IN THE FLORIDA SUPREME COURT

CLINTON LAMAR JACKSON, :

Appellant, :

vs. : Case No. 66,510

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

W.C. McLAIN
ASSISTANT PUBLIC DEFENDER
Chief, Capital Appeals

Hall of Justice Building
455 N. Broadway Avenue
Bartow, Florida 33830
(813)533-1184 or 533-0931

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

On March 6, 1984, a Pinellas County grand jury returned a two count indictment charging Clinton Lamar Jackson with the murder and robbery of Herbert Phillibert. (R4) Jackson pleaded not guilty to both counts (R6) and proceeded to a jury trial on December 4, 1984. (R112-115) The jury found him guilty as charged of both counts, finding that Jackson personally carried a firearm during the robbery. (R108-109,1489-1490)

The penalty phase of the trial was conducted on December 14, 1984. (R122,1530-1636) After hearing additional testimony, the jury recommended a death sentence by a vote of 8 to 4. (R121,1632) On January 3, 1985, Circuit Judge Robert E. Beach adjudged Jackson guilty of the murder and robbery. (R129-130) He sentenced Jackson to death for the murder and ninety-nine (99) years for the robbery. (R131-133) The court also retained jurisdiction over the first one-third of the robbery sentence. (R132)

In support of the death sentence, the trial court found four aggravating circumstances: (1) the homicide was committed during the commission of a robbery (R160)(A1); (2) the homicide was committed to avoid arrest (R161)(A2); (3) the homicide was heinous, atrocious or cruel (R162)(A3); and (4) the homicide was cold, calculated and premeditated. (R163) (A4) The court found that no mitigating circumstances existed. (R164-165)(A5-6)

Jackson filed a motion for new trial (R123-125) which the court heard and denied on January 7, 1985. (R159,

1641-1657) Notice of appeal to this Court was filed on January 17, 1985. (R166-167)

STATEMENT OF THE FACTS

Herbert Phillibert owned and operated a small hardware store in St. Petersburg. (R827) On January 17, 1984, at approximately 4:30 or 5:00 p.m., two customers found Phillibert on the floor a few feet from the cash register area. (R832) The register was open and making beeping noises. (R832) A fresh latent palm print belonging to Nathaniel Jackson was later recovered from the back of the cash register on a shelf. (R1142-1143,1160-1161) Phillibert was alive but unable to speak to the men. (R833) He also held a five dollar bill in his hand. (R835,838) One of the customers, Aston Francis, went to the store next door to call for assistance. (R833) The paramedics arrived at 5:05 p.m. and, in rendering assistance, discovered a small bullet wound in Phillibert's side. (R839,842-843) Phillibert was dead at the time of the paramedics' examination. (R836-838,841) St. Petersburg Police Officer Ron Adams arrived and secured the scene. (R850-853)

Dr. Edward Corcoran, an associate medical examiner, responded to the hardware store. (R856) He examined the body at the scene and performed the autopsy. (R853-854) His examination revealed a single bullet entrance wound in the right lower chest region. (R856) There was no stippling around the wound and no gun powder residue in the clothing indicating the gun was three feet away or more when fired. (R860) The bullet passed at a 15 degree angle through the rib cage, through the liver, the aorta and the lower end of the left kidney. (R858,869) Corcoran recovered the bullet lodged just beneath the skin. (R858) Blood was found in the abdominal cavity. (R858) Loss of blood from the wound to the aorta caused death. (R858-859) Death would have oc-

curred rapidly, within two to four minutes after the wound. (R859) Corcoran estimated time of death to be between 3:30 and 5:30 p.m. (R857,866-867)

Elma Lindsey and Delores Flournoy saw two black men running from between some houses and down an alley in the area of the hardware store. (R876-895) The two women were working in a day-care center near the hardware store. (R877,888) They did not have a view of the store since houses are located between the center and the store. (R877,888) The men ran down near the end of the alley where they entered a small, black pick-up truck. (R878,881-882,889-890,894) Both women later identified a truck belonging to Benny Phillips. (R881-882,894,1110-1111) Neither woman was sure of the time they saw the men running. Lindsey remembered the time as 3:30 or 4:00 p.m. (R880) Flournoy remembered the time as between 5:00 and 5:30 p.m. (R892) Neither woman could identify either man. (R884-885,889)

Benny Phillips owned the small black truck. (R1109-1110) On January 17, 1984, his girlfriend Marsha Jackson was using the truck. (R1111) Marsha Jackson's sons, Nathaniel and Clinton also had free access to the truck at any time. (R1115) Phillips also allowed several of his friends access to his truck. (R1115) Melvin Jones had been using Phillips' truck and had driven it to his job site where he and Phillips were installing kitchen cabinets. (R904) Clinton Jackson picked up the truck at that location around 9:30 or 10:00 a.m. (R905) Jones saw Clinton and his brother, Nathaniel, in the truck between 11:30 and 12:30 p.m. (R905) Clinton was driving. (R905) Later, about 4:45 p.m., Jones saw Clinton and Nathaniel in the truck heading toward 34th

Street which passes in front of the hardware store. (R905-906) Brenda Golden, Clinton's girlfriend, said Clinton and Nathaniel were at her house briefly and left between 4:15 and 4:45 p.m. (R1272-1273) Several latent fingerprints were recovered from the exterior of the truck. (R1122-1127,1160-1167) A number of them from the hood and right side of the vehicle were matched to Nathaniel Jackson. (R1161-1167) Only one print from the driver's door matched Clinton Jackson's fingerprints. (R1163,1167)

About four days before the homicide, Clinton Jackson was assisting Melvin Jones panel a room. (R909) Jones sent Jackson to Phillibert's hardware store to buy some screws. (R909) Jackson returned, and about fifteen minutes later, Jackson said, "I'm going to knock your buddy over down at the store." (R911) According to Jones, Jackson said nothing else. (R911) Jones understood the comment to mean to rob or steal from the store. (R912-914) Jones did not take the comment seriously. (R919-1920) Jones also testified that he saw a .32 caliber pistol in the black truck. (R915)

The defense impeached Melvin Jones' testimony at trial because he was then in jail on several worthless check charges and a grand theft and expected beneficial treatment as the result of his testimony. (R916-921) Jones denied that he expected a benefit from his testimony. He said he did not know if the state would give him a deal for testifying this time. (R916,918) He admitted that he had testified in another murder case the last time he was jailed on 16 to 18 worthless check and theft charges. He spent no time in prison as a result. (R916-917) Finally, Benny Phillips testified that Melvin Jones' reputation in the

community for truthfulness was poor. (R1261-1263)

Clinton Jackson was arrested shortly after midnight on January 18, 1984. (R1179) Detective James Kappel advised him of his rights. (R1181) Clinton said that he had been driving Benny Phillips' truck that day, but he denied any involvement in a robbery or homicide. (R1182,1187) When confronted with the fact that Nathaniel Jackson's fingerprints were found inside the store, Clinton said that was impossible because his brother had been with him all day. (R1182,1187)

Freddie Williams, an inmate in the county jail awaiting disposition of an armed robbery charge and violation of his life parole (R986), claimed to have overheard Clinton admit involvement in the homicide. (R949-951) Williams sat next to Clinton when Marsha Jackson and Benny Phillips visited him the day after his arrest. (R948-954,1042-1043,1092-1093,1113) The visiting area had a glass separating the visitors from the inmate. (R944-946, 1040-1041) Consequently, the visitors and inmates had to speak loudly in order to be heard. (R944-946,1040-1041) Williams allegedly heard Clinton Jackson tell his visitors that he had been arrested for the hardware store murder. (R949) Furthermore, regarding the shooting, he said he had to do it because the man "bucked the jack." (R950-951) Williams said "buck the jack" meant the man resisted the robbery. (R951) Finally, Jackson allegedly told his visitors to tell Nate not to say anything about the hardware store and to get rid of the gun. (R951)

After hearing the statements, Williams notified the State Attorney's Office. (R952) He denied that his cooperation with authorities was in exchange for beneficial treatment. (R992)

Detective Kappel and two assistant state attorneys took Williams' statement. (R1190) Over defense objections, Kappel was permitted to testify at trial to the substance of Williams' statement which was consistent with his trial testimony. (R1190-1195)

David Shorey testified for the defense at trial to impeach Freddie Williams. (R1288-1323) Williams and Shorey shared a cell for over six months while in the Pinellas County Jail. (R1290) The two men became lovers while together. (R1296) Shorey said that in the jail Williams had a reputation as a liar. (R1291) Shorey knew of several people against whom Williams was prepared to testify. (R1292) At one time, Williams told Shorey he was going to get even with another inmate by testifying against him. (R1293-1294) When Shorey asked if Williams needed more information, Williams' response was that he did not need evidence because he could fill in the gaps sufficiently to convince a judge of his story. (R1294) Shorey testified that he still loved Williams and held no animosity toward him even though Williams was going to testify against Shorey, too. (R1296) On cross examination, the prosecutor was allowed to elicit, over objection, the nature of the crime for which Shorey had been convicted and the factual circumstances of that crime. (R1297-1305) Shorey had pleaded guilty to first degree murder for the beating death of a man. (R1304-1305)

