from Appellant's home, and nine (9) casings were fired from an unknown weapon. (R6678-6684) It was conclusively established that the gun found in Appellant's home did not fire

either the casings or the projectiles found by Smith's body. (R6677)

The state introduced evidence of collateral crimes in an attempt to prove Jerry Rogers' guilt in the instant case. (R6733-6841) An employee of the Publix grocery store in Winter Park, identified Jerry Rogers as one of the two masked robbers. Robert Daniel also identified the Appellant as one of two masked robbers that robbed his family grocery store in Orlando.

The defense presented substantial testimony and evidence which cast doubt on the validity of the various identifications of Rogers as one of the two culprits in the instant crime as well as the collateral offenses. Tim Connaly, Monica Burnett and Joel Bennett all failed to select Rogers' picture from a photographic display which contained his photograph. Joel Bennett even saw one of the robbers without a mask. (R6975) Two of the witnesses were able to select McDermid as one of the culprits. (R6969-6970) Ketsey Day Supinger was not shown a photographic lineup until shortly before trial and was still unsure. (R6975-6976) Several witnesses and investigators from the Daniels and Publix robberies testified. This evidence revealed discrepancies between Rogers' appearance and the descriptions of the actual robbers. (R7479-7512) Expert testimony revealed that identifications based upon witnesses' observations in situations like the robberies were very suspect indeed. (R7698-7723)

Todd LeClaire drove through the Holiday Inn and Winn-Dixie parking lots that night close to the time of the

robbery. He saw two men facing the corner of the Winn-Dixie who he thought might have been the robbers after he heard that a robbery had occurred. Neither one of these individuals was Jerry Rogers. (R7180-7197) Joel Bennett, who worked at the Holiday Inn, came within inches of the probable culprits that night. Bennett was able to select McDermid's picture from a photographic lineup shortly after the robbery. (R5382-5384) Bennett described the two individuals as being taller than himself. One assailant was slightly taller than Bennett, while the other was close to 6' tall. Bennett is 5'5½" tall. While Bennett admitted that Rogers and the shorter robber had similarities in their appearance, he did not identify Rogers as one of the two men. (R7304-7338)

Rhonda Milheim saw a suspicious car driving down the alley alongside the Winn-Dixie shortly before the robbery. The car had three people sitting in the front seat. Milheim testified that it was unusual to see cars take this route. (R7341-7346)

Troy Sapp was a guest at the Holiday Inn on the night of the robbery. At approximately 9:00 P.M., Sapp was returning from the restaurant to his room at the top of the stairwell by the breezeway. He heard what sounded like three gunshots before meeting a man about 5'10" running through the breezeway. The man was definitely taller than Rogers and clean cut with noticeable front teeth. (R7379-7417) Sapp saw the man run down to the street level, stop at the back of a car and apparently put something in the trunk. He then got into the driver's seat and

drove away. Sapp saw no one else run by. Karl Hagen accompanied Troy Sapp from the restaurant that evening. His observations corroborated those of Troy Sapp. (R7418-7437)

During his incarceration at various county jails, McDermid had confided in other inmates that Jerry Rogers was not his true accomplice. McDermid showed family photographs in the jail and identified a man in the pictures as his actual accomplice in the attempted robbery of the Winn-Dixie and murder of David Smith. The man pointed out in the photograph bore a striking resembalance to Thomas McDermid. (R7224-7289)

Rogers' defense included the contention that Billy McDermid was Thomas' true accomplice.

McDermid once asked Rogers to hire his brother Billy but the Appellant declined due to Billy's alcohol problem. (R7020) At 5'4½", Billy is shorter than his brother Thomas McDermid.(R7062) Thomas McDermid's teeth protruded from his mouth. (R7064,7086) Billy also has a receeding hairline and a slight paunch much like Jerry Rogers. (R7087-7091,7096-7108) McDermid was extremely protective of his brother Billy and became angry when there was any attempt to implicate Billy. (R7038-7039) Items of evidence which were the fruit of the Publix robbery were found to have Thomas McDermid's fingerprints on them. The items were also checked for Rogers' prints, but none were found. (R7458-7477)

Through the testimony of Sergeant Osterberg of the Orange County Sheriff's Department, Appellant introduced an incident report that revealed that Rogers had reported the theft

of his pistol from a shop on November 3, 1981. While the report was signed by Sergeant Osterberg, he testified that he was not on duty that day, nor did the report comply with his usual procedure. (R7528-7539) The report, which was not on the correct agency form, was not on file with the Orange County Sheriff's Department. (R7991-7996)

On the night of David Smith's murder, Jerry Rogers had a barbecue at his home with his wife, children, mother-in-law and friends. After this social gathering dispersed, Patricia Rogers, Appellant's daughter, hurt her arm while roughhousing with the other children. Rogers drove his daughter to the hospital emergency room at approximately 10:30 P.M. and returned home at close to 3:00 A.M. (R7624-7698,7727-7856) Jerry Rogers testified in his own behalf and corroborated his alibi, denying all involvement with Thomas McDermid's crime spree. Several witnesses testified that Jerry Rogers' business was booming during the early 1980's with no motive to rob stores. Rogers was also a gun enthusiast who reloaded his own shot in order to save money. (R7542-7621)

## SUMMARY OF ARGUMENT

POINT I

Appellant contends that the failure of the trial court to supply written jury instructions in a capital case constitutes reversal error where such instructions are requested. Since the criminal rule of procedure requiring written instructions in capital cases is mandatory in language and is derived from a statute, the trial court has no choice in the matter. No prejudice need be demonstrated. The situation is analogous to the failure to instruct a jury on the minimum and maximum penalties where requested before that rule of criminal procedure was changed. Tascano v. State, 393 So.2d 540 (Fla. 1980).

POINT II

The Appellant is entitled to a new trial where the trial court improperly excluded relevant evidence presented by the defense. A criminal defendant's right to present evidence is critical. (1) The court improperly excluded reputation testimony of a key state witness; (2) medical records which impeached a rebuttal witness presented by the state; (3) evidence of the demeanor of Thomas McDermid in a prior criminal proceeding; (4) the written BOLO containing the descriptions of suspects in the instant crime; and (5) expert testimony of a social psychologist specializing the in fallibility of eyewitness identifications.

POINT III

The trial court should have granted Appellant's motion to dismiss the indictment where it was established that the father-in-law of the victim of the crime charged served on the

grand jury. This destroyed the neutrality of the grand jury and resulted in presumptive prejudice.

POINT IV

The failure of the state to arrest or to charge the Appellant with the instant offense resulted in prejudice to his case. Rogers was first indicted on December 19, 1983, for the offense which occurred on January 4, 1982. The trial court applied an erroneous standard in denying this motion where the court required a showing of bad faith on the part of the state. Appellant suffered actual prejudice where he demonstrated that witnesses' memories had faded and alibi witnesses had disappeared.

POINT V

The introduction of evidence regarding robberies of a Publix and Daniels grocery stores in other cities was not similar enough to qualify as Williams Rule evidence. The similarities were minimal and present in the vast majority of robberies. The dissimilarities were pronounced, especially where a murder occurred during the attempted robbery in the instant case. Even if the similarities were sufficient, the collateral crimes became a feature of the trial and obscured the true issue of guilt for the offense charged.

POINT VI

Appellant was denied due process of law and the right to counsel where the state, in direct contravention of the trial court's order showed a photo lineup to a state witness immediately before her deposition. The lineup contained a photograph of Jerry Rogers who also was at the witness' deposition. The view

of the photograph beforehand tainted the witness' identification of the Appellant as the robber. This witness was the only unbiased witness to identify Rogers as one of the culprits.

POINT VII

Two instances of hearsay were allowed into evidence over objection. A correctional officer was permitted to testify that McDermid told the officer that he heard that Rogers had arranged a "hit" on him. This constituted double hearsay. The trial court also allowed Rogers' brother-in-law to testify that his mother had told him that she was not speaking to Jerry and his wife during the months surrounding the murder. This was prejudicial since Maxine Arzberger was a crucial alibi witness for the defense.

POINT VIII

Hubert Reynolds, a cellmate of Thomas McDermid testified that McDermid confided that Rogers was not his accomplice in the attempted robbery and that McDermid was the actual triggerman. On cross-examination, the state was permitted to illicit prior bad acts and crimes of which Reynolds had been accused. This was improper impeachment. The prosecutor also asked a question which had no basis in fact in an improper attempt to impeach Reynolds.

POINT IX

The physical evidence seized from Rogers' home and shop should have been suppressed where the warrant was invalid on its face. The invalidity arose from the erroneous nature of statements contained in the affidavit. The affidavit was also

improperly supplemented with oral statements and was also stale. No probable cause existed to issue the warrant which was over-broad and resulted in a general search.

POINT X

The trial court improperly interrupted Rogers resulting in his inability to state the specific grounds for his objection to certain evidence. This deprived him of his constitutional right to due process of law.

POINT XI

At the penalty phase, the state was allowed to improperly cross-examine Jerry Rogers concerning evidence of nonstatutory aggravating circumstance. When Rogers denied an alleged incident in a restaurant, the state presented improper impeachment evidence which constituted double hearsay. The result was a mere character attack which denied Rogers a fair trial.

POINT XII

The death sentence imposed by the trial court was improper where impermissible doubling occurred. The court also found aggravating circumstances which were not supported by the evidence and gave undue weight to the jury recommendation of death. This recommendation was based on improper argument by the state. The trial court ignored valid mitigating circumstances and imposed the ultimate sanction in a disproportionate manner.

POINT XIII

This point urges reconsideration of constitutional attacks on Florida's death sentencing procedure. These issues have already been rejected by this Court and are raised here for preservation purposes.

## POINT I

THE TRIAL COURT ERRED IN FAILING TO PROVIDE WRITTEN JURY INSTRUCTIONS WHEN REQUESTED BY THE APPELLANT, THEREBY DENYING HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND TO A FAIR TRIAL.

At the conclusion of the oral jury instructions, the Appellant requested that the jury be furnished written instructions as well. Appellant pointed out the mandatory nature of this requirement, but the court refused Appellant's request, incorrectly stating that such a practice was discretionary. (R8246-8247) Appellant contends that the trial court's failure to comply with Florida Rules of Criminal Procedure, 3.390 clearly resulted in reversible error.

Rule 3.390(b) provides as follows:

> Every charge to a jury shall be orally delivered, and charges in capital cases shall also be in writing. Charges in other than capital cases shall be taken by the court reporter, and, if the jury returns a verdict of guilty, transcribed by him and filed in the cause. (emphasis supplied)

This rule was created in 1972 having been derived from Section 918.10, Florida Statutes (1971), as that statute existed prior to and including its amendment in 1970. 34 Fla. Stat. Ann. 93 (1975). The author's comment in Florida Statutes Annotated points out that close adherence to the rule is essential. Id. The purpose of this rule and its predecessors is to insure that instructions in capital cases are as correct as possible by having them reduced to writing, and thereby requiring their prior preparation before presentation to the jury. See Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). It also provides an

unquestioned verbatim record of the charge to the jury. Id. Charges to the jury in a capital case are required to be wholly in writing. McKinney v. State, 74 Fla. 25, 76 So. 333 (1917).

Kimmons v State, 178 So.2d 608 (Fla. 1st DCA 1965), pointed out that the failure to send written instructions to the jury room is not error except where it is required by statute. Since the rule is derived from the former statute which has been interpreted to be mandatory in nature, see McKinney v. State, 74 Fla. 25, 76 So. 333 (1917), and Coggins, v. State, 101 So.2d 400 (Fla. 3d DCA 1958), the rule is also mandatory in its requirements.

The error at hand appears to be directly analogous to that presented in Tascano v. State, 393 So.2d 540 (Fla. 1980) and Murray v. State, 403 So.2d 417 (Fla. 1981) Prior to its recent amendment, Rule 3.390(a) Florida Rules of Criminal Procedure provided:

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

In interpreting this provision, this Court found the language to be mandatory rather that directory. This Court pointed out that any other interpretation would render the amendment meaningless. Appellant contends that any other interpretation of the language of 3.390(b), Florida Rules of Criminal Procedure would also

render that rule meaningless. Unlike a Tascano situation, no conflicting or contrary instruction such as Florida Standard Jury Instruction (Crim) 2.15 (jury must disregard consequences of their verdict) exists in the instant situation. See Tascano v. State, supra, (Alderman J., dissenting.)

In dealing with the subsequent rash of cases led by Murray v. State, 403 So.2d 417 (Fla. 1981), this Court addressed the question of whether the failure to instruct the jury as to the possible penalties in the face of a request could ever be deemed harmless error. While Murray, supra did not deal directly with the harmless error doctrine where the evidence of a defendant's guilt is overwhelming, subsequent cases did address this issue. See e.g. Haislip v. State, 400 So.2d 473 (Fla. 5th DCA 1981) aff'd 406 So.2d 1114 (Fla. 1981); Gee v. State, 400 So.2d 466 (Fla. 5th DCA 1981) aff'd 407 So.2d 1 (Fla. 1981); and Nelms v. State, 397 So.2d 372 (Fla. 5th DCA 1981) aff'd 406 So.2d 1117 (Fla. 1981). Citing Murray v. State, 403 So.2d 417 (Fla. 1981), this Court reiterated the mandatory nature of the rule and held that defendants denied an instruction of the penalties in the face of a request were to be awarded new trials.