The State wanted to call Marsha Jackson as a witness. (R1052-1053) However, the prosecutor was unwilling to vouch for her credibility because of some alleged prior inconsistent statements. (R1052-1053) He asserted that Marsha Jackson's testimony would be adverse to the State's position (R1053), and that he in-

tended to impeach her with Detective Kappel's testimony. (R1056-1057) After a proffer, the court granted, over defense objections, the State's request to have Marsha Jackson called as a court's witness. (R1085) The court also declared her adverse and allowed the prosecutor to present Detective Kappel's testimony as impeachment. (R1085,1199-1236)

Marsha Jackson and Benny Phillips visited Clinton in jail the day after his arrest. (R1092-1093) After their visit, Detective Kappel was apprised of the information Freddie Williams provided. (R1192-1198) Williams claimed to have heard Clinton admit his involvement in the homicide during his visit. (R947-951,1192-1193) Kappel called Marsha and Benny to his office to question them about the conversation they had with Clinton. (R1093) According to Kappel, Marsha Jackson initially said that Clinton said he was not involved in the robbery and murder. (R1198-1199) But, when Kappel confronted her with information, she changed her story and said that Clinton told her that he was involved. (R1199-1200) Furthermore, concerning the murder, Clinton said, "I had to do it, the man had Nate" (R1200), and the man "bucked the jack." (R1201)

At trial, Marsha Jackson denied having made statements implicating Clinton's involvement. (R1093) She denied that Clinton made any admissions to her. (R1093) She admitted to agreeing with Kappel's leading questions on one occasion merely to get him to leave her alone. (R1101) She explained that the police had harassed and intimidated her. (R1097-1102) She had been stopped in the black truck on the night of January 17 by police officers with guns drawn. (R1102-1103) She and Benny

Phillips were held until they revealed who had used the truck the previous day. (R1104-1105) Consequently, she was still afraid when Kappel questioned her. (R1104-1105) Moreover, she became ill during the questioning, apparently caused by her heart condition. (R1107) Over defense objections, the State was allowed to introduce Kappel's version of Marsha Jackson's statement to him to impeach her testimony. (R1199-1236)

During the penalty phase, both the prosecution and defense presented additional evidence. The State's first witness was Hersa Wildman. (R1548) He and Aston Francis were the two customers who initially found Herbert Phillibert in the store. (R1548-1550) Wildman testified to finding Phillibert on the floor groaning and unable to talk or respond to them. (R1550-1551) Next, the State called Hugh Palmer. (R1552) Over defense counsel's relevancy objections (R1554-1556), Palmer testified to Phillibert's family background, good character and generous business practices. (R1553-1557) He also testified to the general feeling of remorse expressed by the people in the community. (R1557)

The defense presented two witnesses in mitigation. Marsha Jackson, Clinton's mother, said that Clinton was 22 years old at the time of the crime. (R1559) His father drank too much and left the family when Clinton was 6 years old. (R1559) Clinton was the oldest child and had to help his mother with the younger children. (R1560) He was good with the other children and frequently prepared food for them and kept them at night while his mother worked. (R1560) Clinton was never a problem as a child. (R1562) Also, when he was 10 years old, he saved another boy

from drowning at a park pool. (R1560-1561) Clinton was regularly employed. He worked in Benny Phillips' auto body shop and had also held other jobs. (R1561) If he lost a job, he always found another. (R1561) He assisted his mother in paying bills and bought things for his sister and brothers. (R1561)

Brenda Golden, Clinton's fiancee also testified. (R1569) She and Clinton had been living together, and they have a daughter. (R1570-1571) His daughter was born December 4, 1983, before Clinton was arrested in January 1984. (R1571) Brenda said Clinton was good to her and the baby. (R1571) She admitted she was not aware of his past juvenile and adult convictions, although she knew he had been in prison. (R1572-1573)

In rebuttal, the State called St. Petersburg Police Officer C.D. Willingham to testify about an aggravated battery incident for which Clinton was adjudicated in juvenile court. (R1575-1587) The defense objected to his testimony on two grounds: first, Willingham's name had not be provided in the State's discovery (R1575); and, second, Willingham's testimony was based entirely upon a 1975 incident report which was the product of his interview with an unnamed 10 to 12 year old girl who allegedly saw the crime. (R1578,1581-1585) The court overruled both objections. (R1578,1584) Willingham testified that he responded to the Campbell Park area where he was advised of an incident among a large group of young people in the park. (R1579) He talked to a young, unnamed female about 10 to 12 years who said that Clinton had grabbed the victim, punched him in the face, threw him on the ground and kicked him. (R1582) A second individual was also involved. (R1582) The victim was semiconscious and

bleeding from the forehead and lip. (R1582) Clinton was fifteen years old at the time. (R1587)

SUMMARY OF ARGUMENT

I.

The trial court erroneously granted the prosecution's motion to call Clinton Jackson's mother, Marsha Jackson, as a court's witness. Her testimony was neither hostile nor adverse to the State's position. However, under the court's witness procedure, the State was permitted to introduce alleged impeachment evidence consisting of a more favorable version of her statements as made to Detective Kappel. Indeed, the introduction of this alleged impeachment evidence was the sole purpose behind the prosecution's desire to have Marsha Jackson declared a court's witness. The detective's testimony would not have been admitted but for the court's erroneous ruling.

II.

In cross examining defense witness, David Shorey, the prosecutor was allowed to elicit the nature of Shorey's prior conviction and the factual circumstances of the crime. This constituted improper impeachment. §90.610, Fla.Stat.; Mead v. State, 86 So.2d 773 (Fla.1956); Goodman v. State, 336 So.2d 1264 (Fla. 4th DCA 1976). Shorey was a crucial impeachment witness for Freddie Williams, the only State's witness who claims to have heard Clinton Jackson make an admission of involvement in the crime.

III.

Detective Kappel testified about a conversation he had with a key prosecution witness, Freddie Williams. Over objection,

Kappel was allowed to relate to the jury the substance of that conversation which included prior statements Williams made which were consistent with Williams' trial testimony. This improperly bolstered the testimony of Freddie Williams, §90.801(2)(b), Fla. Stat.; VanGallon v. State, 50 So.2d 882 (Fla.1951); Brown v. State, 344 So.2d 641 (Fla.2d DCA 1977).

IV.

Clinton Jackson's death sentence is unconstitutional because the sentencing judge improperly considered three aggravating circumstances. First, the homicide was not especially heinous, atrocious or cruel since death resulted from a single gunshot wound and death was rapid. Cooper v. State, 336 So.2d 1133 (Fla.1976). Second, the murder was not cold, calculated and premeditated. There was insufficient evidence to prove that the murder was premeditated; only a felony murder was established. The shooting did not occur until the victim struggled with one of the perpetrators. Hall v. State, 403 So.2d 1319 (Fla.1981). Third, the homicide was not committed for the purpose of avoiding arrest since immediate protection may have been the motive. Armstrong v. State, 399 So.2d 953,963 (Fla.1981).

The court also failed to consider existing mitigating circumstances in imposing the sentence. Clinton Jackson's deprived family background, employment history, current family status and age should have been considered. Eddings v. Oklahoma, 455 U.S. 104 (1982). Additionally, the court found facts for which there was no evidence in the record to rebut certain mitigating circumstances.

V.

The trial court improperly considered information from Nathaniel Jackson's confession in making its findings to support Clinton Jackson's death sentence. Nathaniel Jackson's confession was not in evidence in Clinton Jackson's case. It would have been inadmissible in the guilt phase, Hall v. State, 381 So.2d 683 (Fla.1979) and the penalty phase. Engle v. State, 438 So.2d 803 (Fla.1983). Moreover, defense counsel did not receive notice of the court's use of the confession, had no knowledge of its use and no opportunity to rebut or challenge its use. Gardner v. Florida, 430 U.S. 349 (1977).

VI.

The State called a rebuttal witness during penalty phase who had not been listed on discovery. Jackson objected to the discovery violation, but the court failed to conduct a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla.1977).

VII.

During penalty phase, the State introduced hearsay evidence from a police officer regarding an assault charge Jackson had as a juvenile. The officer testified to the substance of a statement made by an alleged witness, a twelve year old girl. The officer did not know her name, had never seen her before or since the incident, and had no knowledge of her credibility. Since she was unnamed in his report, Jackson could not confront, rebut or test the realibility of the source of this hearsay testimony.