Appellant contends that the mandatory nature of the language contained in the criminal rule of procedure at issue is intended to provide a bright line rule for trial judges in an attempt to notify them never to deviate from the policy of the law. Other rules of criminal procedure are analogous as well as that presented in Tascano, supra. Rule 3.190(j), Florida Rules

of Criminal Procedure provides that the defendant "shall" be notified of the time and place of a deposition to perpetuate testimony, and the defendant's jailers "shall" produce the defendant at that deposition. In interpreting this rule of procedure where defense counsel received notice and attended a deposition while the defendant did not, the state's failure to follow Rule 3.190(j)(3), created fundemental error thus depriving the defendant of his constitutional right to confront and cross-examine the witnesses against him. Brown v. State, 471 So.2d 6 (Fla. 1985). No showing of prejudice was required nor was an objection to use of the deposition at trial necessary to preserve the error. Id. Similar mandatory language was also at issue in Curtis v. State, 10 F.L.W. 533 (Fla. September 26, 1985). This Court reiterated the need for strict compliance with Rule 3.410, Florida Rules of Criminal Procedure set forth in Ivory v. State, 351 So.2d 26 (Fla. 1977). This Court refused to adopt a harmless error standard pointing out that requiring that prejudice be shown would unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent "harm" real or fancied. Ivory, 351 So.2d at 28 (England, J., concurring). To require that prejudice be shown in the case at bar would have similarly undesired repercussions.

The vast majority of the cases affirming convictions where requirements of Rule 3.390 have not been met resulted from the failure to request submission of the written instructions and by the failure to object to that omission. See e.g. Songer v.

Wainwright, 423 So.2d 355 (Fla. 1982); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Kimmons v. State, 178 So.2d 608 (Fla. 1st DCA 1965); and Coggins v. State, 101 So.2d 400 (Fla. 3rd DCA 1958).

While it is clear that the rule and the majority of the case law supports Appellant's contention that the trial judge's failure to furnish written jury instructions upon request in a capital case is reversible error, Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970) stands alone in opposition thereof. Applying the abuse of discretion standard, Matire held that it was not reversible error for the trial court to fail to send written instructions with the jury for its use in deliberations. Appellant contends that Matire is strictly limited to its peculiar facts. Matire was convicted of first degree murder with a recommendation of mercy. Counsel for the defendant requested that the written instructions be given to the jury for use during its deliberations. In finding no reversible error, the appellate court placed great emphasis on the fact that major corrections or interlineations had been made on the proposed written jury instructions at defense counsel's request. Defense counsel recognized the administrative problem of reproducing a corrected copy of the instructions that could be given to the jury and seemed to request that a portion of the instructions be submitted for their deliberations. The appellate court pointed out that this partial submission would clearly violate the criminal rules of procedure. Matire v. State, supra at 211. The district court

pointed out that the instructions were not unusually long or complex; that the record did not reflect that the jury was troubled or confused; that no request was made for any one or all of the instructions to be read; and that the jury reached its verdict in one hour. Id. at 211. In holding that the trial court did not abuse its discretion, the district court limited the holding to the facts and circumstances of that particular case. Id. at 209. In so doing, the court pointed out that written instructions should be used when at all possible and practical. Id. at 211.

While the written instructions contained in the record on appeal in the case at bar do contain some interlineations, deletions and changes (R4632-4554), nothing suggests that a corrected copy could not have been reproduced. Indeed, it is even unclear that the written instructions contained in the record on appeal were the same ones used by the trial judge in instructing the jury. Several passages of the written instructions that have been crossed out in the copy contained in the record on appeal were, in fact, read to the jury. (Compare e.g. R8236-8237 and R4635-4636; R8239 and R4643) These examples clearly demonstrate one of the major reasons behind the requirement of written jury instructions in capital cases. Matire, supra, pointed out that such a requirement provides an unquestioned verbatim record of the charge to the jury. Such a record is sadly unavailable in the case at bar as a result of the trial court's refusal to comply with Appellant's request to abide by the Florida Rules of Criminal Procedure.

Appellant contends that the failure of the trial court to comply with Rule 3.390, Florida Rules of Criminal Procedure, requires reversal of Appellant's conviction and sentence. While it may seem to be a drastic and expensive step to the State and to this Court the failure to grant a new trial would constitute a violation of Appellant's constitutional rights to due process of law, equal protection under the law and to a fair trial. Amend. V, VI, and XIV, U.S.Const. The imposition of a death sentence in the face of such error results in a violation of Appellant's guarantee against cruel and unusual punishment. Amendment VIII, U.S.Const. It would have been a simple matter for the trial court in the instant case to comply with Appellant's legitimate request and recognize Appellant's correct statement of the law. Indeed, Appellant contends that it was incumbent upon the State to support Appellant's request, since they too are interested in providing defendants with a fair trial not subject to possible reversal. Failure to grant a new trial in this cause will only result in prolonging the constitutional infirmity of Appellant's conviction and sentence, thereby increasing the expense and delaying justice.

## POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

The right of an accused to present witnesses to establish his defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the trier of fact so that it can be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974). Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979); Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979). Much of Appellant's evidence was improperly excluded by the trial court, thus requiring several independent subsections.

A. The Trial Court Committed Reversible Error By Excluding Relevant, Admissible Evidence Concerning The Reputation For Truth And Veracity Of The Key State Witness.

Albert Johnston and Jerry Rogers were partners in a cabinet shop. In June of 1981, the Appellant dissolved the partnership and moved to another location as a result of the growth in his business. (R7542-7544) Johnston met Tom McDermid in April of 1981 at which time McDermid began working for the Appellant. (R7544) Johnston aided McDermid in obtaining a

lawyer to represent him on his theft charge during his employ at Disney World. (R7544-7545) It was abundantly clear from Johnston's testimony that he was in a position to know Tom McDermid's reputation for truth and veracity in the community.

> Q: Now did you have the means to know the reputation for the truth and veracity of Thomas McDermid in his community?
> A: Except what I've heard, you know, from people. Personally I didn't, because I didn't associate with him anymore that I had to. (R7547)

Johnston stated that he had knowledge of this reputation, but was precluded from offering this testimony to the jury based upon the state's objection grounded on an allegation that an improper predicate existed. (R7547-7549) Appellant contends that this constitutes reversible error.

Section 90.609, Florida Statutes, recognizes that one of the means of attacking the credibility of a witness is through the introduction of evidence that the witness has a poor reputation for truth and veracity in the community or among his associates. Williams v. State, 344 So.2d 927 (Fla. 3d DCA 1977) Reputation of the witness for truth and veracity is the only reputation testimony that is admissible. Schavers v. State, 380 So.2d 1180,1181 (Fla. 5th DCA 1980). The proper foundation for the admission of such reputation evidence is establishing that the witness knows the person's reputation for the trait involved. Hinson v. State, 59 Fla. 20, 52 So. 194 (1910). Reputation testimony of this type is an exception to the hearsay rule. §90.803(21), Fla. Stat. (1983) This section includes within the

exception, "reputation of a person's character among his associates or in the community." It is thus clear that reliability of a person's reputation may be derived from among his associates rather than simply from the neighborhood where the person resides or is employed. The logical approach is to allow reputation testimony based on discussions at one's place of employment or other areas in which the person has some constant association. See Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937).

Since Albert Johnston had direct daily contact with Thomas McDermid, Rogers' partner/employee, he could properly testify to McDermid's reputation. Johnston also had direct contact with McDermid who apparently worked out of Johnston's shop for some period of time. Appellant maintains that the question propounded to Johnston was a proper one. Since reputation depends upon what is discussed in the community, the proper question is, "have you heard ...?" rather than one which purports to elicit the personal knowledge and opinion of the witness. Ehrhardt, Florida Evidence §§405.1, 609.1 (2d Ed. 1984). Johnston answered Appellant's question with a "disclaimer" indicating that his knowledge arose from hearing talk from other people in the community about McDermid's reputation for truth and veracity. (R7547-7549) This is precisely the type of knowledge required.

The exclusion of the pertinent testimony constituted reversible error. The common thread running throughout the trial as well as this appeal is the inherent unreliability of Thomas

McDermid. McDermid, who copped a sweet deal with the state, thus avoiding the death penalty as well as securing other benefits, was the only witness who provided enough evidence to convict Jerry Rogers at trial. Without his testimony (or without the jury's belief in his testimony), Jerry Rogers would be a free man today. Without the testimony of Albert Johnston to establish the poor reputation for truth and veracity of Thomas McDermid, the jury was left without a complete picture. Appellant submits that the exclusion of this evidence must result in a reversal for a new trial.

B. The Trial Court Abused Its Discretion In Refusing To Allow The Introduction Of Relevant Evidence Consisting Of Medical Records Of A Damaging State Rebuttal Witness.

One way that the Appellant proved his defense was through the testimony of several inmates who testified that McDermid admitted to them that Jerry Rogers was not his accomplice in the offense charged. (R7224-7289) On rebuttal, the state presented testimony of James Lancia, another inmate, who testified that he had been in collusion with the Appellant to discredit McDermid's testimony at a previous trial. Lancia indicated that he had perjured himself at the Appellant's Seminole County trial by testifying that McDermid had confided that Jerry Rogers was not his accomplice. (R8001-8004) Lancia also testified that Rogers had admitted his guilt to him while they were both in the same jail. (R8003-8004) On surrebuttal, the Appellant presented the testimony of two witnesses to impeach Lancia's testimony. (R8032-8065) Carol Guemple, the medical

supervisor for the Seminole County Jail, testified that Lancia had been receiving psychotropic medications to control his hallucinations and delusions during his stay at the jail. (R8050-8055) When the medical records on which Ms. Guemple based her testimony were moved into evidence, the state objected on the grounds that they were cumulative to her testimony. This objection was sustained and the evidence was excluded. (R8055-8056)

The trial court's ruling was clearly error. The evidence was relevant and therefore admissible. The harmful nature of the exclusion of this evidence is obvious. The rebuttal testimony of James Lancia that he had been in collusion with the Appellant to perjure himself at a prior trial was devestating to the defense's case. It implied that the Appellant had similarly obtained the tesimony of the inmates that had testified in the instant trial. If the jury believed James Lancia's testimony, they would simply disregard the testimony of the inmates presented by the defense in its case-in-chief. Since that testimony went directly to impeaching Thomas McDermid's claim that Jerry Layne Rogers was his accomplice in the murder, it struck at the heart of the defense. As such, the impeachment of James Lancia was of critical importance. Any evidence that would support the defense's attempt to prove that James Lancia was a mentally unbalanced individual who suffered from delusions and hallucinations during his jail stay with McDermid and Rogers should have been admitted to the jury. The exclusion of this critical, relevant evidence deprived Appellant of his constitutional right to present evidence relevant to his defense and cannot be considered harmless.

C. The Trial Court Erred In Excluding The Testimony Of Gary Boynton, Esquire.

During Appellant's case-in-chief, the testimony of Gary Boynton, the attorney who represented the Appellant at the trials on the Orange County charges was proffered. (R7449-7455) The state attorney objected to the witness testifying based on relevance and the cumulative nature of the evidence. (R7438-7447) After hearing argument and the proffer, the trial court excluded the testimony. (R7448)

In response to the trial court's inquiry, Mr. Boynton testified that he was of the opinion that his testimony would be probative to reveal the demeanor and attitude of Thomas McDermid during the latter's deposition in Orange County. (R7443-7444) Mr. Boynton indicated that McDermid was recalcitrant and reluctant to answer questions. Boynton further stated that McDermid was just "plain nasty" sometimes. (R7444) The proffered testimony of Boynton indicated that McDermid became threatening when Boynton inquired about McDermid's family. He became especially threatening when his brother Billy was discussed. All of this testimony was excluded. (R7449-7455)

Appellant submits that the exclusion of this evidence constitutes reversible error. A common thread running throughout the trial, particularly Appellant's defense, was the inherent unreliability of Thomas McDermid as a credible witness. Any evidence which revealed McDermid's bias and motive for his testimony should have been admitted in this, a capital trial. Appellant concedes that McDermid's animosity was revealed to some

extent by his own testimony. Appellant contends that the testimony of a member of the Florida Bar concerning Thomas McDermid's demeanor at an early date in these multiple prosecutions has great relevance and should have been heard by the jury. While some of the testimony would have been somewhat cumulative, Appellant submits that the trial court abused its discretion in excluding this corraborative evidence.

Exclusion was especially damaging regarding testimony of McDermid's attitude when his brother, Billy McDermid, was mentioned at the deposition. (R7451) Appellant does not believe that this evidence was cumulative. It would have aided the defense in establishing the fact that Billy McDermid was Thomas McDermid's true accomplice. Thomas McDermid's implication of Jerry Rogers was an effort to protect his weaker, alcoholic brother. Since this evidence constituted crucial proof of Appellant's defense, its exclusion violated Jerry Rogers' constitutional right to present evidence.