VIII.

State witness Hugh Palmer testified in the penalty phase over relevancy objections. His testimony concerned the victim's character, background, business practices and standing in the community. Palmer also testified to the impact of his death on members of the community. The court erroneously ruled the evidence admissible to the heinous, atrocious and cruel aggravating circumstance.

IX.

Since there was insufficient evidence of a premeditated murder, Jackson's conviction for murder rests upon the felony murder theory. Consequently, the court incorrectly adjudicated and sentenced Jackson on the robbery count.

X.

Assuming the sentence for robbery is not vacated, this Court must remand for resentencing since the trial court failed to consider a guidelines scoresheet and presumptive sentence as computed under the guidelines. Furthermore, the court improperly retained jurisdiction for the first one-third of the sentence imposed.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO CALL MARSHA JACKSON AS A COURT'S WITNESS WHICH ALLOWED THE STATE TO INTRODUCE EVIDENCE OF JACKSON'S ALLEGED ADMISSIONS UNDER THE GUISE OF IMPEACHMENT WHICH WOULD NOT HAVE BEEN ADMISSIBLE IN ANY OTHER MANNER.

Marsha Jackson is Clinton Jackson's mother. The State wanted to call her as a witness to testify about a conversation she had with Clinton while visiting him in jail shortly after his arrest. (R1052-1053) However, the prosecutor asserted that she had made prior inconsistent statements, and he did not want to vouch for her credibility. (R1052-1053) He also asserted that her testimony would be adverse to the State's case. (R1053) The prosecutor's express motive was to have Marsha Jackson testify solely to impeach her with statements she allegedly made to Detective Kappel. (R1056-1057) After a proffer of her testimony (R1064-1071), the court declared her to be adverse to the prosecution, called her as a court's witness and allowed the State to impeach her with the alleged prior inconsistent statements. (R1085)

The trial court's ruling was incorrect for two reasons. First, Marsha Jackson was not an adverse witness. And second, even if adverse, the state was not entitled to produce her as a witness solely to impeach her. This Court must reverse Clinton Jackson's case for a new trial.

Section 90.608(2), Florida Statutes which deals with impeachment provides:

> (2) A party calling a witness shall not be allowed to impeach his character as provided in s. 90.609 or s. 90.610, but, if the witness proves adverse, such party may contradict the witness by other evidence or may prove that the witness had made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness. Leading questions may be used during any examination under this subsection.

A witness does not become adverse under this statute by merely failing to give the expected beneficial testimony. E.g., Jackson v. State, 451 So.2d 458 (Fla.1984); Hernandez v. State, 156 Fla. 356, 22 So.2d 781 (1945); Gibbs v. State, 193 So.2d 460 (Fla.2d DCA 1967). As the court in Gibbs succintly said,

> ...In case a witness proves adverse, this statute authorizes the party producing him to contradict him by other evidence or prove that he has made at other times a statement inconsistent with his present testimony. A party producing a witness cannot impeach him unless he not only fails to give beneficial testimony but also he must become adverse by giving evidence that is prejudicial to the party producing him. A party cannot impeach his own witness who merely fails to testify as to beneficial facts....

193 So.2d at 465; see, also, Johnson v. State, 178 So.2d 724 (Fla.2d DCA 1965). The witness's testimony must be affirmatively harmful. Jackson, 451 So.2d at 463.

Marsha Jackson's testimony was not affirmatively harmful to the State's case. The prosecutor believed that Clinton had admitted his involvement in the homicide to her during their visit. At trial, Marsha Jackson merely testified that Clinton did not make such an admission. (R1093) She also denied telling Detective Kappel during his interrogation of her the day after the jail visit that Clinton had made such an admission. (R1093-

1094) She said that she had been harassed during that interrogation and at one point agreed with Kappel's leading question which included Clinton's alleged admission.[1] (R1093-1094)

> Q. When you visited with Clinton, he told you in fact he had committed this homicide; didn't he?
>
> A. When I visited with Clinton he told me he had committed a homicide?
>
> Q. Yes, Ma'am.
>
> A. No. Clinton didn't tell me he had committed a homicide.
>
> Q. After this visit, did the police call you down to the station, Detective Kappel and Detective Feathers?
>
> A. No. They called Benny down to the station and I went with Benny to pick up his truck.
>
> Q. And while you were there they questioned you about your visit in the jail; didn't they?
>
> A. Two hours later after I was there. Yes, they did.
>
> Q. In fact, you told Detective Kappel that Clinton told you that he did it; didn't you?
>
> A. Detective Kappel told me.
>
> Q. And then you agreed with him?
>
> A. For what he said to me and how he had did me, I said yes, yes, yes. Let me go.
>
> Q. In fact, you told Detective Kappel that Clinton said to you, "I had to do it, they had Nate"?
>
> A. No, I didn't tell Detective Kappel that.

(R1193-1194)

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[1] Detective Kappel had talked to jail inmate Freddie Williams before he interrogated Marsha Jackson. (R1192-1198) Williams claimed to have overheard Clinton Jackson admit his involvement in the crime. (R947-951,1192-1193)

Furthermore, when confronted with a statement she allegedly made when the state attorney talked to her about Clinton's alleged admission, Marsha Jackson said she did not recall making the statement. (R1096-1098) Her testimony, while not as beneficial as the State would have liked, was not adverse. E.g., Jackson, 451 So.2d 458.

The trial court's incorrect ruling permitted the State to introduce the testimony of Detective Kappel as impeachment. (R1198-1203) This evidence would have been inadmissible but for the ruling that Marsha Jackson's testimony was adverse. Although admitted for impeachment, its unofficial effect was to present a version more favorable to the State. Indeed, Kappel's version of what Marsha Jackson told him was consistent with Freddie Williams' story and tended to corroborate and bolster Williams' testimony. (See, Issue III, infra) This unofficial corroboration of Williams' testimony prejudiced Jackson's case since Williams' credibility was a major issue in the trial. (R986-1015)

Assuming Marsha Jackson's testimony was adverse, the prosecution was not entitled to present her as a witness and have her called as a court's witness solely to introduce impeachment evidence. Perry v. State, 356 So.2d 342 (Fla.1st DCA 1978); see, also, Erp v. Carroll, 438 So.2d 31,39 (Fla.5th DCA 1983). The prosecutor's goal was to establish that Clinton Jackson made admissions to Marsha Jackson. Unable to accomplish this directly through Marsha Jackson's testimony, the prosecutor improperly used the impeachment evidence as a device "to get in through the back door that which he could not have gotten in through the front door." Perry, 356 So.2d at 344. Although the evidence

was not admitted as substantive evidence, that distinction would make little difference to a jury. Moreover, the prosecutor did argue Kappel's testimony in closing during the penalty phase. (R1597)

The erroneous ruling in this case denied Jackson his rights to due process and a fair trial. Amends. V, VI, XIV, U.S. Const. Jackson urges this Court to reverse his conviction for a new trial.

ISSUE II.

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO IMPEACH DEFENSE WITNESS DAVID SHOREY BY ELICITING THE FACTS OF HIS PRIOR CONVICTION FOR MURDER.

During the prosecutor's cross examination of David Shorey, he asked the following question:

> Q. You're living [in state prison], because you pled guilty to first degree murder, because you were charged with beating an old man with a pipe?

(R1297) Defense counsel immediately objected to the question as improper impeachment. (R1297) The court overruled the objection and allowed the prosecutor to explore not only that Shorey had pleaded guilty to murder but the factual circumstances of the murder, a beating death of an elderly man. (R1304-1305)

It is well established that a witness may be impeached by the existence of a prior conviction for murder. See, §90.610, Fla.Stat. However, once the existence of a conviction is established, the impeachment can proceed no further. Neither the nature of the offense nor the factual circumstances of the crime can be revealed to the jury. E.g., McArthur v. Cook, 99 So.2d 565 (Fla.1957); Mead v. State, 86 So.2d 773 (Fla.1956); Goodman v. State, 336 So.2d 1264 (Fla.4th DCA 1976); Whitehead v. State, 279 So.2d 99 (Fla.2d DCA 1973). As the Fourth District Court in Goodman said,

> The reason for not permitting questioning as to the nature of previous convictions of a criminal defendant for the purpose of impeaching him as a witness is simply that any additional light on his credibility which might be produced by the information would not compensate for the possible prejudicial

> effect on the minds of the jurors. The jury would almost certainly make inferences which went beyond the question whether or not the witness was worthy of belief.

336 So.2d at 1266.

The State attempted to justify this improper impeachment on the grounds that the nature and circumstances of the offense was relevant to Shorey's credibility. (R1298-1302) Shorey had lied to State witness Freddie Williams about the facts of the murder. He told Williams that he stabbed the man instead of beating him. (R1305-1036) However, Shorey freely admitted that he lied. (R1305-1306) There was no justification for the State to elicit the facts of Shorey's murder charge to merely demonstrate the lie.