D. The Trial Court Abused Its Discretion In Excluding The Typed BOLO Which Constituted Relevant Evidence.

The Appellant recalled Sergeant Dominic Nicklo, the chief investigating officer, during his own case-in-chief. (R6956-6983,7352-7378) Sergeant Nicklo testified as to the contents of the initial BOLO issued shortly after the offense. (R6972) Nicklo also testified concerning the contents of a more detailed BOLO which was issued shortly thereafter. (R6972) This later BOLO was developed after talking in some detail with all of the witnesses. (R6972-6973) When the Appellant attempted to

introduce the BOLO into evidence, the trial court refused to allow the introduction of the document despite the fact that it was properly authenticated. (R7373) The state's objection that it was cumulative to the live testimony was sustained and the evidence was excluded.

Appellant recognizes that the trial court has some discretion in the introduction of evidence, but nevertheless contends that the exclusion of the BOLO constituted an abuse of discretion on the part of the trial court. Relevant evidence is evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. (1983) All relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (1983) While Appellant anticipates that the state will argue that any error committed in this instance is harmless, Appellant submits that this Court should not reject this issue in haste. It must be remembered that the instant case is a capital case in which the Appellant was sentenced to death. The trial was an extremely long one with an enormous amount of testimony and evidence for the jury to consider. Where the crux of the defense involved identification (or rather misidentification) of the Appellant as one of the culprits, the early descriptions of the assailants became critical. The defense case was bottomed on the variances between the Appellant's physical appearance and that contained in the BOLO. Since the evidence went to the heart and soul of Appellant's defense, Appellant contends that the trial court should have allowed the admission of this relevant and important evidence.

E. The Trial Court Erred In Excluding The Testimony Of John Brigham.

John C. Brigham, an expert witness in the field of psychology, specialized in studying factors affecting the accuracy of eyewitness identifications. (R7699-7700) The state filed a motion in limine to preclude this testimony. (R3693) This motion was granted in part by the trial court's limitation of Dr. Brigham's testimony. The Appellant was allowed to ask only a general hypothetical question concerning a witness' ability to make an accurate identification several months or even years after observing two (2) armed robbers with stocking masks in a stressful situation for a period of two (2) to twenty (20) seconds. (R7715-7723) The Appellant wished to ask more detailed hypothetical questions incorporating the facts related to four (4) of the eyewitnesses and the factors surrounding their observations of the robbers. Some of these witnesses included ones who identified the Appellant as the perpetrator in the collateral crimes which the state was allowed to introduce over objection. Instead, the Appellant was limited to very general hypothetical questions propounded to the expert witness.

Appellant submits that the exclusion of this pertinent testimony constituted reversible error. In making this contention Appellant is well aware of this Court's decision in Johnson v. State, 393 So.2d 1069 (Fla. 1980) in which this precise issue was considered. This Court ruled that the trial court's exclusion of an expert witness who would have testified about the fallibility of eyewitness perception and identification

did not constitute an abuse of discretion. This Court concluded that such a ruling did not deprive Johnson of his rights to due process of law and to compulsory attendance of witnesses. Id. at 1071-1072. See also Rodriquez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982) and Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978).

These cases are distinguishable by the fact that the lower court excluded the expert testimony completely. In the instant case, the trial court allowed the expert to testify but, in so doing, limited the scope of his testimony. Since the trial court obviously ruled that the expert witness' testimony had relevance, Appellant contends that the limitation of the application of facts resulted in a skewed and confusing view by the jury. The trial court originally ruled that the Appellant could propound a hypothetical question which encompassed the surrounding details of Ketsey Day Supinger's view of the assailants. (R7707-7708) The trial court then allowed only a general hypothetical question when the Appellant stated he wished to present the facts of three (3) other misidentifications. (R7708-7714) Since the state was permitted to introduce evidence of so-called similar fact collateral crimes over Appellant's objection, it was only fair to allow the Appellant to rebut that evidence through the testimony of his own witnesses. Dr. Brigham's testimony would have done exactly that. While Appellant concedes that the general hypothetical question and corresponding answer by Dr. Brigham put forth some of the desired evidence, the defense was simply not allowed to go far enough. Appellant submits that the jurors received incomplete and confusing evidence as a result.

## POINT III

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT RETURNED BY A GRAND JURY CONTAINING THE FATHER-IN-LAW OF THE VICTIM OF ONE OF THE CRIMES CHARGED, THEREBY DENYING THE APPELLANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 15, AND 16 OF THE CONSTITUTION OF FLORIDA.

After much ado and resistance by the State of Florida, the Appellant was, on October 25, 1985, provided the names of the grand jurors who returned the indictment in his case. (R5755-5757) One of those grand jurors, Robert R. Supinger, (R7170), is the father-in-law of Ketsey Supinger. (R7171-7172) Ketsey Supinger was the cashier allegedly robbed by the Appellant and McDermid, that attempted robbery forming the underlying felony of the felony murder charge contained in the indictment. (R1,41) The grand juror's partisan connection with the offense is evident, not only from the logical inferences to be drawn from the relationship between the grand juror and the victim, but also from Supingers' conduct in sending his daughter-in-law a letter and accompanying newspaper clippings concerning the arrest of the Appellant approximately a month after Supinger served on the grand jury. (R7170-7173)

A motion to dismiss the indictment based upon the relationship between a member of the grand jury and the victim of the crime charged was made during petit jury selection just prior to the jury being sworn. (R6140-6156) The motion was timely, in that the Appellant received the information needed to make the challenge only the day before the challenge was made.

(R5757-6150) See Section 905.05, Florida Statutes (1983); Herman v. State, 396 So.2d 222 (Fla. 4th DCA 1981), cert. denied 402 So.2d 610 (Fla. 1981).

> Section 905.05, Florida Statute (1977), allows a belated right to challenge the grand jury to a person who did not know at the time the grand jury was empaneled that he was subject to grand jury action. These statutes are an extension of prior law which had limited challenges of grand jurors to the time of empanelment and on the grounds of legal qualification.

Porter v. State, 400 So.2d 5,7 (Fla. 1981).

The burden to show the basis for discharge of a grand juror is on the movant. State v. Demetree, 213 So.2d 709 (Fla. 1968). In the instant case, Rogers sought to challenge grand juror Robert R. Supinger on the grounds that he was the father-in-law of the victim of a crime charged in the indictment. (R6140-6156) Section 905.04(1)(c), Fla. Stat. (1983), the statutory basis for the challenge, in pertinent part provides:

> The state or a person who has been held to answer may challenge an individual prospective grand juror on the ground that the juror [is] related by blood or marriage within the third degree to the defendant, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted.

There is no doubt here but that Robert Supinger is related by marriage to within the third degree of Ketsey Supinger. Cf. Howell v. State, 102 Fla. 612, 136 So. 456, (1931); Cruce v. State, 87 Fla. 406, 100 So. 264, (1924). Also evident is the fact that Ketsey Supinger was a person injured by the offense alleged, because it was from her

custody that the property was attempted to be taken, and she was the person placed in fear contemporaneously with the attempted forceful taking.

The indictment alleged the killing of another human being during the commission of a robbery or attempted robbery. (R41) Implicit in the charge of the alleged robbery are the elements of an attempted forceful taking of property from the custody of Ketsey Supinger. Section 812.13, Florida Statutes (1983). That the father-in-law of a robbery victim participated as a member of the grand jury returning a murder indictment based upon a killing occurring during the commission of that attempted robbery destroys any notion of fairness and due process. If anything, the Constitutions of the United States and Florida require that an unbiased and impartial determination be made by the grand and petit juries, lest their very function be relegated to a pro forma act. It is the essence of a fair trial that the proceedings be impartial. The facts of this case belie impartiality, and the timely motion to dismiss should have been granted. Reversible error has occurred. Accordingly, this Court is requested to reverse the conviction and to remand with directions that the indictment be dismissed.

## POINT IV

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS DUE TO PRE-ARREST DELAY.

On April 10, 1984, the appellant filed a motion to dismiss due to pre-arrest delay alleging that his constitutional rights had been violated as a result of the state intentionally delaying charges against the Appellant in the instant case in order to gain a tactical advantage resulting in actual, substantial and presumptive prejudice. The Appellant alleged that prejudice arose from now unavailable alibi witnesses, fading of material witnesses' memories and extensive pre-trial publicity. (R592-595) As the appellant alleged in his motion, the offense occurred on January 4, 1982, (R1), the Appellant has been in the custody of various county and state correctional facilities continuously since April 12, 1982, (R5220-5225), and the state certainly had sufficient grounds to seek and obtain an indictment of the appellant on November 29, 1982(if not sooner), when Tom McDermid implicated the appellant as his accomplice. (R4895) There was never any allegation by the state that the appellant had attempted to elude authorities during the period prior to his indictment and arrest.

While it is true that the appellant was in custody on other offenses as of April 12, 1982, and the state was well aware of this fact, the appellant was not formally arrested or charged for the instant offense until he was transported to St. John's

County on January 5, 1984. (R4) Rogers was first indicted for the January 4, 1982 murder on December 19, 1983. (R1) The state did not dispute the fact that their own delay arose from a desire to avoid any speedy trial problems which might arise due to appellant's charges in other circuits around the state. (R4854,4869,5037,5464) Indeed this appeared to be the primary, if not the sole reason for the delay.

A. The Trial Court Applied An Erroneous Standard In Denying Appellant's Motion To Dismiss.

In denying Appellant's motion, the trial court clearly stated that the Appellant must show "actual prejudice" to his own case and "bad faith" on the part of the state in order to gain a tactical advantage. (R2989) The trial court purportedly arrived at this standard after reading Howell v. State, 418 So.2d 1164 (Fla. 1st DCA 1982). Appellant contends that this was clearly error. While Howell does require a showing of actual prejudice, the inquiry then turns to the reason for delay. This test encompasses a balancing process with particular reasons weighted against the particular prejudice suffered on a case-by-case basis. Howell, supra at 1170. This test was adopted from United States v. Townley, 665 F.2d 579, 581-582 (5th Cir. 1982). In assessing the holding in United State v. Townley, supra, the Howell court stated, "That case stands for the proposition that something less than unintentionally caused delay by the prosecution might suffice to justify a finding of due process deprivation, if actual prejudice is also present." Howell, supra, at 1170. It is therefore clear that the trial court was

operating on the incorrect assumption that a defendant must demonstrate "bad faith" on the part of the state. (R2989) Since this was an erroneous standard and it is not abundantly clear on the record that the trial court would have reached the same result applying the correct standard, this cause must be remanded for such a determination.

B. The Trial Court Erred In Denying Appellant's Motion To Dismiss.

Appellant does not complain of any violation of his Sixth Amendment constitutional right to speedy trial which becomes effective only at the time of arrest or indictment, whichever comes first. United States v. MacDonald, 456 U.S. 1 (1982); United States v. Gonzalez, 671 F.2d 441,444 (11th Cir. 1982); Howell v. State, 418 So.2d 1164 (Fla. 1st DCA 1982). Rather, Appellant contends that his rights guaranteed by the Due Process Clause of the Fifth Amendment were violated. This clause protects against an oppressive delay between the offense and arrest or indictment. United States v. Lovasco, 431 U.S. 783, 789 (1977); Howell v. State, supra. The central concern of due process in a delayed arrest or indictment setting is the prevention of oppressive actual prejudice to the defense caused by the passage of time. MacDonald, supra, (Marshall, J. dissenting.); State v. Griffin, 347 So.2d 692, 695 (Fla. 1st DCA 1977). Proof of actual prejudice makes such a due process claim ripe for adjudication. Lovasco, supra at 789.

In Griffin, the district court set forth the general standards involved in pre-arrest/indictment due process vio-

lations attributable to time delay by the state:

> The authorities appear to agree, and we so hold that a pre-arrest due process deprivation cannot be quantified into a specific number of days. Many factors must be taken into consideration; among them are the reason the government assigns to justify the delay and the judicial discretion of the trial court in evaluating the circumstances. Prejudice to the defendant is the most important factor in evaluating the questions of due process deprivation. No matter how long the delay, if within the period of the statutes of limitations, unless the accused can demonstrate that he has been prejudiced thereby, the delay, per se, will not justify dismissal.

Griffin, supra, at 695 (footnotes omitted.)

United States v. Townley, 665 F.2d 579 (5th Cir. 1982), stands for the proposition that something less than an intentionally caused delay by the prosecution might suffice to justify finding a due process violation, if actual prejudice is also present. The First District in Howell, supra, adopted the following test approved in Townley:

> Thus, in evaluating an asserted due process violation based on pre-indictment delay, Lovasco and Marion require us "to consider both the reasons for the delay and the prejudice of the accused."... Further the accused bears the burden of proving the prejudice and, if the threshold requirement of proof of actual prejudice is not met the inquiry ends there... Once actual prejudice is found, it is necessary to engage "in a reciprocal balancing of the government's need for investigative delay... against the prejudice asserted by the defendant."... The inquiry turns on "whether the prosecution's actions violated 'fundamental conceptions of justice' or

> the community's sense of fair play and decency."..."Inherent in the adoption of a balancing process is the notion that particular reasons are to be weighed against the particular prejudice suffered on a case-by-case basis.