Shorey was a defense impeachment witness who testified about Freddie Williams' willingness to fabricate testimony for his own benefit. (R1291-1295) Williams' testimony was critical to the State's case since he was the only person who allegedly heard admissions attributable to Clinton Jackson. (R948-951) Consequently, the prosecutor's improper impeachment of Shorey cannot be deemed harmless in this case. Jackson asks this Court to reverse his conviction for a new trial.

ISSUE III.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR CONSISTENT STATEMENTS MADE BY A KEY PROSECUTION WITNESS, FREDDIE WILLIAMS.

Freddie Williams was a key prosecution witness at trial. (R943-1015) He was an inmate in the county jail at the same time as Clinton Jackson and claimed to have overheard Jackson make admissions of guilt. (R947-951) Williams testified that he was sitting beside Jackson in the visiting area when Jackson made the alleged admissions to his two vistors. (R947-951) According to Williams, Jackson said that he had been arrested for the murder of the man in the hardware store. (R950) Furthermore, Williams stated that Jackson said, "[W]e had to do it, he bucked the jack." (R950-951) Jackson also allegedly told his vistors to tell Nate to get rid of the gun. (R951)

During the testimony of Detective James Kappel, the prosecutor was allowed, over defense objections, to elicit evidence about Kappel's conversation with Freddie Williams. (R1190-1194) Kappel's testimony proceeded as follows:

> Q. (By Mr. Sandefer) Let me back up a few steps and come back.
> When you went in and talked to Freddie Williams, did you talk to him about anything about the case you were the detective on?
>
> A. No, I did not.
>
> Q. Did you just ask him to tell you what he knew?
>
> A. That's correct.
>
> Q. Had any of the discussions of the facts taken place between you and him at that time?
>
> A. None whatsoever.

Q. What did he tell you about the information he said he had?

A. He said he obtained the information the previous night during a visitation with his girlfriend.

He told me he was in the County Jail and that during the time he was talking to his visitor, that there was a person sitting next to him in a stall, talking to two other visitors which he thought were possibly family.

He told me that during his conversation he overheard the black male sitting next to him telling a black female about his involvement in an armed robbery and murder in a hardware store in St. Petersburg.

Q. Did he tell you any of the statements he overheard?

A. Yes, he did.

Q. What did he tell you?

A. I asked him specifically some of the statements he heard during the conversation.

He told me he heard the black male tell the visitor to find Nate and tell him to get rid of the gun.

He also told me that the black male made a statement, something to the effect that the guy tried to buck the jack.

Q. Did you know what that meant?

A. No, I did not.

So, I stopped him. I said okay. I need to know what "buck the jack" means.

He told me it's a slang term meaning there is an armed robbery and apparently the person who is being robbed doesn't go along with the game of being robbed and tries to fight back and they call it "buck the jack."

(R1192-1193) This evidence of Williams' prior consistent statements given to Detective Kappel was improper as it tended to bolster Williams' credibility, and a new trial is mandated.

§90.801(2)(b), Fla.Stat.; Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McElveen v. State, 415 So.2d 746 (Fla.1st DCA 1982); Brown v. State, 344 So.2d 641 (Fla.2d DCA 1977); Roti v. State, 334 So.2d 146 (Fla.2d DCA 1976).

The State attempted to justify the evidence of prior consistent statements under the exception allowing its use "to rebut an express or implied charge against [the declarant] of improper influence, motive or recent fabrication." §90.801(2)(b), Fla.Stat. However, this exception is not applicable. The prior consistent statements were not made before the event prompting the improper influence, motive or fabrication. E.g., Van Gallon, 50 So.2d 882; McElveen, 415 So.2d 746. The defense urged that Williams lied from the very beginning, not that some recent intervening event motivated him to change his story. (R1190-1191) Williams was in trouble and fabricated the story before approaching law enforcement with his alleged information. (R1190-1191)

The State was allowed to improperly bolster Freddie Williams' testimony with the prior consistent statements. Williams' credibility was a critical issue and the error is not harmless. Jackson asks this Court to reverse his convictions for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED IN SENTENCING CLINTON JACKSON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court incorrectly applied Section 921.141, Florida Statutes in deciding to sentence Clinton Jackson to death. Nonexisting aggravating circumstances were improperly found and considered, and existing mitigating circumstances were not considered. The sentence determination process was skewed in favor of death. This misapplication of the statute renders Clinton Jackson's death sentence unconstitutional. See, Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific problems in the application of the statute are addressed separately in the remainder of this argument.

A.

The Trial Court Erred In Finding That The Homicide Was Especially Heinous, Atrocious Or Cruel.

In considering this homicide to be especially heinous, atrocious or cruel, the court found the following facts:

> Herbert Philibert was in his fifties at the time of his death. He was married with grown children. He was a Jamaican immigrant who had come to America, worked hard, and led an honest life to support his family. He saved enough money to put a down payment on this hardware store. He ran the store himself seven days a week. He was a contributing citizen who enjoyed helping others and was generous to persons around him. He has been missed by the community. He was a kind, likeable man. This defendant and his brother agreed on a plan to rob Herbert

> Philibert at his most vulnerable time, when he was alone at the end of the day. They drove around until all customers left as if stalking their prey. They entered the victim's business with a firearm to rob him by force. The defendant did not know Mr. Philibert, he was randomly selected as the target of this man's greed because of his vulnerability. The defendant knew he was an easy mark having been to the store four days earlier. The victim did nothing to contribute to his death other than try to hold on to his final five dollars he had worked for. He was killed for a five dollar bill. Callously and with utter indifference to his victim's pain and suffering, this defendant shot Herbert Philibert. Mr. Philibert's life work, his family, and his suffering meant nothing to the defendant or his brother. Mr. Philibert was alive for at least five minutes after he was shot. He bled to death internally. When his long time friends discovered him he was on the floor of the store he had worked so hard for. He was groaning in pain. He certainly knew he was going to die. His friends called out his name and Herbert Philibert was able to look up at them with his eyes, but the noises he made did not form the words he was trying to say. The defendant and his brother left Mr. Philibert as they found him, alone. He was left to die, helpless, unable to move or talk, left only with his realization that his life was over and his pain. The killing was unnecessary. The victim could have been easily overpowered without the use of the gun. It is evident that in his death Herbert Philibert suffered greatly in body and mind. Then, after he shot Mr. Philibert, the defendant callously went to an apartment and slept with a girlfriend. He had made a clean escape, that was his only concern. This aggravating factor has been established beyond a reasonable doubt.

(R162-163)(A3-4) The trial court's factual findings were improper and insufficient to support the existence of the aggravating factor of heinous, atrocious or cruel. As this Court said in State v. Dixon, 283 So.2d 1 (Fla.1973)

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the

> norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. There are no such additional facts setting this homicide apart from the norm.

This case involves a simple shooting death. The victim was shot only once during a robbery. Under the State's theory of the case, the shooting occurred and was prompted by the victim's confrontation with one of the robbers. Moreover, the victim's suffering was brief. (R859) The medical examiner testified that death occurred within two to four minutes after the wound. (R859) On numerous occasions, this Court has held that such homicides do not qualify for this aggravating factor. E.g., Teffeteller v. State, 439 So.2d 840 (Fla.1983); Maggard v. State, 399 So.2d 972, 977 (Fla.1981); Armstrong v. State, 399 So.2d 953,962-963 (Fla. 1981); Cooper v. State, 336 So.2d 1133 (Fla.1976). Nothing distinguishes this case from those and this Court should follow these prior cases and reverse the court's finding in this case.

Most of the trial judge's factual findings were irrelevant to determining the existence of the aggravating circumstance. Herbert Phillibert's good character, family background and standing in the community were improper considerations. (R162-163) (A3-4) See, also, Issue VIII, infra. The manner of death, and the physical or mental suffering of the victim during the homicide are the only relevant factors. E.g., Lewis v. State, 377 So.2d 640 (Fla.1979); Cooper v. State, 336 So.2d 1133 (Fla.1976); State v. Dixon, 283 So.2d 1 (Fla.1973). Suffering of the victim's family or the community as a result of the homicide has no bearing on its existence. Riley v. State, 366 So.2d 19 (Fla.1978).