Townley, supra, at 581-582 (cites omitted); accord, United States v. King, 593 F.2d. 269,272 (7th Cir. 1979). Once the defendant has met his burden of proof by demonstrating actual prejudice resulting from any delay in arrest or indictment, the burden then shifts to the government to show why the delay was necessary. United States v. King, 593 F.2d 269,272 (7th Cir. 1979).

Appellant contends on appeal as he did below that he suffered actual prejudice as a result of the delay. See Lovasco; State v. Parent 408 So.2d 612 (Fla. 2d DCA 1981); Howell; and State v. Newman, 367 So.2d 251 (Fla. 4th DCA 1979). Appellant demonstrated actual prejudice to the trial court. The instant offense occurred on January 4, 1982. (R6208) A BOLO description was issued immediately with a fairly detailed description of two white males. (R4857-4858) Three probable cause statements were prepared by law enforcement authorities on this particular case. The first probable cause statement of April 14, 1982, did not result in any arrests since the state was of the opinion that more evidence needed to be gathered in order to support the case. (R4866) This contention was made by the State despite the fact that the matched shell casings had already been obtained from appellant's house. (R4894-4895) The second probable cause statement of May 14, 1982, occurred after Joel Bennett identified Tom McDermid from one of two photographic lineups. (R4863,4865)

The state did not make an arrest following this development due to what they thought was insufficient evidence and the speedy trial problems that might arise as a result of other charges pending against the accused culprits. (R4866-4868) The third probable cause statement of December 2, 1982, arose following a statement from Thomas McDermid to the police directly implicating the appellant as his accomplice in the attempted robbery and murder. (R4869) The authorities still did not arrest the appellant with one of the reasons cited being the number of charges and trials currently facing the appellant in other circuits. (R4866,4867,4869) Around the beginning of December, 1982, the appellant had two cases pending in Orange County and one pending in Seminole County. (R4896)

The only suspects identified by the police in the instant case were the appellant and Tom McDermid and the McManus brothers. (R4881-4883) In spite of all the evidence accumulated by the state at this early date and the scarcity of suspects, the appellant was not initially indicted on the instant charge until December 19, 1983. (R1) He was first formally arrested on this charge on January 5, 1984. (R4) Appellant's first appearance was held on January 6, 1984, (R8421-8426) and he was arraigned on January 13, 1984. (R4675) An amended indictment was returned on February 22, 1984, (R4683), and the appellant was rear-raigned. (R4690)

At the pre-trial motion hearings, the appellant clearly demonstrated actual prejudice to his case caused by the delay. Daniel Williams, a former St. Augustine police officer and key

investigator of the murder, delivered the murder victim's clothing to the crime lab on December 8, 1982. (R109) Williams delivered the fired ammunition casings and the pistol seized from Appellant's house to the crime lab on April 14, 1982. (R109,4841) Since that time, he had suffered a heart attack which had severly affected his memory. (R4840) The vast majority of his testimony came from reports done at the time of the crime and was not the product of his independent recollection. (R4840) Mr. Williams was unable to remember how much time elapsed between the interviews that he conducted and the subsequent reports that he filed. (R4844) Mr. Williams was unable to remember if the evidence that he processed had ever been compromised during his handling of it. (R4844-4845) Williams also had no recollection of the investigative work he did concerning Todd LeClaire and Joel Bennett. (R4843-4844) Appellant submits that he demonstrated prejudice regarding this witness.

Joel Bennett was at the scene of the crime and observed two (2) culprits fleeing the scene. (R7304-7340) Todd LeClaire saw two suspicious individuals near the scene of the crime who did not match Appellant's description. (R7180-7199) These two witnesses were not called in the state's case, but were called by the defense. Todd LeClaire saw two suspicious men facing the corner of the Winn-Dixie building around the time of the robbery. The police never showed LeClaire photographs or talked to him again except for the day following the robbery. LeClaire told the police that he might be able to identify the blond individual and, at trial, testified that he possibly <u>still</u> might be able to

identify the culprits. (R7195-7196) However, LeClaire testified that his memory of the two (2) individuals had been impaired by the passage of time. (R4962-4969)

Joel Bennett gave a description of the two culprits to Sergeant Nicklo at time of the robbery. Bennett came within inches of the two (2) men as they walked through the hallway of the Holiday Inn where Bennett worked. Bennett identified McDermid as one of the individuals, but did not select Jerry Rogers as one of pair. He testified that he believed that McDermid was the shorter of the two (2) individuals with the buck teeth. (R7311-7316,7336-7337) Bennett admitted that at the time of the photo identification, his memory of the shorter individual was much more clear. (R7314) Appellant's submits that without the undue delay by the state in the case at bar, these witnesses could have provided more than simply negative testimony (not being able to identify Rogers as one of the robbers), but could instead have offered positive evidence (being able to state emphatically that Jerry Rogers was not one of the individuals). Appellant submits that he demonstrated actual prejudice to the trial court regarding these witnesses.

Numerous other witnesses' memories were also affected by the delay. Jeneane Warner, who identified the Appellant as one of the robbers of the Daniels' Grocery Store in Orlando was unable to estimate the amount of time that she looked at the robbers in the parking lot. As a result of the passage of time she was unable to remember this factor which is extremely important in weighing the identification of the witness. (R5232-5263) Vickie Baker, a witness in the St. Augustine attempted robbery,

did not recall ever viewing a photographic lineup. (R5361,5370) In fact, Sergeant Nicklo did show her two photographic lineups, one containing McDermid and the other containing Rogers. She narrowed her choice in one lineup down to two photos, one of which was of Thomas McDermid. She was unable select a photo from the lineup containing the Appellant's picture. Her faded memory was obvious at the motion hearing. (R5359-5379)

Troy Sapp's testimony at his deposition revealed that the length of time since the incident undoubtedly affected his memory, concluding that two (2) years was a long time to remember someone you only saw for a few seconds. He did testify that he could have identified the culprits at the time of the incident. (R5396-5401) Karl Hagen also had similar difficulties. (R5402-5403) Monica Burnett presented a similar situation as well. (R5405-5406) Grady Gray remembered details for about three (3) months before he forgot the lion's share of the information. (R5414)

Appellant submits that these faded memories of key eyewitnesses established prejudice caused by the state's delay. In denying the motion, the trial court may have given too much weight to the disappearance of Appellant's alibi witnesses, John and Laura Norwood. (R2989-2990) In so doing, the trial court curiously concluded that there was not one scintilla of evidence to indicate that John and Laura Norwood ever existed. The trial court's odd conclusion was made in spite of sworn testimony to the contrary. Debra Rogers testified that she met John and Laura Norwood through her husband Jerry, who met them at a construction

site. While the Appellant was in the Seminole County jail preparing to defend himself against other charges, Debra Rogers attempted to locate the last known address of the Norwoods. She contacted the Florida Power Corporation, Orlando Utilities Corporation, Winter Park Telephone, Southern Bell and the main post office. (R4957) Debra was an untrained investigator who received no outside aid. Finding the Norwoods was important to corroborate the Appellant's alibi that he was at home having a barbecue the night of the murder. The Norwoods were the only nonfamily members who could have corroborated this fact. (R4956-4959) Debra last talked to the Norwoods in July of 1982 at which time they said that they were thinking about moving back up north. (R4958-4950)

In light of the delay in bringing charges in the instant case, the inability to locate the Norwoods was not surprising. This conclusion follows from the fact that the couple apparently lived in a truck equipped with a camper. (R7764-7766) Steven Brady, the prosecutor in Seminole County, first heard mention of John and Laura Norwood in the summer of 1983. (R4917-4920) This was prior to Appellant's first indictment or arrest for the murder, hence no motivation existed for him to fabricate at that point. In contrast, the state's first statement of probable cause mentioning Jerry Rogers as a suspect in the murder was issued on April 14, 1982. (R1879) The second probable cause statement of May 14, 1982, resulted from an eyewitness identification of Thomas McDermid from a photographic lineup. (R1880) Both of these probable cause statements were

issued before the disappearance of John and Laura Norwood. The prejudice caused by the delay of the state becomes critical.

Appellant submits that he demonstrated actual prejudice to the trial court below. The court chose to reject this demonstration of prejudice and, hence, did not require the state to come forward with any reasons to justify the delay. As such, the trial court once again applied an incorrect standard. This resulted in a deprivation of Appellant's constitutional rights to due process of law. Amend. V and XIV, U.S. Const. This Court should reverse and remand these proceedings to the trial court with instructions to dismiss the indictment. At the very least, remand should be had so that the trial court can apply the proper standard and law to the instant set of facts.

## POINT V

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

Prior to trial, Appellant moved in limine to prevent the state from presenting so-called similar fact evidence. (R765-766) The trial court rendered a detailed order denying the motion in limine without prejudice to attack the manner and scope of the evidence of collateral crimes presented at trial. (R2985-2995) The similar fact evidence introduced involved the commission of armed robberies by both the Appellant and Tom McDermid of two other grocery stores. (R2986) In denying the motion in limine, the trial court made findings of fact that all three robberies had the following similar factual circumstances (modus operandi):

> 1) Target is a chain-type grocery store.
> 2) Robbery takes place just prior to closing.
> 3) Two white males involved, one slightly taller that the other. Both in the mid twenties or early thirties.
> 4) Both wear nylon stocking masks.
> 5) Each carries an automatic type firearm (handgun).
> 6) One robber directs his attention to the cash registers, while the other seeks out the office and office safe area containing cash receipts.
> 7) Both robbers direct patrons and employees to "lay on the floor".
> 8) Unnecessary violence and physical contact with victims is sought to be avoided.
> 9) Bags are used to secure money, plastic or pillow cases.
> 10) Tom McDermid was one of two participants. (R2986-2987)

Appellant objected strenuously throughout the proceedings to any and all evidence and argument concerning collateral crimes. Appellant does not believe the preservation of this issue is in doubt. (See e.g. R6727) The standard limiting instruction was read to the jury prior to the evidence being introduced. (R6732)

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

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

This holding has been codified in §90.404(2)(a), Florida Statutes. (1983)

An extension of Williams occurred in Williams v. State, 117 So.2d 473 (Fla. 1960), which held that the state cannot make a prior or subsequent offense the feature instead of an incident of trial. This Court expressed concern that the testimony of collateral crimes degenerates from the development of facts pertinent to the issue of guilt into a character attack.

Appellant contends that the trial court erred in allowing the voluminous amount of testimony into evidence where it was not similar enough to the crime charged and thus was simply irrelevant evidence of collateral crimes. Appellant also contends that the state's introduction of the large amount of

such evidence resulted in the subsequent robberies becoming a feature rather than merely an incident of the trial. At the conclusion of all of the evidence, Appellant moved for a judgment of acquittal based on the contention that the collateral crimes had become a feature of the trial. (R8076-8077) Appellant submits that the trial court should have at least granted a mistrial at that point.

The relevancy of similar fact evidence must be clear and convincing, not illusory, fancied or suppositious. Headrick v. State, 247 So.2d 203 (Fla. 2d DCA 1970) Even if a trial judge finds evidence of this type to be otherwise relevant, it is still inadmissible when its probative value is substantially outweighed by its unduly prejudical nature. §90.403, Fla. Stat.; Young v. State, 234 So.2d 341 (Fla. 1970); and Heiney v. State, 447 So.2d 210, 216-218 (Fla. 1984) (Boyd, J. dissenting).

Appellant points out the obvious fact that armed robbery (which was the subject offense in the collateral crimes introduced by the state) is vastly different from first degree murder, even felony-murder. The felony-murder which was the charge in the trial below bore very little resemblance to the robberies of the Publix and Daniels grocery stores. The collateral crimes involved a completed and successful robbery of the cash receipts. No such success was present in the Winn-Dixie attempted robbery. Similar fact circumstance number eight (8) found by the trial judge was the avoidance of unnecessary violence and physical contact of the victims. (R2987) No such avoidance was present in the murder of David Smith. The state's

theory of prosecution established the senseless murder of Mr. Smith rather than what could have been very easy extrication from the scene without unnecessary violence.

A factually analogous case is presented in Drake v. State, 400 So.2d 1217 (Fla. 1981). This Court pointed out the many dissimilarites of the collateral crimes, "not the least of which is that the collateral incidents involved only sexual assualts while the instant case involved murder with little, if any, evidence of sexual abuse." Id. at 1219. The same situation is presented in the case at bar. The collateral crimes involved only successful robberies while the instant case involved murder with a bungled attempted robbery. As this Court did in Drake, a new trial must be ordered with the exclusion of the prejudical evidence.