The fact that the robbery was planned is also irrelevant. (R162-163)(A3-4) No evidence suggested that the murder was likewise planned. See, Issue IV, B, infra. Even if the homicide had been planned that is still not pertinent to the heinous, atricious or cruel factor. See, Combs v. State, 403 So.2d 418,421 (Fla.1981). However, the State's own theory of the case was that the shooting was a spontaneous one during the robbery after the victim confronted one of the perpetrators. As this Court held in Armstong v. State, 399 So.2d 953, such killings are not heinous, atrocious or cruel in nature. The fact that the murder was unnecessary (R162-163)(A3-4) is certainly not supportive of the aggravating factor; all murders are unnecessary but not heinous, atrocious or cruel. State v. Dixon, 283 So.2d at 8. Finally, the Court's consideration of Clinton Jackson's actions after the crime was also improper. (R162-163)(A3-4) Actions occurring after the victim's death may not be considered. Jackson v. State, 451 So.2d 458 (Fla.1984); Herzog v. State, 439 So.2d 1372 (Fla.1983) Additionally, any actions tending to establish the perpetrator's state of mind at the time of the killing is immaterial. Michael v. State, 437 So.2d 138,142 (Fla.1983).

In conclusion, the shooting death in this case was not beyond the norm of capital offenses. Only one shot was fired. There was no prolonged or unusual victim suffering. The murder was not planned but was a spontaneous reaction to the victim's confrontation of the perpetrators of the robbery. Consequently, the aggravating circumstance of heinous, atrocious or cruel was improperly found, considered and weighed in sentencing.

B.

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

The premeditation aggravating circumstance provided for in Section 921.141(5)(i), Florida Statutes, requires more than evidence of the premeditation element for first degree murder. E.g., Hardwick v. State, 461 So.2d 79 (Fla.1984); Jent v. State, 408 So.2d 1024 (Fla.1981). There must be sufficient evidence to prove beyond a reasonable doubt that the homicide was premeditated in a cold, calculated manner without a pretense of moral or legal justification. Ibid. In this case, the evidence failed to prove a premeditated murder; only a felony murder was established. See, Hall v. State, 403 So.2d 1319 (Fla.1981). Consequently, not even the threshhold requirement of a premeditated murder is available to support this aggravating factor. See, Combs v. State, 403 So.2d 418 (Fla.1981).

To support the premeditation aggravating circumstance, the trial court found the following:

> The evidence clearly established that this defendant stood back a distance of three feet or more with a gun carefully trained on the victim. As the victim struggled with the defendant's brother, the defendant shot the victim directly into his body in line with his heart. The defendant had a clear shot and selected his shot. He had performed his job in the preplanned scheme of the robbery, his part of this business deal. His role was to be the gunman. There were other means available to effectuate his brother's escape. This defendant chose to shoot the victim in a vital spot, severing his aorta. He effectively eliminated the only witness to the crime. There was no warning shot fired. There was no second thought about the victim, or whether he had a family or had anything to live for. There was no thought of

> his suffering. With no more caring than as if he were stepping on a roach, this defendant killed Herbert Philibert. It was an act devoid of human feeling, with no justification. After his arrest the defendant's only concerns were to avoid detection. He told his mother to have his brother get rid of the murder weapon. This was not a domestic murder nor was there a heated argument. This defendant was the "triggerman" in a robbery and chose to gun down a helpless victim although other alternatives were available. This aggravating factor has been proven beyond a reasonable doubt.

(R163)(A4) This evidence establishes nothing more than a shooting death during a robbery prompted by the victim's unexpected action of struggling with a perpetrator. No murder was planned. Nothing points to the formation of a premeditated design to kill at the moment of the shot; multiple shots were not fired. The evidence, in the light most favorable to the State, shows that a single shot was used to secure a perpetrator's safety from the victim's actions. While not justifiable or excusable, the homicide was not proved premeditated. Only a felony murder was proven beyond a reasonable doubt.

In Hall v. State, 403 So.2d 1319, this Court reversed the defendant's conviction for first degree murder because of insufficient proof of premeditation. Hall and his co-defendant, Mack Ruffin, raped, robbed and murdered Karol Hurst. The two men then drove her car to a convenience store in an adjoining county. Having become suspicious of the two men's presence inside the store, the clerk telephoned for assistance. Deputy Coburn responded and apparently confronted Hall and Ruffin in the parking lot of the store. Two witnesses saw the men approach the deputy who was standing by his car holding his shotgun. No one saw the shooting incident. Hall and Ruffin fled in the Hurst car and

were later apprehended. Deputy Coburn's pistol was found inside the Hurst car. He had been shot in the chest from a range within two to five feet with his own pistol. The bullet passed through a side opening in his bullet-proof vest. A pistol found under Coburn's body proved to be the one used in the Hurst murder.

Upon the above facts, this Court reversed Hall's first degree murder conviction, holding that the circumstantial evidence only supported a verdict for second degree murder. Noting that the circumstantial evidence was subject to a reasonable hypothesis of innocence, this Court said,

> ...The evidence of the defendants' homicidal intent is subject to conflicting interpretations. One is that Hall or Ruffin seized Coburn's gun intending to kill him, took aim, and fired. If this were true, then this killing was premeditated. There are other interpretations, one of which is that Coburn struggled with one or both of the defendants until either Hall or Ruffin pulled the trigger without intending to kill. If this were true, then the killing was not premeditated.
>
> To prove a fact by circumstantial evidence, the circumstances must be inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla.1977); Davis v. State, 90 So.2d 629 (Fla.1956). While the circumstantial evidence in this case is inconsistent with any reasonable hypothesis of innocence as to the homicide of Deputy Coburn, it is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation. Therefore, the evidence is insufficient to prove premeditation, and the conviction for first-degree murder is reversed. We do find, however, sufficient evidence to sustain a conviction of second-degree murder.

Id. at 1320-1321. The circumstantial evidence of premeditation in this case is also insufficient.

Assuming there was evidence of premeditation, there was insufficient evidence to prove the heightened form required for the aggravating circumstance. E.g., White v. State, 446 So.2d 1031 (Fla.1984); Preston v. State, 444 So.2d 939,946 (Fla.1984); Maxwell v. State, 443 So.2d 967 (Fla.1983). The circumstance is designed to reflect the mental state of the perpetrator. See, Mason v. State, 438 So.2d 374,379 (Fla.1983). At best, the State proved Jackson's state of mind to be an intention to shoot in order to free his brother. Nothing more was established.

In similar felony murder cases, this Court has rejected the premeditation aggravating factor. The defendant in Maxwell v. State, 443 So.2d 967, shot his robbery victim once when the victim protested the defendant's demand for his gold ring. This Court held that even though the defendant

> ...killed [the victim] intentionally and deliberately...there was no showing of any additional factor to establish that the murder was committed in "a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

443 So.2d at 971. In White v. State, 446 So.2d 1031 (Fla.1984), the defendant shot his robbery victim once in the back of the head. There was no direct evidence of how the shooting occurred except the defendant's testimony which indicated the shooting was the result of a scuffle. This Court concluded that the evidence was insufficient to establish the aggravating circumstance. 446 So.2d at 1037. Finally, in Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant confessed to the police that he had robbed a Ramada Inn, kidnapped the night auditor, drove him to a remote wooded area and shot him. In his statement, Cannady said that he

had not intended to kill and that the victim jumped at him before he shot. Again, this Court rejected the finding of the premeditation circumstance. Similar holdings have been made in other felony murder cases. See, e.g., Preston v. State, 444 So.2d 939 (Fla.1984); Peavy v. State, 442 So.2d 200 (Fla.1983); Harris v. State, 438 So.2d 787 (Fla.1983); McCray v. State, 416 So.2d 804 (Fla.1982).

The premeditation aggravating circumstance should not have been a factor in sentencing Jackson to death. Jackson asks this Court to reverse his sentence.

C.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest.

Section 921.141(5)(e), Florida Statutes, which provides for an aggravating circumstance if the homicide was committed to avoid arrest, was not properly applied in this case. (R161)(A2) Where the victim is not a law enforcement officer, the circumstance is not properly found unless the evidence clearly proves that avoiding arrest was the dominate or only motive. Menendez v. State, 368 So.2d 1278,1282 (Fla.1979); Riley v. State, 366 So.2d 19,21-22 (Fla.1978). In finding this circumstance to exist, the court said,

> The defendant's primary purpose in entering the victim's store was to commit the antecedent crime of robbery. The victim was killed to avoid capture and detection. This was not a killing borne out of animosity where the taking of property was an afterthought.
>
> This defendant trained a gun on the victim as his brother took money from the cash register. The victim, for whatever reason, decided to try to hold on to his final five dollars. The victim struggled with, and held on to,

> this defendant's brother. The victim was confronting this defendant's brother face to face. Neither this defendant nor his brother wore a mask. This defendant had been in the store on a prior occasion and lived approximately one mile from the store. The victim had ample opportunity to be able to identify the defendant and his brother. By killing the victim, the only witness to the robbery was eliminated. The store was entered at a time when the victim was known to be alone. The victim was a man in his fifties and would have been no match for the defendant and his brother, who were both healthy men in their twenties. The two of them could have easily overpowered the victim by less drastic means and made their escape. This defendant had a gun trained on the victim and in order to secure his brother's release he shot the victim. The shot was from a distance of three feet or more and was into the body directly in line with his heart, severing his aorta. Had the victim continued to hold onto the defendant's brother, the capture, arrest, and identification of either or both would have been inevitable.

(R161)(A2) These factual findings were insufficient to justify the aggravating circumstance.

The trial judge relied upon two reasons to justify his finding. First, according to the State's theory, Jackson shot the victim after he confronted and grabbed his brother and co-perpetrator. (R161)(A2) And, second, Jackson had been inside the store a few days earlier to make a purchase, and as a result, the victim could identify him. (R161)(A2) These reasons are inadequate.

Initially, there is no direct evidence regarding the circumstances of the shooting. The prosecutor's theory was that Clinton shot Phillibert after he confronted and began struggling with Nathaniel Jackson. Assuming this theory is correct, it only establishes that the shooting occurred to free Nathaniel at that

moment to insure that no immediate harm came to him. Therefore, the shooting would not necessarily have been motivated by a desire to avoid arrest. It was a spontaneous act in response to the confrontation. Such a spontaneous killing under the circumstances does not qualify for this aggravating factor. Armstrong v. State, 399 So.2d 953,963 (Fla.1981). The fact that the homicide was not premeditated (see, Issue IV, B, supra), and that the victim was shot only once and was still alive when the perpetrators left further corroborates the inference that the shooting was not committed to avoid arrest. Rembert v. State, 445 So.2d 337,340 (Fla.1984). Given a reasonable hypothesis inconsistent with the aggravating circumstance, the finding cannot stand. Simmons v. State, 419 So.2d 316 (Fla.1982).

Finding that the victim recognized Jackson and was the only witness to the robbery is also legally insufficient to justify the circumstance. Being the only witness to a felony will not suffice, see, Foster v. State, 436 So.2d 56 (Fla.1983), and the same is true for merely recognizing the perpetrator. See, Rembert v. State, 445 So.2d at 340. Moreover, the evidence did not establish that the victim knew or recognized Jackson. Jackson's having been in the store a few days before does not prove Phillibert recognized him. Additionally, the court's finding that the perpetrators did not wear masks (R161)(A2) has no support in the record. No one saw the incident in the store to know if masks were used. An inference that no masks were used cannot be drawn from the fact that none were found.

The aggravating circumstance of avoiding arrest was not proven beyond a reasonable doubt. Clinton Jackson's death sentence must be reversed.

D.

The Trial Court Erred In Failing To Find Existing Nonstatutory Mitigating Circumstances.

The trial judge rejected all the mitigating evidence presented in Clinton Jackson's behalf and found no mitigating circumstances. In reaching this conclusion, the court said,

> (c) Whether any other aspects of the defendant's character, record, or circumstances of the offense are mitigating. The Court has considered and evaluated all of the evidence presented regarding the character of the defendant. Evidence showed that the defendant was able to hold down a job when he chose to. He simply chose to obtain money by other means. The defendant came from a broken home yet there was no evidence that this affected him detrimentally to any degree. To the contrary, persons who testified in his behalf stated that he was a responsible person, although they were unaware of most of his criminal activity. This defendant showed no remorse from the time of his arrest throughout the proceedings. After his arrest, his only concern was to escape punishment. He told his mother to have his brother Nate get rid of the gun because the State did not have much on him. He called his own mother as a witness in his trial and knowingly suborned perjury. He enlisted his own brother to do the crime with him. His character has been established from the time he kicked another boy into unconsciousness and continued to prey on vulnerable victims through thefts, burglaries, and now murder.
>
> The Court has considered all of the evidence presented and finds that no mitigation has been established either statutory or nonstatutory. Nothing testified to by witnesses or any circumstances of the offense establish any mitigation.

(R165)(A6) These conclusions were incorrect and based upon evidence not supported by the record.

Mitigating evidence in this case established several mitigating circumstances. Jackson grew up in a broken home from a deprived family background. (R1559-1560) Scott v. State, 411

So.2d 866,869 (Fla.1982). He was gainfully employed. (R1561) McCampbell v. State, 421 So.2d 1072,1075 (Fla.1982). He was a good father. (R1571) Jacobs v. State, 396 So.2d 713 (Fla.1981). He was a good and helpful son and brother. (R1560-1561) Finally, his age of 22 years at the time of the crime. (R1559) Each of these factors should have been considered and weighed in mitigation. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

In evaluating mitigating evidence, the trial court improperly considered at least three facts. First, the court found and considered lack of remorse even though the evidence was neutral on this issue. (R165)(A6) While lack of remorse can be considered to negate mitigating evidence, Agan v. State, 445 So.2d 326 (Fla.1983); Pope v. State, 441 So.2d 1073 (Fla.1983), there was no evidence of remorse to be rebutted or lack of remorse to be considered as rebuttal. Second, the court said, "[Jackson] called his own mother as a witness in his trial and knowingly suborned perjury." (R165)(A6) This fact is not true. Marsha Jackson was called as a court's witness at the request of the State. (See, Issue I, supra.) Finally, the court noted that Jackson "enlisted his own brother to do the crime with him." (R165)(A6) There was no evidence concerning who initiated the crime. In fact, Clinton Jackson's involvement was established only through circumstantial evidence. The trial court improperly relied upon Nathaniel Jackson's confession for this fact. (R49-51) His confession was not admitted into evidence and was inadmissible. Engle v. State, 438 So.2d 803 (Fla.1983)(See, Issue V, infra.)

The trial judge fail to consider or improperly evaluated the mitigating evidence in this case. Mitigating circumstances were present and should have been included in the sentencing weighing process. Jackson asks this Court to reverse his death sentence.

ISSUE V.

THE TRIAL COURT ERRED IN CONSIDERING EVIDENCE FROM NATHANIEL JACKSON'S TRIAL IN SENTENCING CLINTON JACKSON TO DEATH, WHERE SUCH EVIDENCE WAS INADMISSIBLE IN CLINTON JACKSON'S CASE AND WHERE THE DEFENSE WAS NOT GIVEN NOTICE OF THE COURT'S USE OF THE EVIDENCE OR AN OPPORTUNITY TO CONFRONT IT.

Circuit Judge Beach presided over both Clinton Jackson's trial and his brother and co-defendant's trial. The penalty phase of Nathaniel Jackson's trial was conducted shortly after the guilt phase of Clinton's trial and just before the penalty phase of Clinton's case. (R1492-1493) There was a one week continuance between guilt phase and penalty phase. (R1492) The court sentenced Nathaniel and Clinton at the same time. (R1498) Evidence in the two cases was not the same. Clinton denied any involvement. (R1187) Nathaniel confessed his involvement but blamed Clinton as the initiator of the crime and the triggerman. (R49-51) Nathaniel's confession was not in evidence in Clinton's trial. Since Clinton could not confront the confession, it was inadmissible in both the guilt phase, Bruton v. United States, 391 U.S. 123 (1968); Hall v. State, 381 So.2d 683 (Fla.1979), and the penalty phase. Engle v. State, 438 So.2d 803 (Fla.1983). However, the court, either intentionally or unintentionally, considered facts from Nathaniel's inadmissible confession in sentencing Clinton to death. (R160-165)(A1-6) Consequently, Clinton was denied his rights to due process and to confront the evidence against him.

Even if Nathaniel's confession had been admissible evidence, the court nevertheless denied Clinton Jackson the oppor-

tunity to confront, rebut or otherwise challenge the confession. Defense counsel was not given notice of the court's intention to use the evidence. Defense counsel did not have actual notice of the court's use of Nathaniel's confession. Not until the court's written findings were filed after the sentencing hearing does its use of the confession become apparent. (R160-165)(A1-6) Clinton Jackson has been denied his rights to due process and to confront the sentencing evidence used against him in violation of the mandate of Gardner v. Florida, 430 U.S. 349 (1977).

The findings of fact in support of the death sentence demonstrates the error that occurred. In evaluating the mitigating evidence, the judge stated, "He enlisted his own brother to do the crime with him." (R165)(A6)(See also, Issue IV, D, supra.) Only circumstantial evidence of Clinton Jackson's involvement was presented in his trial. There was no evidence in Clinton's trial concerning who initiated the robbery. However, in his confession, Nathaniel Jackson said that Clinton asked him to participate in the robbery. (R50) Consequently the only source of the judge's finding was Nathaniel Jackson's inadmissible confession.