The remainder of the trial court's "similar fact circumstances (modus operandi)" also suffers when scrutinized. While Winn-Dixie and Publix are part of grocery store chains, Daniels is an independently owned family grocery store. (R6800) While the Winn-Dixie attempted robbery and the Daniels robbery occurred within approximately ten (10) minutes of closing time, the Publix robbery occurred thirty (30) to forty (40) minutes prior to closing. (R6209,,6733-6742,6802-6803)

The trial court also placed great stock in the fact that each of the robberies involved two (2) white males, one slightly taller than the other, both in their mid-twenties or early thirties. (R2986) This factor is not completely supported by the record. The BOLO issued for the Daniels robbery listed

two white males, one 5'8", one at 5'4" and both between twenty and twenty-five years of age. (R507) The Publix robbery involved one white male at 5'8", thirty to thirty-five years old, and another white male at 5'10", approximately twenty-five years of age. (R4333) The instant offense in St. Augustine involved two (2) white males, both in their mid-twenties; both approximately 5'7" in height. (R6972) Jerry Rogers is 5'4½" tall, approximately 160 pounds, while McDermid is 5'8" and 175 pounds. (R2038,7011) One witness even saw three robbers, one carrying a shotgun. (R5394-5396)

The fact that Thomas McDermid was one of the two participants in all of the robberies has no bearing on proving the state's case against Jerry Rogers. Appellant submits that a factor of this type skews the Williams Rule and results in an unfair application. If this type of factor can be considered, a vindictive person could drag enemies down with him in crimes he committed with another individual. Appellant submits that this type of factor should not be considered in comparing similarity of crimes for Williams Rule purposes.

Appellant submits that this Court must look at the evidence presented and compare this attempted armed robbery/murder with the evidence of collateral crimes regarding the successful and nonfatal robberies of Daniels and Publix. Similarities can be found in all robberies whether or not they were committed by the same individuals. Appellant contends that most, if not all of the factors of similarity found by the trial court are common in numerous robberies. The Appellant presented

extensive testimony in support of this contention at pre-trial motion hearings. (R4890-4893,5091-5093,5166-5167,5264-5271, 5280-5304)

In Drake v. State, 400 So.2d 1217 (Fla. 1981), this Court reversed a first-degree murder conviction on the grounds that the trial court erroneously admitted evidence of two prior sexual assaults by the defendant. The theory of admissibility was, as in the instant case, that the collateral crimes were relevant to show identity by a common modus operandi. In reversing the ruling of the trial court, this Court held:

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared actual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant. Id. at 1219.

The Third District Court of Appeal addressed the same issue in Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982) and held:

> However, we understand the test to be far more stringent - not merely that there be greater similarity than this similarity between the crimes, but rather that there be something so unique or particularly unusual about the perpretrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged. See Beasley v. State, 305 So.2d 285 (Fla. 3rd DCA

> 1974). Accord, Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974); Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974).

Id. at 1215.

In Bricker v. State, 462 So.2d 556, 559 (Fla 3d DCA 1985), the Third District Court of Appeal reiterated the test for admissibility of similar fact evidence:

> [The] similar crimes test is a stringent one: there must be something so unique or particularly unusual about the perpretrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged. [Green v. State, 427 So.2d 1036, 1038 (Fla. 3rd DCA 1983)], citing Sias v. State, 416 So.2d 1213 (Fla. 3rd DCA 1982).

The general similarities found in the Williams Rule cases and the instant case would likely be found in a vast number of such crimes and can hardly point to the Appellant as the perpretrator. See Sias, supra.

In sum, the evidence of the prior robberies failed the stringent test for admissibility under Section 90.404(2)(a), Florida Statutes (1983). The net result of their admission showed simply that Appellant was a bad person who committed other robberies in the past. For this very reason, it was error to admit the testimony of prior crimes into evidence. Drake v. State, 400 So.2d 1217 (Fla. 1981); Williams v. State, 117 So.2d 473 (Fla. 1960); and Williams v. State, 110 So.2d 654 (Fla. 1959). The result of the admission of this highly prejudical testimony effectively denied Appellant's constitutionally guaranteed right to a fair trial.

An extension of Williams supra occurred in Williams v. State, 117 So.2d 473 (Fla. 1960), which held that the state may not make a prior or subsequent offense a feature instead of an incident of the trial. In Sias, supra, the Third District Court of Appeal noted that:

> Where the evidence of the other crime is found to be so disproportionate as to become a feature of the case, reversals have followed. See, e.g., Williams v. State, 117 So.2d 473 (Fla. 1960); Knox v. State, 361 So.2d 799 (Fla. 1st DCA 1978); Davis v. State, 276 So.2d 846 (Fla. 2d DCA 1973), aff'd, State v. Davis, 290 So.2d 30 (Fla. 1974); Reyes v. State, 253 So.2d 907 (Fla. 1st DCA 1971); Green v. State, 228 So.2d 397 (Fla. 2d DCA 1969).

In the instant case, the state was allowed to go too far afield in the introduction of testimony concerning the collateral crimes, such that the inquiry transcended the bounds of relevancy to the charge being tried and made the collateral crimes a feature of the trial instead of an incident. See Green v. State, 228 So.2d 397 (Fla. 2d DCA 1969), Cf. Denson v. State, 264 So.2d 442 (Fla. 1st DCA 1974). As a result of the testimony simply demonstrated the bad character of the appellant thus unduly prejudicing him. See Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977).

## POINT VI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO PRECLUDE IDENTIFICATION TESTIMONY WHERE THE IDENTIFICATION WAS TAINTED THROUGH THE STATE'S VIOLATION OF A COURT ORDER REQUIRING DEFENSE COUNSEL TO BE INFORMED OF AND PRESENT AT A PHOTO LINEUP IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

Under the unique circumstances of this case where the defendant was representing himself (with the assistance of court-appointed counsel) at trial and in the discovery process, the trial court ordered that the state inform defense counsel of any photo lineups and provide for the presence of defense counsel at such lineup. (R 3342-3343, 3498-3499) In violation of this order, and without notifying opposing counsel, the state through one of its assistants and an investigator, conducted a photo lineup with witness Ketsey Day Supinger, a key state witness who had not previously identified anyone in conjunction with the robbery/murder. (R 3948-3953, 3984-4005, 4423-4454)

At the photo lineup, Mrs. Supinger narrowed the photographs to two and was leaning more strongly toward one, but was unable to make a positive identification of the perpetrator. (R 3952, 3988-3989, 4432, 4454) One of these two photographs was that of the defendant, but the testimony during depositions and hearings was contradictory as to whether she was leaning toward

the photograph of the defendant or of the other man as the robber. (R 3952, 3988-3989, 3992, 4026-4027)

Within two minutes of clandestinely viewing the photographs, including that of the defendant, she was taken into the deposition which was being conducted by the defendant and his two assisting attorneys. (R 3969-3970) Even though she had just viewed the defendant's photograph as a possible suspect, Mrs. Supinger, under questioning from the defendant himself, stated that she would not be able to identify the robber by his face. (R 4440) After the assistant state attorney referred to the defendant at the deposition by his name, Mrs. Supinger indicated that she knew that he was the perpetrator. (R 4445-4446)

The defendant moved to preclude the state from using the witness to identify the defendant. (R 3863-3866, 4445-4446) Counsel maintained and the court stated that this was the precise prejudicial situation which the court's order had been designed to prevent. (R 4466, 4471-4474) The situation, as it improperly occurred, amounted to an impermissibly suggestive showup. The court recognized this fact and precluded the state from utilizing any evidence of the photo lineup or the identification at the deposition. (R 4459-4460, 4467, 4471)

However, the court refused to suppress any in-court identification of the accused, stating that the situation was in large part due to the defendant's decision to represent himself and conduct his own questioning at deposition. (R 3809-3810) Counsel indicated that if they had been made aware prior to the deposition of the just-completed, unsuccessful photo lineup,

they, of course, would not have had the defendant present at the deposition. (R 6165) This suggestive identification procedure, they maintained, tainted the identification of the defendant at the deposition and at the trial. The state did not and cannot under the facts of the case demonstrate an independent basis for the witness' identification of the defendent.

It is recognized, as pointed out in the trial court's order, that a defendant does not have the absolute right to the presence of counsel at a photographic lineup. United States v. Ash, 413 U.S. 300 (1973). However, under the particular facts of this case, the court recognized the need for defense counsel's knowledge of and presence at the photo lineup. (R 4471) Irreparable prejudice to the defendant occurred because of the state's violation of the order which resulted in the defendant being present at a proceeding minutes after the witness had viewed his photograph at the lineup. (R 4471-4474)

Through a series of United States Supreme Court cases, due process considerations have established as a requirement of law a threshold of reliability for the admissibility of identification evidence. Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Neil v. Biggers, 409 U.S. 188 (1972). See also Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978), cert. den. 365 So.2d 709 (Fla. 1978). Due process requires that evidence of a procedure which gives rise to a very substantial likelihood of misidentification be withheld from consideration by the jury. Exclusion of the identification

evidence is warranted if the identification procedure was so suggestive, and the witness' unassisted ability to make the identification was so weak, that it may be reasonably said that the witness has lost or abandoned his or her mental image of the offender and has adopted the identification suggested. Simmons v. United States, supra.

Having just viewed the defendant's picture and without making any positive identification, Mrs. Supinger was taken to the deposition room where, not knowing of the lineup, the defendant was preparing to depose her. (R 3953-3955) It appears that the witness was also informed by an employee of the state attorney's office that the accused would be present at and taking part in her deposition. (R 4019, 4425, 6269) Still, the witness, under questioning by the defendant himself, admitted that she would not be able to positively identify the robber by his face. (R 4440) It was not until the assistant state attorney called the defendant by name that the witness indicated that she knew that the defendant was the robber. (R 4448, 4445-4446) The appellant can conceive of no identification procedure more prejudicial and impermissibly suggestive than that which occurred here. This situation is tantamount to, if not worse than, an impermissible "showup" confrontation which has been widely condemned as unduly suggestive and conducive to irreparable misidentification. Stovall v. Denno, 388 U.S. at 302.

The fact that the witness was unable to positively identify the perpetrator from the photo lineup and stated that she could not identify him by his face, makes her subsequent

identification (after being told that this was the defendant) inherently unreliable. There is a very substantial likelihood that Mrs. Supinger's subsequent identification was based on her view of the defendant's photograph and her immediate view of (and introduction to) the defendant at the deposition rather than on her view of the robber, whether she realized it or not. She, in fact, admitted that part of the basis for her identification of the defendant was having just seen his photograph in the lineup. (R 3955, 4497)

The unique circumstances in this identification process tainted the identification at the deposition, thus shifting the burden to the state to prove that the in-court identification could be made independent of the improper pre-trial identification. Lauramore v. State, 422 So.2d 896 (Fla. 1st DCA 1982), rev. den. 426 So.2d 27 (Fla. 1983); State v. Cromartie, 419 So2d 757 (Fla. 1st DCA 1982), rev. dismissed 422 So.2d 842 (Fla. 1982); Adams v. State, 417 So.2d 826 (Fla. 1st DCA 1982). In Baxter v. State, supra at 1237, (a photographic lineup case), the court, citing Stovall v. Denno, supra, stated that suggestive identifications and their fruits are inadmissible:

> It is the danger of misidentification, rather than the mere occasion of suggestion, that constitutes the basis for exclusion of the identification evidence.
>
> * * *
>
> Evidence which is the fruit of a suggestive identification procedure does not meet threshold reliability where the procedure gives rise to a very substantial likelihood of misidentification. [citations omitted.]

> Due Process requires that evidence posing such a high danger of misrepresentation be withheld from consideration by the jury.

See also Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973); Crume v. Beto, 383 F.2d 36 (5th Cir. 1967); Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). Certainly the totality of the circumstances (Stovall v. Denno, 388 U.S. at 302) surrounding the confrontation here not only suggests a danger of misidentification, but gives rise to exactly the practice which the courts have condemned.

The identification procedure being unduly suggestive, the court must then question whether the misidentification would taint a later in-court identification. Grant v. State, 390 So.2d 341 (Fla. 1980). The state possesses the burden to overcome the presumption that the in-court identification would be tainted:

> [O]nce a trial court determines that a pretrial identification procedure was impermissibly suggestive, it is presumed that any in-court identification will be tainted. It is the State's burden to overcome this presumption by "clear and convincing" evidence.

State v. Sepulvado, 362 So.2d 324, 327 (Fla. 2d DCA 1978).

The state has not met and cannot meet that burden in the case sub judice. During the offense, for two seconds, Ketsey Day Supinger observed only the masked perpetrator who was standing at her register; she was unable to observe the other perpetrator. (R 3930-3932,4484,5661,6213-6215,6249,6264,6292). She gave a general description to the police which she changed after viewing the photo lineup and the defendant in person; such changes including the perpetrator's height and facial characteristics (teeth).

(R 3980, 4440, 6266) Mrs. Supinger was unable to positively identify the robber from the photo pack, narrowing the choice to two whom she felt were the closest to the robber. (R 3952) She was leaning toward one of the photos, but felt that the face was thinner, more like the other photo. (R 3988) The state attorney investigator testified that the witness was leaning more toward photograph E (which was not the defendant's), rather than photograph B (which was the other photograph to which she had narrowed it down and which was the defendant's). (R3989, 3992) Upon being confronted by the person whom she later identified to be the robber at her register, Mrs. Supinger stated that she did not know "if she could identify him by face." (R 4440) After the impermissible identification procedure, however, the witness was "certain" of her identification of the defendant as the robber at her register, both from the photograph and from viewing him in person. (R 3957, 3976) However, McDermid, the admitted accomplice and state's key witness, testified that it was he at Supinger's register and that the defendant was the other perpetrator (who according to Supinger's testimony she was unable to see and could not identify). (R 4484, 6538-6540) It thus reasonably appears that the witness has lost or abandoned her original mental image of the offender at her register (McDermid) and has adopted the identification suggested (the defendant). Simmons v. United States, supra.