Two additional factual errors in the trial judge's findings may very well have been derived from Nathaniel Jackson's trial. (R161)(A2) First, the judge's discussion regarding the aggravating circumstance of avoiding arrest included the following, "Neither this defendant [Clinton Jackson] nor his brother wore a mask." (R161)(A2)(See also, Issue IV, C, supra.) There was no evidence regarding masks in Clinton Jackson's trial. Therefore, the court either made an improper inference from a lack of evidence or relied on evidence from Nathaniel Jackson's trial.

Second, the findings of fact concerning mitigation states, "[Clinton Jackson] called his own mother as a witness in his trial and knowingly suborned perjury." (R165)A6) This statement is not true. Marsha Jackson was called as a court's witness upon the prosecutor's motion. (R1085,1091) The judge may have confused the two trials since Marsha Jackson may have been called as a defense witness in Nathaniel's case.

The trial court used inadmissible evidence against Clinton Jackson in sentencing. Furthermore, the court failed to give him notice of its use and an opportunity to confront, rebut or challenge the evidence. Clinton Jackson has been denied due process and his right to confrontation. Amends. V, VI, VIII, XIV, U.S. Const. This Court must reverse his death sentence.

ISSUE VI.

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS WHO WAS NOT LISTED ON DISCOVERY TO TESTIFY IN REBUTTAL DURING PENALTY PHASE WITHOUT FIRST CONDUCTING A HEARING REGARDING THE DISCOVERY VIOLATION AND THE PROCEDURAL PREJUDICE SUFFERED BY THE DEFENSE.

The defense requested discovery from the prosecution in this case pursuant to Fla.R.Crim.P. 3.220(a). (R7-11,27-28,29) However, the State failed to disclose on its answer to demand for discovery the name of C.D. Willingham who was called to testify in rebuttal during the penalty phase of the trial. (R14-19,31-35, 46-56,61,81,84,86,90,1575-1578) Jackson's counsel objected to the State's failure to disclose the witness. (R1576-1577) The trial court conducted no hearing into the violation as is required by Richardson v. State, 246 So.2d 771 (Fla.1977).[2/] (R1576-1578) The witness was allowed to testify. (R1575-1587)

It is well established that a trial judge must make inquiry when the State violates the discovery rules to determine if the violation resulted in procedural prejudice to the defense. Wilcox v. State, 367 So.2d 1020 (Fla.1979); Cumbie v. State, 345 So.2d 1061 (Fla.1977); Richardson v. State, 246 So.2d 771 (Fla. 1977). The burden is on the State to show nonprejudice, Wilcox,

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[2/] During the guilt phase of the trial, a potential discovery violation arose. (R1030) At that time, the trial judge indicated that he was not familiar with hearings mandated by Richardson v. State. (R1033-1034) The prosecutor and defense counsel explained the procedure to the court at that time. (R1034)

367 So.2d 1020, and an inadequate showing or a failure to conduct a hearing requires a new trial. Smith v. State, 372 So.2d 86 (Fla.1979); Dorsey v. State, 375 So.2d 60 (Fla.2d DCA 1979). These standards apply to the failure to disclose rebuttal witnesses as well as witnesses for the case-in-chief. E.g., Kilpatrick v. State, 376 So.2d 386 (Fla.1979); Witmer v. State, 394 So.2d 1096 (Fla.1st DCA 1981); Hardison v. State, 341 So.2d 270 (Fla.2d DCA 1977); Grant v. State, 354 So.2d 80 (Fla.4th DCA 1977); Miller v. State, 403 So.2d 619 (Fla.5th DCA 1981). In this case, no inquiry was made at all. (R1576-1578) The error is clear, and a new penalty phase of the trial is the only remedy. Ibid.

In response to the defense objection, the prosecutor stated that the defense had not requested discovery for penalty phase. (R1576) This is not correct. The defense demanded all items discoverable under Fla.R.Crim.P. 3.220 (R7-11,27-28,29) Penalty phase rebuttal witnesses are not excluded from the scope of the rule. Therefore, Jackson's demand was complete and sufficient to require disclosure of Willingham's name.

If an appropriate Richardson hearing had been held, the State would not have been able to establish that no prejudice accrued to the defense. Willingham's testimony consisted of double hearsay and hearsay from unidentified sources. (See, Issue VII, infra.) With notice of his testimony, the defense could have more effectively challenged his testimony and investigated sources.

The State violated the discovery rule in failing to list its rebuttal witness. Jackson was entitled to a Richardson

inquiry at which time the State would have the burden of proving no procedural prejudice to the defense. By failing to conduct such an inquiry, the trial court committed reversible error, and this Court must reverse this case for a new penalty phase.

ISSUE VII.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF STATE REBUTTAL WITNESS C.D. WILLINGHAM DURING PENALTY PHASE, SINCE HIS TESTIMONY CONSISTED OF HEARSAY FROM AN UNNAMED SOURCE WHICH COULD NOT BE CONFRONTED OR REBUTTED.

State witness C.D. Willingham was called as a rebuttal witness during the penalty phase of the trial. (R1575) He was the police officer investigating an incident which resulted in Clinton Jackson's being charged with aggravated battery as a juvenile. (R1576) Willingham did not witness the incident. (R1578-1581) Furthermore, he had no independent recall of his investigation. (R1578-1581) His testimony was based entirely on his police report which was admitted into evidence. (R1575-1583) However, his police report relied upon a statement made by a twelve-year old girl who had allegedly witnessed the crime. (R1581-1582,1585) Willingham had never seen the girl and had not seen her since the incident. (R1585) He did not know her name, and her name was not written in his report. (R1583-1586) Upon this predicate, Willingham was allowed to testify solely from his police report about what the unnamed informant told him at the time. (R1581-1583) According to the girl's statement Clinton had struck another teenage boy and kicked him causing the boy to become semi-conscious. (R1582-1583)

Hearsay evidence is admissible in the penalty phase of a capital trial if the defendant has the opportunity to rebut it. §921.141(1), Fla.Stat.; Perri v. State, 441 So.2d 606 (Fla.1983). In the instant case, Jackson was unable to confront or rebut the hearsay evidence offered through C.D. Willingham's testimony.

(R1575-1588) His testimony was based completely on his police report since he had no independent recall of the events, and his police report, in material part, was based upon hearsay statements of an unnamed, unidentified twelve year-old girl who allegedly witnessed the crime. Jackson could not test Willingham's testimony because Willingham had no recall. Jackson could not test the accuracy of the police report because the source of the information in the report was the unidentified informant. Jackson could not test the reliability of the informant because she was unidentified and had not been previously known to Willingham so that he might have information regarding her reliability. Compounding the problem, the State failed to list Willingham's name on discovery. This gave the defense no notice of the testimony before Willingham took the stand. (See, Issue VI, supra.)

There was no foundation to contend that this hearsay evidence was reliable. With faded memories and unidentified informants, Jackson had no opportunity to confront or rebut the evidence. This hearsay evidence should not have been admitted. Jackson asks this Court to reverse his death sentence.

ISSUE VIII.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF THE HOMICIDE VICTIM'S CHARACTER AND FAMILY BACKGROUND DURING THE PENALTY PHASE OF THE TRIAL.

During the penalty phase of the trial, the prosecutor called Hugh Palmer for the sole purpose of testifying about the victim's character, family background, business practices and standing in the community. (R1552-1558) Jackson objected on relevancy grounds. (R1553-1556) The State argued that the evidence was relevant to the aggravating factor that the homicide was especially heinous, atrocious or cruel. (R1554-1555) Agreeing with the State, the court overruled the defense's objection. (R1554-1556)

Palmer testified that Phillibert was fifty-three years old, was married and had two sons, one of whom was in the Air Force. (R1553) He said that Phillibert came to St. Petersburg from Jamaica, purchased the hardware store and worked hard, sometimes seven days a week. (R1554) According to Palmer, Phillibert was a generous man in his business practices. (R1556-1557) Palmer had also talked to members of the community to express their sorrow over their loss as the result of Philliber's death. (R1557) Phillibert was generally well liked in the community. (R1558)

None of Palmer's testimony was relevant to the heinous, atrocious or cruel aggravating factor. The evidence did nothing more than improperly appeal to the sympathy of the jury. Two elements are pertinent to the aggravating circumstance--the physical pain and suffering of the victim as a result of the manner of death, e.g., Lewis v. State, 377 So.2d 640 (Fla.1979); Cooper

v. State, 336 So.2d 1133 (Fla.1976), and the mental pain and suffering of the victim caused by the knowledge of impending death. Routly v. State, 440 So.2d 1257 (Fla.1983); Knight v. State, 338 So.2d 201 (Fla.1976). Acts occurring after the homicide are irrelevant. Jackson v. State, 451 So.2d 458 (Fla.1984); Drake v. State, 441 So.2d 1079 (Fla.1983); Herzog v. State, 439 So.2d 1372 (Fla.1983). State of mind of the perpetrator and his thought processes concerning the crime are irrelevant. Michael v. State, 437 So.2d 138,142 (Fla.1983). And, his remorse or lack of remorse about the consequences of his crime are irrelevant. Pope v. State, 441 So.2d 1073 (Fla.1983). The impact on the community as a result of the death has no bearing on the issue. Indeed, not even the impact the death has on a family member who witnesses the homicide is material. Riley v. State, 366 So.2d 19 (Fla.1978). Certainly, evidence of the victim's background, business practices and community standing were irrelevant to any issue properly before the jury. The prosecutor's suggestion that the heinous, atrocious or cruel aggravating factor can be influenced by the victim's social or economic standing in the community (R1554-1556,1600-1601) is elitest and totally untenable.