The pre-trial and in-court identifications must therefore be suppressed as unreliable, and the case reversed and remanded for a new trial.

## POINT VII

THE TRIAL COMMITTED REVERSIBLE ERROR IN ALLOWING PREJUDICAL HEARSAY TESITMONY WHICH DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AND TO A FAIR TRIAL.

A. The Trial Court Erred In Admitting The Hearsay Testimony Of Officer Todd Over Objection.

During his own case-in-chief, Appellant called Michael Todd, an Orange County Corrections Officer where the Appellant and Tom McDermid were previously incarcerated in that facility. (R7200-7222) On one occasion when Officer Todd was escorting McDermid to his attorney, they encountered the Appellant going out for recreation chained to some other inmates. Animosity existed between the two and a confrontation ensued. McDermid told the Appellant that he was going to "get him" during his recreation period. Officer Todd warned McDermid twice to refrain from advancing toward the Appellant. In response, McDermid grabbed Officer Todd's hair, before he was eventually subdued by a total of five (5) officers. An internal report was completed but no formal charges were filed against McDermid. (R7200-7204) On cross-examination, the state was allowed to elicit hearsay testimony over objection that McDermid told Officer Todd following the incident that the Appellant was trying to arrange for harm to befall McDermid during his incarceration. Officer Todd also testified that McDermid told him that the Appellant was ruining McDermid's reputation by informing other inmates of his "stool pigeon" status. Appellant's specific and timely hearsay objection was overruled prior to this improper and prejudicial testimony. (R7211-7212)

Appellant submits that it is obvious that this testimony constituted hearsay and does not fall within any of the exceptions to the hearsay rule. It is axiomatic that hearsay is inadmissible in this state. §90.802, Fla. Stat. (1983) In light of the clear error below, this Court must decide whether, but for the error, it is likely that the result below would have been different. Teffeteller v. State, 439 So.2d 840, 843 (Fla. 1983) and Hendrieth v. State, 11 FLW 354 (Fla. 1st DCA, February 7, 1986). In making this inquiry, this Court should bear in mind that the Appellant was sentenced to death based, in part, on this improper evidence. Since the trial was essentially a swearing match between Jerry Layne Rogers and Thomas McDermid, any evidence concerning animosity between the two assumes greater significance. Without this unrebbutted hearsay evidence, Appellant submits that the result below may have been different indeed.

The objectionable testimony takes on even greater significance when the contents are examined more closely. Officer Todd was allowed to testify that the Appellant had, in essence, arranged a "hit" on McDermid. Not only is this irrefutable evidence of uncharged, collateral crimes (constituting improper character evidence), the testimony also was double or even triple hearsay. Todd's testimony revealed that McDermid told him that he had heard that the Appellant was trying to arrange an attack on McDermid. The tenuous nature of the testimony is obvious. Such evidence is clearly improper and prejudical, and is also impossible to refute. Since the testimony

was admitted over a timely and specific objection, the error is clear. Appellant submits that the clarity of the harm is readily apparent when one considers the "substance" of the double hearsay. A new trial is warranted under these circumstances.

B. The Trial Court Erred In Allowing Prejudicial Hearsay Testimony Concerning A Family Feud That Allegedly Occurred At The Time Of The Murder.

Over a specific and timely objection, Stephen Young, Appellant's brother-in-law, was allowed to testify that Maxine Arzberger, Young's mother and Appellant's mother-in-law, told him that she and Jerry and Debra Rogers were not on speaking terms during the months surrounding the murder. (R7956-7958) This was critical since Maxine Arzberger was one of only two adult alibi witnesses that the Appellant could produce to substantiate his own testimony that he was at a family barbecue on the night of the murder. The other adult alibi witness was Appellant's own wife.

The contention that Young's testimony constituted hearsay is clear. Appellant's contention that Young's testimony constitutes reversible error is based on the absolutely critical nature of the evidence. The objectionable testimony goes to the heart of Appellant's alibi defense, since it refutes Maxine Arzberger's testimony that she was with the Appellant on the night of the murder. The implication by the state is that Maxine Arzberger would not have been at the Rogers' house for the barbecue on the night of the murder, since she was not speaking to or socializing with Jerry and Debra Rogers during that period

of time. The devestation to the defense's case caused by this objectionable testimony then becomes apparent. Under these circumstances, a new trial is necessary.

## POINT VIII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE THE STATE WAS ALLOWED TO CONDUCT AN IMPROPER, PREJUDICAL AND IRRELEVANT CROSS-EXAMINATION OF A KEY DEFENSE WITNESS WHICH DEGENERATED INTO A CHARACTER ASSASSINATION.

Appellant presented the testimony of Hubert Reynolds who had been a cellmate of Thomas McDermid's in the St. Augustine jail. At that time, McDermid told Reynolds that he (McDermid) was the triggerman who shot David Smith during the attempted robbery of the Winn- Dixie. Although McDermid never mentioned his partner by name, he showed Reynolds family photos which included his accomplice in the murder. The photograph was not one of Jerry Rogers. The individual was taller than Rogers and bore a striking resemblance to Thomas McDermid. (R7242-7246,7248,7258) This testimony supported Appellant's defense that the true accomplice of Thomas McDermid may have been his own brother, William.

Reynolds testimony had added credibilty in spite of his three (3) prior felony convictions, since he encountered the Appellant only once while in jail. Reynolds testified for the defense in spite of the fact that the State Attorney's Office had approached several inmates, Reynolds included, in May of 1984 and indicated that they had obtained evidence that the inmates were lying. The state attorney threatened each of the inmates that they would be taken in front of Judge Watson if they persisted in perjuring themselves. In spite of this fact, Reynolds' remained consistent and truthful. (R7247,7249-7250) At the time of his testimony, Hubert Reynolds was currently awaiting the result of

his parole violation hearing. (R7247-7248) Appellant contends that these factors are a good indication that Hubert Reynolds' testimony was truthful.

On cross-examination, the prosecutor properly impeached Hubert Reynolds by eliciting his admission that he had been convicted of three (3) felonies. (R7252) The state also engaged in some pertinent cross-examination regarding the witnesses' bias and motive of testifying. That cross-examination involved Hubert Reynolds' animosity, if any, towards the Office of the State Attorney who prosecuted him in the past. (R7251-7252,7259) Mr. Reynolds maintained that while he previously had animosity toward the state attorney, this no longer existed. He also admitted that the Appellant was a witness in his civil suit against the county. (R7261-7262,7268,7272)

Mr. Reynolds stated that it was fairly easy to obtain inmates to testify in your behalf. (R7252) The prosecutor then asked Mr. Reynolds if he had been charged with an offense with "Butch" McBurrows. Reynolds denied this allegation. The Appellant objected to the line of inquiry. Rather than repeating the question which Reynolds may have not completely understood, the prosecutor asked if Reynolds if he had ever been charged along with Shelley Brazel with the same offense. Appellant again objected stating, "What's this all about?" The prosecutor replied, "You're going to find out." The court overruled the objection and the prosecutor was permitted to elicit the fact that Mr. Reynolds had been charged with setting a fire at the

jail with Shelley Brazel, another inmate. (R7252-7254) After Reynolds admitted that he was charged under these circumstances, the prosecutor inquired if Reynolds had called the State Attorney's Office to tell a prosecutor that he had the names of several inmates who would be willing to testify that Shelley Brazel was the sole culprit. Reynolds responded:

> A. No. I never did make that statement to anyone.
> Q. You never made that statement to Mr. Alexander?
> A. To no one, to anyone.
> Q. And wasn't one of those inmates whose name you gave him a Tony Early?
> A. I never gave that statement to anyone.
> Q. You never gave that statement to anyone?
> A. I never gave that statement to anyone. (R7254)

The defense was forced to digress on re-direct into a necessary explanation in defense of the attack by the prosecutor regarding the accused but convictionless crimes. Since the above inquiry occurred over Appellant's initial objection, Appellant contends that error occurred.

The great weight of authority is to the effect that evidence of pending charges against a witness is inadmissible for impeachment purposes. See Fulton v. State, 335 So.2d 280 (Fla. 1976). This Court in Jordan v. State, 107 Fla. 333, 144 So. 669 (1932), stated the Florida view, as follows:

> It is only permitted to interrogate witnesses as to previous convictions, not mere former arrests or accusations, for a crime.

It is also established that "evidence of particular acts of

misconduct cannot be introduced to impeach the credibility of a witness." Watson v. Campbell, 55 So.2d 540, 541 (Fla. 1951).

In addition to the inquiry being an improper method of impeachment by the state of a defense witness, the prosecutor was also guilty of propounding an improper predicate question. That occurred in the above exchange when the prosecutor insinuated with no basis in proof that Mr. Reynolds had called the State Attorney's Office and offered to furnish the names of inmates who would clear him of any involvement in the arson charge. (R7254) Mr. Reynolds was then forced to deny this accusation (which had no foundation) a total of four (4) times. (R7254) The undersigned counsel is certain that the Appellee will point out the evidence (if any) introduced later to corroborate the prosecutor's attempt to "impeach" Mr. Reynolds, but the Appellant cannot find any such evidence in the record. Appellant submits that such evidence does not exist. Since the questions included facts not in evidence, the jury was left with the bare allegation by the prosecutor that Mr. Reynolds had made such a statement. Since this alone constituted improper impeachment, Mr. Reynolds' credibility was unjustly besmirched. This coupled with the improper character attack upon the witness results in reversible error. Mr. Reynolds' credibility was critical to the defense case-in-chief and thus, cannot be assessed as harmless error.

## POINT IX

IN CONRAVENTION OF APPELLANT'S RIGHTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ALLOWING EVIDENCE OBTAINED AS A RESULT OF AN UNREASONABLE SEARCH AND SEIZURE OF APPELLANT'S HOME AND SHOP.

On April 19, 1984, Appellant filed a motion to suppress evidence obtained as a result of an unreasonable search and seizure of Appellant's home in Winter Park, Florida. (R636-640) An amendment to the motion to suppress was filed in June of 1984. (R1284-1285) The Appellant orally enlarged the motion to suppress to include items seized from his place of business. (R4987-4988) The state stipulated as to Appellant's standing and expectation of privacy. (R4986) Appellant also orally enlarged the grounds to include his First Amendment right to freedom of press. (R4988) After hearing extensive testimony and argument, the trial court denied the motion to suppress. (R2991-2992) The court found that the affidavit and the warrant complied with the requirements of the law. The trial court found no evidence of bad faith on the part of the police and ruled that misspellings contained in the warrant were insignificant. The court also found that the scope of the search did not invalidate the seizure of evidence, even though the material seized was somewhat beyond that described in the warrant. (R2992) Evidence found in the search was introduced over Appellant's renewed and standing objections at trial. (R6612-6614,6639-6704)

Appellant contends on appeal as he did at trial that the evidence seized from his home and shop was the product of an unreasonable search and seizure in violation of his constitu-

tional rights. Amend. IV and XIV, U.S. Const. Numerous problems exist with the warrant and the method by which it was obtained.

Appellant initially submits that statements in the affidavit were contradicted and proven erroneous by evidence presented at the suppression hearing. In the affidavit, Deputy Wood states that the Publix robbery:

> ...was committed by two white males of which the descriptions match those of the defendants known as Jerry Layne Rogers and Thomas Joseph McDermid. Your Affiant knows this as surveillance teams have observed these suspects on numerous occasions.
>
> Your Affiant knows that on April 9, 1982, investigator William B. McClintock of the Winter Park Police Department showed a photographic lineup to two separate witnesses to this armed robbery. These two witnesses positively identified, without hesitation, Jerry Layne Rogers and Thomas Joseph McDermid as the persons who robbed them on April 7, 1982. (R258,263,1883,1886)

Appellant submits that the evidence adduced at the suppression hearing shows that the facts contained in the affidavit were proven to be erroneous, or at the very least were not supported by the evidence. Deputy Wood testified that he took Detective McClintock at his word that two (2) witnesses had identified McDermid and Rogers as the culprits in the Publix robbery. (R5152-5153) In fact, only one witness had identified Jerry Rogers from a photo lineup. (R5121-5143,5192-5204) Mr. Woodard's selection of Rogers' photo was not without hesitation. He did in fact hesitate on his identification of Rogers and concluded, "I feel these are [the ones] who robbed [the store]."

(R5126) It is also clear from the testimony at the suppresssion hearing that Woodard was the only witness to even tentatively identify Jerry Rogers.

The term "surveillance teams" is also misleading. The surveillance teams in the instant case consisted of Deputy Wood driving by Rogers' home on a few occasions. (R5047-5049,5186) There was some indication that the Appellant was never seen at his home following the robberies. Appellant also submits that the descriptions of the two Publix robbers did not sufficiently match the actual appearance of Jerry Rogers. (R5058-5091)

Generally, the sufficiency of a search warrant is determined soley with reference to the warrant and supporting affidavit. State v. Jacobs, 320 So.2d 45 (Fla. 2d DCA 1975). Even where a warrant is sufficient on its face, the court may make a determination of the truthfulness of the factual statements contained in the warrant affidavit. Id. In cases where the affiant subsequently contradicts material averments made to secure the warrant, or where otherwise such averments are proved erroneous, the warrant may be found to be invalid. Id.; United States v. Jones, 475 F.2d 723 (5th Cir. 1973). Appellant submits that he has met the test of proving erroneous, material statements contained in the affidavit to be erroneous.

Appellant also submits that a problem exists with the specificity of the warrant itself. The warrant states that evidence of the Publix robbery exists in the home, namely a certain semi-automatic pistol, a clear nylon stocking, and U.S.

currency. (R257) The trial court conceded that the material seized was somewhat beyond that precisely described in the warrant. (R2992) The testimony at the suppression hearing revealed that no stocking was seized and several guns with ammunition were seized where the warrant listed only one. (R5007-5010) A map was seized as well along with an assault rifle. (R5009-5114) This is one indication that the police were simply on a fishing expedition into Appellant's home simply hoping to find some incriminating evidence. If a warrant fails to adequately specify the material to be seized, the scope of seizure is left to the discretion of the executing officer and is therefore constitutionally overbroad. Pezzella v. State, 390 So.2d 97 (Fla. 3d DCA 1980). The purpose of this requirement is to prevent general searches such as the one that Appellant contends occurred here. Id.

Appellant also submits that the officers did not have probable cause to believe that these items of evidence were in the residence. Deputy Sears admitted that he did not see Rogers at his residence from the date of the Publix robbery until the warrant was signed. (R5017) Deputy Wood could tell from his "surveillance" that the Appellant was not at home following the robberies. (R5186) In spite of this, Deputy Wood stated in the affidavit that he believed that items of evidence used in the crime were concealed in the dwelling. (R5172-5173) This was in spite of the fact that he did not see Rogers enter his home, nor did he have information from others that Rogers had been seen entering the home. (R5172-5173) He testified that he thought the items were in the house because Rogers and McDermid

established a pattern of moving out of the area for two to three (2-3) days following a robbery before returning to their residences. (R5177-5178) Appellant fails to understand how this factor would constitute probable cause to believe the evidence was in the residence. See King v. State, 410 So.2d 586 (Fla. 2d DCA 1982).

It is a fundamental requirement that a search warrant to be valid must set forth the particularity of the items to be seized. Sims v. State, 11 FLW 358 (Fla. 1st DCA February 7, 1986) In determining the sufficiency of a search warrant on this issue, the inquiry is limited soley to an examination of the warrant itself and the supporting affidavit. Carlton v. State, 449 So.2d 250 (Fla. 1984). In Sims, supra, the district court found a warrant to be facially invalid where the search was to find specific items of stolen property with a blue wheelbarrow the only item mentioned in the warrant. There was no description to identify it from any other blue wheelbarrow. In finding the description to be totally insufficient, the Sims court highlighted the fact that the officers seized twenty-seven (27) different items of which thirteen (13) had to be returned. A similar situation exists in the instant case. The warrant refers only to U.S. currency with no other particularized description. The only other two items mentioned were a "certain semi-automatic pistol and a clear nylon stocking." Appellant submits that such a broad, unspecified description of items renders the warrant invalid. The good faith exception to the exclusionary rule is not available to the state in the instant situation.

United States v. Leon, 468 U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

It was also clear that the magistrate issuing the warrant received oral information from Deputy Wood, the affiant, in considering the available probable cause. (R5168) It is clear that the affidavit forming the basis of a search warrant must, in and of itself, demonstrate probable cause for issuance of the warrant and cannot be supplemented by oral testimony to prove probable cause. Orr v. State, 382 So.2d 860 (Fla 1st DCA 1980).

Appellant also complained below about the inaccuracies and typographical errors on the face of the warrant itself which had been corrected by hand and initialed by Deputy Wood. (R257) These consisted of the original phrase, "that there is not being kept in ... said premises ... pistol, a clear nylon stocking, and U.S. currency ..." which was changed to "that there is now being kept ...". The other change was less major in meaning. While this Court may not find the warrant invalid based on these errors, Appellant submits that it is more evidence of the lackadaisical manner in which the warrant was sought, prepared and issued. For all of these reasons, Appellant contends that the motion to suppress should have been granted.

## POINT X

THE TRIAL COURT'S REFUSAL TO ALLOW THE APPELLANT TO STATE THE SPECIFIC GROUNDS OF AN OBJECTION RESULTED IN A DEPRIVATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

During the direct examination of Maxine Arzberger, Appellant's mother-in-law and a crucial alibi witness, the state impeached her testimony that she had been with the Appellant on the night of the murder. This was done by the prosecutor playing a tape recorded conversation that Maxine had with Flynn Edmonson, State Attorney investigator, which contained apparent prior inconsistent statements. (R7888-7897) During the continuation of direct examination, Maxine attempted to clarify her statements on the tape by denying that Debra Rogers, her daughter, had asked her to lie concerning the alibi. (R7898) The prosecutor again sought to impeach Maxine with a portion of the tape. The following then occurred:

> The Court: You may play the tape.
> Mr. Rogers: Objection. My objection was --
> The Court: Objection will be overruled. She's denied saying anyone asked her to do it, so play the tape. (R7898)

The prosecutor then proceeded to play the tape which ostensibly impeached Maxine Arzberger's testimony. (R7898-7905)

Appellant submits that the trial court's apparent refusal to allow Rogers to state the grounds of his objection constitutes a fundamental violation of his due process rights guaranteed by the United States Constitution. Amend. V, U.S. Const. As a result, we simply cannot know on what basis Appellant's objection was grounded. This situation is analogous to that in Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983), where

the trial court's refusal to allow a proffer of testimony precluded effective appellate review and resulted in reversal. The trial court's insistence on interrupting the Appellant's objection denied the opportunity to set forth the specific grounds for the objection. This constitutes clear reversible error.

The harmful nature of the error is obvious. Appellant's alibi was heavily grounded on the testimony of Maxine Arzberger, the only available alibi witness who was not a member of Appellant's immediate family. His alibi defense was second only to the critical impeachment of Thomas McDermid's testimony. Appellant therefore submits that the error cannot be considered harmless especially in light of the magnitude of Appellant's sentence of death.

## POINT XI

AT THE PENALTY PHASE, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING IMPEACHMENT TESTIMONY ON A COLLATERAL MATTER WHICH DEGENERATED INTO A CHARACTER ATTACK BEARING NO RELATION TO ANY AGGRAVATING CIRCUMSTANCE THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL RESULTING IN CRUEL AND UNUSUAL PUNISHMENT.

During the penalty phase, the Appellant presented the testimony of two witnesses, his wife and himself. (R8300-8306) The six pages of testimony was offered in mitigation with Debra Rogers testifying about her marital life with the Appellant. She concluded that he was a good husband and father as well as a hard worker and good provider. She also expressed her belief in his innocence. (R8300-8301) The Appellant testified that he had never been arrested prior to April of 1982. He also professed his innocence and told of having offered to submit to a polygraph examination as well as truth serum. (R550) The state did not accept these offers. (R8304-8405)

On cross-examination by the state, the Appellant testified that he did not remember being involved in a violent incident at a restaurant. (R8305) On rebuttal, the state questioned Stephen Young, Appellant's brother-in-law, concerning this incident. Mr. Young testified that the Appellant became miffed at a restaurant during an incident in which a stranger took a chair from their table without asking. Mr. Young testified that the Appellant did not threaten the individual and Young did not recall any statement by Rogers about a fork. Young did recall that the <u>other</u> individual may have threatened to get violent. (R8307-8309) The state was then allowed to bring

forth the testimony of Flynn Edmonson, investigator for the State Attorney's Office, alleging that Mr. Young told Edmonson that someone removed a chair and that Jerry got violent. Edmonson testified that Young also told him that Rogers told Young that he should run a fork through the man's throat. (R8310-8311) Appellant objected based on the irrelevant nature of the testimony and the fact that the state should be limited to rebuttal of anything offered in mitigation. This objection was overruled. (R8310-8311) The prosecutor argued that the testimony rebutted evidence that Rogers was a nonviolent person. The only evidence of this sort that arose during the penalty phase was on the state's cross-examination of the Appellant. (R8306) The Appellant admitted to becoming angry at times but emphatically denied ever becoming violent as a result. (R8306)

Appellant submits that the trial court erred in allowing the testimony of Flynn Edmonson regarding this tenuous impeachment of Stephen Young which allegedly rebutted evidence offered by the Appellant in mitigation. The result was a denial of Appellant's constitutional right to a fair trial. Amend. V, VI, and XIV, U.S. Const.; Art. I, §9, Fla. Const. That resulted in cruel and unusual punishment when the trial court sentenced Jerry Rogers to death. Amend. VIII, U.S. Const.

Initially, Appellant points out that the cross-examination of the Appellant at the penalty phase was totally irrelevant, beyond the scope of direct examination, assumed facts not in evidence and constituted evidence of a nonstatutory aggravating circumstance. Appellant concedes that

there was no objection to the state's line of questioning on cross-examination of the Appellant in this regard. It is nevertheless enlightening when one considers the issue raised here.

Jerry Rogers testified in mitigation and Appellant submits that his testimony was limited to evidence of mitigation. The state's cross-examination violates the dictates of State v. Dixon, 283 So.2d 1 (Fla. 1973) which condemns the state for attempting to force a defendant to prove aggravating circumstances.

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The state can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the state... In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

Id. at 7-8.

Not content with attempting to force the Appellant to prove a nonstatutory aggravating circumstance to aid their cause, the state unsuccessfully sought to elicit the same testimony from Stephen Young, Appellant's brother-in-law. (R8307-8310) When Mr. Young related the true course of events which occurred in the restaurant that day, the state was still unsatisfied. Over objection, Flynn Edmonson testified that Stephen Young had told

him on one occasion in the past that the Appellant had said that he should run a fork through the man's throat. (R10-11) Not only was this impeachment on a collateral matter [see e.g. Whaley v. State, 157 Fla. 593, 26 So.2d 656 (1946) and Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977)], it also constituted evidence of a nonstatutory aggravating circumstance. As such, it was improper.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), this Court approved detailed testimony concerning the events surrounding another murder which the state introduced in support of Section 921.141(5)(b), Florida Statutes (regarding previous convictions for capital or violent felonies). In so holding, this Court emphasized the following language of the statute:

> ...In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7)... (emphasis supplied) §921.141(1), Fla. Stat.

This Court concluded that the testimony obviously related to the aggravating circumstance delineated in Section 921.141(5)(b), Florida Statutes and was thus admissible.

This Court continued in Elledge, supra, to hold that testimony concerning a defendant's confession to another murder for which no conviction had been obtained constituted reversible error. Elledge, supra, at 1002. Since that evidence tends to prove a nonstatutory aggravating circumstance, this Court vacated the death sentence and remanded for a new penalty phase. This occurred in spite of the failure of trial counsel to object to the improper evidence.

A similar result should occur in the case at hand. The objectionable testimony failed to rebut any evidence offered by the Appellant in mitigation and, instead, tended to prove a nonstatutory aggravating circumstance. Additionally, the testimony constituted a tenuous "impeachment" of Mr. Young on a very remote and collateral matter. The prosecutor used this objectionable evidence during his closing argument to the jury as well. (R8315) The evidence also could be termed improper double hearsay. Once Stephen Young denied the statement attributed to Jerry Rogers, the state was precluded from offering extrinsic evidence that impeached Young which resulted in impeachment of Jerry Rogers. Since a timely objection preserved this issue, Appellant's death sentence must be vacated with remand for a new sentencing hearing.

## POINT XII

THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17, OF THE FLORIDA CONSTITUTION.

Following the penalty phase the jury returned with a 12-0 vote in favor of death. (R8340-8341) In imposing the death sentence, the trial court found that the evidence established five aggravating circumstances and rejected all mitigating circumstances. (R4591-4598) The trial court found, that; (1) the appellant had been previously convicted of other felonies involving the use or threat of violence; (2) the murder was committed while the appellant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit a robbery; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the murder was committed for pecuniary gain; and (5) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

A. The Trial Court Erred In Finding That the Capital Felony Was Committed For Pecuniary Gain.

Case law indicates that this aggravating factor is limited in its application to situations where the sole or primary motive for the killings is to obtain monetary gain. See Simmons v. State, 419 So.2d 316, 318 (Fla. 1982); State v. Dixon, 283 So.2d 1,9 (Fla. 1973). This Court has approved the finding of pecuniary gain only in cases in which an actual robbery occurred or was at least attempted, or in which the defendant

received something of value during the crime. See e.g. Bolender v. State, 422 So.2d 833 (Fla. 1982), (murder during robbery and torture of cocaine dealers); Ross v. State, 386 So.2d 1191 (Fla. 1980), (killed burglary victim and ransacked house for valuables); Antone v. State, 382 So.2d 1205 (Fla. 1980), (contract killing); Hargrave v. State, 366 So.2d 1 (Fla. 1979), (robbery of a convenience store). Here, the attempted robbery of the grocery store was complete and no pecuniary gain occurred as a result of the murder.