Admission of this evidence certainly had a prejudicial impact on the judge and jury. The prosecutor was allowed to refer to it in argument to invoke the jury's sympathy. (R1600-1601) Moreover, the trial judge improperly used the evidence in finding the heinous, atrocious or cruel aggravating factor. (R162-163)(A3-4)(See, Issue IV, A, supra.) This Court must reverse Jackson's sentence.

ISSUE IX.

THE TRIAL COURT ERRED IN ADJUDICATING AND SENTENCING JACKSON ON THE ROBBERY COUNT SINCE THERE WAS NO EVIDENCE OF A PREMEDITATED MURDER AND THE ROBBERY WAS THE UNDERLYING FELONY FOR FIRST DEGREE FELONY MURDER.

The State indicted Clinton Jackson for first degree premeditated murder (R4), but proceeded on both a premeditation and a felony murder theory. (R1372,1376-1379,1458-1461) Robbery was the underlying felony for the felony murder. (R1460) At trial, there was no proof of premeditation. In Issue IV, B of this brief, the sufficiency of the evidence for premeditation was discussed, and Jackson incorporates that discussion by reference here in support of this argument. Since premeditation does not exist, the first degree murder conviction is supported only upon the felony murder theory. Consequently, the Fifth Amendment guarantee against double jeopardy prohibits both the conviction for robbery and the sentence.

This Court has firmly held to the position that a sentence cannot be imposed for the underlying felony of a felony murder. E.g., Hawkins v. State, 436 So.2d 44 (Fla.1983); State v. Hegstrom, 401 So.2d 1343 (Fla.1981). However, the question whether the conviction for the underlying felony is proper has not been consistently answered. See, State v. Hegstrom, 401 So.2d 1343. The answer should be that the conviction for the underlying felony as well as the sentence is improper.[3/]

3/ This question is presently before this Court in at least two other cases. Snowden v. State, Case No. 65,176; State v. Enmund, Case No. 66,264.

This Court has repeatedly found that the legislature intends separate convictions and sentences only for separate offenses and does not intend separate convictions and sentences for both a greater and a necessarily included lesser offense. State v. Gibson, 452 So.2d 553,556-558 (Fla.1984); Bell v. State, 437 So.2d 1057,1058 (Fla.1983); Borges v. State, 415 So.2d 1265,1267 (Fla.1982). See §775.021(4), Fla.Stat. (1983). Convictions for lesser included offenses are punitive in effect. They expose the defendant to enhanced sentences under both the sentencing guidelines and habitual offender statutes. They adversely affect parole release dates in those cases where parole remains available. And, they may be used as impeachment evidence in subsequent criminal proceedings. Bell v. State, 437 So.2d at 1059; Fla.R.Crim.P. 3.701. Since the legislature does not intend separate convictions for necessarily included lesser offenses, and since separate convictions for such offenses are punitive, separate convictions are proscribed by the multiple punishment protection afforded by the double jeopardy clauses of the United States and Florida Constitutions. Portee v. State, 447 So.2d 219, 220 (Fla.1984); Bell v. State, 437 So.2d at 1058,1061; see Whalen v. United States, 445 U.S. 684,688-690 (1980); Amends. V and XIV, U.S. Const.; Art. I, §9, Fla. Const.

Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements of the two offenses. The two offenses are separate and may be separately punished only if each offense requires proof of a fact the other does not. Whalen v. United States, 445 U.S. at 691-692; State v. Baker, 456 So.2d 419,420 (Fla.1984); Bell v. State, 437

So.2d at 1058; §775.021(4), Fla.Stat. (1983). In a felony murder case, the underlying felony is a statutory element of the felony murder. Thus, the elements of the underlying felony are wholly included within the elements of felony murder, and the underlying felony is a necessarily included lesser offense. Whalen v. United States, 445 U.S. at 693-694; Copeland v. State, 457 So.2d 1012, 1018 (Fla.1984); State v. Gibson, 452 So.2d 557 n.6; State v. Hegstrom, 401 So.2d at 1346; §782.04(1)(a), Fla.Stat. (1983). Because the underlying felony is a necessarily included lesser offense to felony murder, and the legislature did not intend separate convictions and sentences for necessarily included lesser offenses, the double jeopardy clauses of the United States and Florida Constitutions prohibit the imposition of separate convictions and sentences for the underlying felony. See State v. Gibson, 452 So.2d at 558 n.7; Bell v. State, 437 So.2d at 1058, 1061.

This Court has created an anomaly in the law by allowing convictions for the underlying felony while reversing sentences for the underlying felony in Copeland v. State, 457 So.2d at 1018; Hawkins v. State, 436 So.2d at 47; and State v. Hegstrom, 401 So.2d at 1346. See Snowden v. State, 449 So.2d 332,335-337 (Fla. 5th DCA 1984), pet.for rev.pending, Fla.Case No. 65,176. The conflict between Hegstrom, and Bell was recognized in State v. Gibson, 452 So.2d at 558 n.7. This conflict should be resolved by holding that separate convictions for felony murder and the underlying felony are not permitted by §775.021(4), Fla.Stat. (1983), and the double jeopardy clause. Clinton Jackson's conviction and sentence for robbery must be vacated.

ISSUE X.

THE TRIAL COURT ERRED IN IMPOSING A CONSECUTIVE SENTENCE OF NINETY-NINE YEARS ON THE ROBBERY COUNT WITHOUT CONSIDERING THE GUIDELINES RECOMMENDED SENTENCE AND IN RETAINING JURISDICTION OVER ONE-THIRD OF THE SENTENCE.

The robbery for which Jackson was charged and convicted took place on January 17, 1984. (R4) Consequently, the robbery sentence had to comply with the sentencing guidelines. §921.001-(4)(a), Fla.Stat. (1983).

Fla.R.Crim.P. 3.701(d)(1) directs that a guidelines scoresheet be prepared for each defendant who is to be sentenced under the guidelines. Nothing in the record indicates that a guidelines scoresheet was even prepared or considered by the trial judge. The court simply announced that a consecutive sentence of ninety-nine years would be imposed and jurisdiction would be retained over one-third of the sentence. (R1525)

In Doby v. State, 461 So.2d 1360 (Fla.2d DCA 1984), the Second District Court held that a sentencing judge may not dispense with a guidelines scoresheet by merely announcing satisfactory reasons for imposing a guidelines departure sentence. The court must be informed of the presumptive sentence under the guidelines before deciding that departure is warranted.

The purpose of the statute permitting retention of jurisdiction over a defendant's sentence is to permit the trial judge to exercise review over a defendant's release on parole during the first third of his sentence. However, parole is not available to a defendant "convicted of crimes committed on or after October 1, 1983." §921.001(8), Fla.Stat. (1983). Accord-

ingly, the retention of jurisdiction should be stricken. Barr v. State, __So.2d__, 10 FLW 1811 (Fla.2d DCA 1985)(Case No. 84-1719, opinion filed July 24).

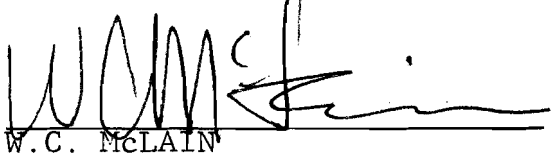
The trial court's failure to consider a guidelines scoresheet and the presumptive sentence before sentencing Jackson on the robbery requires a reversal for resentencing.

CONCLUSION

Clinton Jackson asks this Court to reverse his convictions and sentences and remand his case for a new trial on the basis of Issues I through III. For the reasons presented in Issue IV, Jackson asks this Court to reduce his death sentence to life imprisonment. In Issues V through VIII, Jackson urges, in the alternative, that he be granted a new penalty phase before a new jury. Jackson asks that his conviction and sentence for robbery be vacated on the basis of the argument expressed in Issue IX. Finally, in Issue X, Jackson requests that his robbery sentence, if not vacated, be remanded for resentencing since the sentencing guidelines were not applied.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: 
W.C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 26th day of August, 1985.

W.C. McLAIN

WCM:js