In the written findings of fact, the trial court admits that the finding of this aggravating circumstance is a close question. (R4594) The trial court also admits that no money was obtained and that the murder would not result in securing any money. The court even concedes that pecuniary gain was not the motive for the killing. (R4595) However, the trial court goes on to curiously conclude that due to the closely connected chain of events, the crime was committed for pecuniary gain. (R4595) Appellant strongly contends that this finding has no basis in the facts or the law.

In the factually indistinguishable case of McCray v. State, 416 So.2d 804 (Fla. 1982), McCray broke a window of the victim's van and removed several boxes of guns which he took to the edge of the woods before returning to his car. McCray then returned to the victim's nearby store where the victim sat in his van. McCray jumped from his own car, saying that he did not want to leave empty-handed. He then approached the van yelling, "This

is for you . . .," and shot the victim three times in the abdomen. No money was taken from the victim at that time, and this Court disapproved the trial judge's finding that the murder was for pecuniary gain. Id. at 807. See also Simmons v. State, 419 So.2d 316, 318 (Fla. 1982).

The trial court's finding of this circumstance cannot be supported under any theory. It is abundantly clear that the state failed to prove this aggravating circumstance beyond a reasonable doubt as required by State v. Dixon, 283 So.2d 1 (Fla. 1973). The finding of this aggravating circumstance must be stricken.

B. The Trial Court Erred In Finding That The Murder Was Committed During The Flight Following The Attempted Commission Of A Robbery.

In finding this aggravating circumstance present, the trial court concluded that the appellant was fleeing the scene of an attempted robbery when the murder was committed. (R4593-4594) While the evidence did establish this fact, the trial court clearly erred in finding this circumstance present since, to do so, the court was guilty of improper doubling. Since the trial court found this aggravating circumstance, as well as the circumstance that the murder was committed for pecuniary gain, both circumstances are based on the same aspect of the crime and can constitute only one aggravating circumstance for purposes of sentencing. Maxwell v. State, 443 So.2d 967 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Palmes v. State, 397 So.2d 648 (Fla. 1981); and Provence v. State, 337 So.2d 783

(Fla. 1976). This circumstance must be stricken.

C. The Trial Court Erred In Finding That The Murder Was Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest.

In support of this finding, the trial judge concluded that the store manager would have been able to identify the appellant, thus calling for the initial shot. (R4594) The trial judge then stated that the appellant then shot the manager two more times through the back as he lay on the ground, concluding that the appellant was afraid of identification. The trial judge also relied on the allegations that the appellant later commented, "He tried to play hero, so I had to shoot the son of a bitch." (R4594)

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 circumstance is typically found where the evidence clearly demonstrates that a defendant killed a police officer who was attempting to apprehend him. See e.g. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). 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). However, this Court in Riley, 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. Appellant submits that the state has failed in meeting its burden of

proof regarding this particular aggravating circumstance.

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), this Court rejected the application of this aggravating circumstance despite the fact that the murder was committed with a pistol equipped with a silencer, the purpose of which may have logically been to avoid arrest detection. With facts similar to the case at hand, this Court again 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". Armstrong v. State, 399 So.2d 953 (Fla. 1981). In light of the applicable case law as well as the evidence adduced at trial, appellant submits that this aggravating circumstance was not established beyond and to the exclusion of every reasonable doubt. State v. Dixon, supra.

D. The Trial Court Erred In Finding That The Murder Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

In finding that this circumstance was established, the trial judge appears to rely upon the details surrounding the shooting much as the court did in finding that the murder was committed for the purpose of eliminating a witness. In this respect, appellant contends that the trial judge engaged in improper doubling of factors and thus erred in finding this circumstance. Provence v. State, 337 So.2d 783 (Fla. 1976).

Appellant further contends that the high level of premeditation required under this aggravating circumstance has not

been established beyond a reasonable doubt. See Jent v. State, 408 So.2d 1024,1032 (Fla. 1982). In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court found that the state failed to establish this circumstance beyond a reasonable doubt where no evidence was presented that the murder was planned. It is certainly clear that this circumstance was not intended to apply to all premeditated murder cases. Id.

The appellant was undoubtedly surprised by his confrontation with the store manager as he was fleeing the scene. As such, the facts of the case at bar appear to be similar to those present in Blanco v. State, 452 So.2d 520 (Fla. 1984). Blanco entered a dwelling with the intent to steal and was surprised by the victim's attempt to take the gun from him. The subsequent murder followed quickly and did not show any heightened premeditation, calculation or planning. Appellant submits that the evidence did not show beyond a reasonable doubt the heightened premeditation required to establish this circumstance. This is especially true in light of the fact that even appellant's accomplice failed to witness the murder, thus rendering the crime witnessless. (R49-52) The only conceivable evidence of premeditation is the medical examiner's testimony about the bullet wounds. (R6382-6403) The gap in time between the confrontation between the victim and his assailant and the shooting could not have exceeded more than a few seconds. (R49-52) Appellant contends that it would be impossible to form the requisite heightened premeditation required by this circumstance in such a short period of time. Therefore, this

aggravating circumstance must be stricken.

E. The Trial Court Erred In Giving Undue Weight To The Jury Recommendation Of Death.

Under Florida law, the jury recommends a sentence after a conviction in a capital case, but the trial judge imposes the sentence. The trial judge shall impose a sentence of life imprisonment or death "notwithstanding the recommendation of a majority of the jury...". Section 921.141(3), Florida Statutes (1983). Interpreting this third tier of Florida's trifurcated capital punishment process, this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), stated:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - - - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

Id. at 8 (emphasis added).

The above language from State v. Dixon, supra, was quoted with approval by the United States Supreme Court in upholding the constitutionality of Florida's capital punishment statute in Proffitt v. Florida, 428 U.S. 242 (1976). One of the challenges raised in Proffitt v. Florida, supra, was that the statute permits the death penalty to be imposed in an arbritary

or capricious manner, that is, in a manner inconsistent with similarly situated defendants, or in a manner disproportionate to the offense. In approving the Florida sentencing process, the United States Supreme Court said:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, (citations omitted), but it has never suggested that jury sentencing is constitutionally required and it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

428 U.S. at 252 (emphasis added).

It is therefore the obligation of the trial court to compare the defendant and the offense with other defendants and other offenses in determining what sentence is proper. In finding the establishment of all the aggravating circumstances cited in the findings of fact and in rejecting all mitigating circumstances, the trial court clearly placed undue emphasis on the jury's recommendation. In Ross v. State, 386 So.2d 1191 (Fla. 1980), this Court remanded the case to the trial court for reconsideration of sentence because it appeared that the trial court gave undue weight to the jury recommendation of death. Since the trial court committed a similar error in the case at bar, Jerry Rogers' death sentence cannot stand.

F. The Imposition Of The Death Sentence In The Instant Case Is Constitutionally Infirm Where The Jury Did Not Find And The State Argued They Need Not Find That Jerry Rogers Was The Triggerman.

Appellant concedes that substantial, competent evidence exists on the record to support a finding that the Appellant was the actual triggerman in this crime. However, the state charged felony-murder in the indictment and proceeded on that theory. In fact, the state argued in its summation at the penalty phase that the jury need not find that Jerry Rogers was the triggerman in order to recommend death. (R8322) This constituted a misstatement of the applicable law. Although there was no objection, Appellant submits that the improper argument constitutes fundamental error. As a result, Appellant's death sentence was imposed in contravention of the United State Constitution. Amend. V, VI, VIII and XIV, U.S. Const.

This Court is well aware that a death penalty imposed on a person who aids and abets a felony in the course of which a murder is committed by others cannot be upheld where that person does not, himself, kill, attempt to kill, or intend to kill. Enmund v. Florida, 458 U.S. 782 (1982). The proper course to take in the instant case would have involved something similar to a special verdict form to allow the jury to determine whether or not Jerry Layne Rogers was the actual killer. The prosecutor's improper argument (R8322) renders the jury recommendation null and void. The jury received no instruction from the trial court on the applicable law regarding this issue. As such, the prosecutor's objectionable argument was the only guidance they

had. In light of the great weight given to the jury recommendation by the trial court, Jerry Layne Rogers' sentence must be reduced to life or this cause remanded for a new sentencing hearing. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

G. The Trial Court Erred In Rejecting All Mitigating Circumstances.

The trial court rejected out of hand a finding that the appellant did not have a significant history of prior criminal activity. (R4596) The trial court relied on appellant's three prior armed robbery convictions. Nevertheless, it is clear that the crux of this mitigating factor is the word "significant." See State v. Dixon, supra, at 10 and Cook v. State, 369 So.2d 1251, 1257 (Ala. 1979). This Court has approved the finding of no significant history where the defendant had also committed a robbery contemporaneously with the murder. Mendendez v. State, 419 So.2d 312 (Fla. 1982). In Lewis v. State, 377 So.2d 640 (Fla 1980), this Court found that one prior felony conviction did not negate this circumstance.

The trial court also rejected all non-statutory mitigating circumstances. In so doing, appellant submits that the trial court totally disregarded the evidence. The trial judge totally ignored the testimony presented by the appellant at the penalty phase that the Jerry Rogers had been a good husband and father to three children for the past fourteen years. (R8300-8304) The testimony at the penalty phase as well as other testimony presented during the guilt phase of the trial clearly

indicated that the appellant was a hard worker and a good provider. (R8301) See McCampbell v. State, 421 So.2d 1072 (Fla. 1982), and Walsh v. State, 418 So.2d 1000 (Fla. 1982).

Even in rejecting the mitigating circumstance that the appellant's mental capacity was impaired, (R4597), the trial court accidently stumbled upon a valid nonstatutory mitigating circumstance. The trial court concluded that the appellant was "articulate, intelligent...the Court was continually impressed with his ability to know and comprehend the criminal law and trial procedures." (R4597) In fact, it is clear from reading the trial transcript that the appellant would make a fine attorney someday if given the chance.

The trial court also considered the pre-sentence investigation report in reaching his findings of fact in support of the death penalty. (R4591) While this report is currently not contained in the record on appeal, Appellant knows from past experience that this Court will consider that document during the pendancy of this appeal. The report contains mitigating factors which the trial court chose to reject. These factors include the fact that the Appellant was raised under the impression that his mother was dead until he found out otherwise when he entered military service. Her present whereabouts are unknown. The Appellant served in the United States Navy for almost three (3) years in the late 1960's. He was decorated with the National Defense Service Medal, the Vietnam Campaign Medal and Presidential Unit Citation. The probation officer agreed with the trial court in concluding that Jerry Layne Rogers is an

intelligent, articulate man who was also helpful and courteous during the interview in spite of the fact that the jury had just recommended the death penalty.

Finally, a proper consideration in mitigation is the disposition of the at least equally culpable Thomas McDermid. McDermid, "who is certainly no angel," was allowed to plead guilty in numerous cases pursuant to a plea bargain with the state. He was given complete immunity for the murder of David Smith and much concurrent time resulting in a net sentence of 25 years imprisonment. (R6570-6591) If McDermid had received consecutive sentences, he could have faced approximately 140 years in prison. (R6590-6591) See McCampbell v. State, supra; Slater v. State, 316 So.2d 539 (Fla. 1975).

Appellant submits that the trial court erred in completely rejecting these as well as other mitigating factors that were established by the evidence.These nonstatutory factors which the trial court failed to consider weigh heavily against any aggravating factors and call for the reduction of Jerry Layne Rogers' sentence to life imprisonment. Jerry Layne Rogers' life is worth sparing.

## POINT XIII

### 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 that detailed briefing would 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. 685 (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). This leads to arbitrary and capricious imposition of the death penalty.

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 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 State 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 State Constitution because it results in arbitrary application of this circumstance and 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. The conclusory finding by the Court of a cold, calculated and premeditated killing demonstrates the arbitrary application of this aggravating circumstance.

Additionally, a disturbing trend has become apparent in this Court's 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 Cr.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 (Fla. 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 (Fla. 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 upon the foregoing cases, authorities and policies, Appellant respectfully requests the following relief:

As to Points I, II, V, VI, VII, VIII and X, Appellant respectfully request that this Honorable Court reverse the judgment and sentence and remand for new trial.

As to Point III, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence and remand for discharge or, in the alternative, remand with instructions to quash the indictment.

As to Point IV, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence and remand for discharge.

As to Point IX, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence and remand for a new trial with instructions to suppress the physical evidence obtained as a result of the search.

As to Point XI, Appellant respectfully requests that this Honorable Court vacate the death sentence and remand for a new penalty phase.

As to Point XII, Appellant respectfully requests that this Honorable Court reduce the death sentence to life imprisonment or remand for a new penalty phase.

As to Point XIII, Appellant respectfully requests that this Honorable Court declare Florida's death sentence to be unconstitutional.

Respectfully submitted,

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL 32014 and to Jerry Layne Rogers, A092118, Florida State Prison, P.O. Box 747, Starke, FL 32091, on this 24th day of February, 1986.

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CHIEF, CAPITAL APPEALS
ASSISTANT PUBLIC DEFENDER