IN THE SUPREME COURT OF FLORIDA

NATHANIEL JACKSON, Appellant, vs. STATE OF FLORIDA, Appellee,	Pinellas County Case Nos. 84-965 and 84-7995 CFANO Appeal No. 66,671

INITIAL BRIEF OF APPELLANT

Arthur S. Corrales, Esquire
One Tampa City Center
Nineteenth Floor, Suite 9
Tampa, Florida 33602
(813) 273-8027
Attorney for Appellant

TABLE OF CONTENTS

		PAGE
TABLE OF CITATIONS		ii
STATEMENT OF THE CASE AND FACTS		1
SUMMARY OF ARGUMENT		8
ISSUES		
I.	DID THE DEATH PENALTY IMPOSED UPON NATHANIAL JACKSON CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN IT WAS NOT ESTABLISHED THAT HE KILLED, ATTEMPTED TO KILL OR INTENDED TO TAKE LIFE?	11
II.	DID THE COURT ERR IN ITS INSTRUCTIONS TO THE JURY DURING THE PENALTY PHASE SO AS TO REQUIRE REVERSAL OF THE DEATH PENALTY IMPOSED?	16
III.	DID THE COURT ERR IN FINDING SUFFICIENT AGGRAVATING CIRCUMSTANCES SO AS TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY?	19
IV.	DO THE FACTS IN THE CASE AT BAR WARRANT THE IMPOSITION OF THE DEATH PENALTY IN LIGHT OF THE SUPREME COURT'S DUTY TO CONDUCT A MANDATORY PROPORTIONALITY REVIEW?	25
CONCLUSION		29
CERTIFICATE OF SERVICE		30

TABLE OF CITATIONS

CASES

Alvord v. State,
322 So.2d 533 (Fla. 1975) 16

Antone v. State,
382 So.2d 1205 (Fla. 1980) 23, 27

Arango v. State,
411 So.2d 172 (Fla. 1982) 17, 18

Armstrong v. State,
399 So.2d 953 (Fla. 1981) 21

Bullock v. Lucas,
743 F.2d 244 (5th Cir. 1984) 14

Coker v. Georgia,
433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) 13

Cooper v. State,
336 So.2d 1133 (Fla. 1976) 23, 27

Dobbert v. State,
409 So.2d 1053 (Fla. 1982) 23

Enmund v. Florida,
458 U.S. 782, 102 S.Ct. 3368,
73 L.Ed.2d 1140 (1982) 8, 9, 11, 12, 13, 14, 15, 18, 20, 25

Fleming v. State,
374 So.2d 954 (Fla. 1979) 23, 27

Furman v. Georgia,
408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) 26, 27

Gregg v. Georgia,
428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) 12

Jones v. Thigpen,
741 F.2d 805 (5th Cir. 1984) 14

Kampff v. State,
371 So.2d 1007 (Fla. 1979) 24, 27

Lockett v. Ohio,
438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) 12

Maggard v. State,
399 So.2d 973 (Fla. 1981) 23, 27

Martin v. State,
420 So.2d 583 (Fla. 1982) 23

Menendez v. State,
368 So.2d 1278 (Fla. 1979) 21

Mullaney v. Wilbur,
421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 13, 17, 18

O'Callaghan v. State,
429 So.2d 691 (Fla. 1983) 23

Proffitt v. State,
428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) 25

Rembert v. State,
445 So.2d 337 (1984) 20, 24

Riley v. State,
366 So.2d 19 (Fla. 1978) 20, 21

Ross v. Kemp,
756 F.2d 1483 (11th Cir. 1985) 14

Slater v. State,
316 So.2d 539 (Fla. 1975) 25, 26

State v. Dixon,
283 So.2d 1 (Fla. 1973) 16, 17, 18, 22, 26

Swan v. State,
322 So.2d 485 (Fla. 1975) 26, 27

Tafero v. State,
459 So.2d 1034 (Fla. 1984) 15

Tedder v. State,
322 So.2d 908 (Fla. 1975) 27

Weems v. United States,
217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910) 25

White v. State,
10 F.L.W. 247 (Fla. April 25, 1985) 15

Williams v. State,
386 So.2d 538 (Fla. 1980) 19

Woodson v. North Carolina,
428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) 12, 25

STATUTES

Section 921.141(2)(3) Fla. Stat. (1983) 16

JURY INSTRUCTIONS

Fla. Stand. Jury Inst. (Crim.) 78, 80 16

STATEMENT OF THE CASE AND FACTS

On the Sixth day of March, 1984 a two count Indictment was returned by the Grand Jury of the Sixth Judicial Circuit in and for Pinellas County against Appellant, Nathaniel M. Jackson, charging him with Murder in the First Degree and Armed Robbery in the shooting death of Herbert Phillibert on January 17, 1984. (R 18)

On November 6, 1984 the trial of Nathaniel Jackson began after Voir Dire and Opening statements with the testimony of Hersa Wildman. (R 355) Ms. Wildman testified that at approximately 4:30 p.m. on the seventeenth day of January, 1984 she entered the hardware store with Aston Francis and called out for the owner, Herbert Phillibert. She testified that when he didn't answer their call they walked over toward the cash register which was making a buzzing noise. At this point Francis spotted Herbert Phillibert lying face down on his side groaning. They then called for paramedics who tried to revive him when they saw what appeared to be a bullet hole in his side. This testimony was substantiated by Aston Francis (R 360-368) and the paramedics, Larry Stevens Parker (R 368-371) and Samuel Warren. (R 371-386) Edward Corcoran, M.D., the associate medical examiner, who performed the autopsy on Herbert Phillibert was later proffered as an expert in forensic pathology. (R 392) This was accepted by the Court and defense counsel. During Corcoran's testimony, State's Exhibits 1 A-D (photographs) were introduced to illustrate the bullet wounds (R 686-689). Dr. Corcoran then testified that upon internal examination prior to opening the body he cut an area on the left side of Herbert Phillibert and found a bullet present. He stated that upon internal examination he found that the bullet had passed through the lower

chest wall on the right side, through the liver, the abdominal aorta grazing the left kidney, there being approximately a pint of blood in the abdominal cavity and a quart of blood in the back tissue in the back of the cavity around the aorta. The cause of death in his expert opinion was the blood loss of the vascular system from the gunshot wound. (R 395) He further testified that due to the lack of smoke, powder, or stippling effect, that the gun had been fired from a distance of at least 3 feet (R 397-398), but admitted that he could not determine how the gunshot wound was inflicted. (R 404)

Elma Lindsey, a day care teacher, then testified that when she was working at the day care center located behind Herbert Phillibert's establishment on the afternoon of January 17th, 1984, she witnessed two black males running from the direction of the hardware store to a black truck. She testified that she was later taken by the St. Petersburg Police Department to a lot with several automobiles where she identified the truck in question. (R 410-413) Upon cross-examination, she admitted that due to houses restricting her vision, she could not determine specifically where the men were coming from nor how far apart the men were when they began running. (R 415-417) Delores Flournoy, a co-worker of Elma Lindsey's, was then called to the stand and basically corroborated Ms. Lindsey's testimony. (R 417-423)

Bennie Phillips, owner of Bennie's Auto Shop as well as the black truck which had been identified by Elma Lindsey, then testified. During his testimony, the State introduced into evidence photographs of Mr. Phillips' truck as State's composite Exhibit 5 A through D. (R 426, 702-705) Phillips testified that he had loaned his truck on the day in

question to either Clinton Jackson, Nathaniel Jackson's brother and co-defendant, or Marsha Jackson, Nathaniel Jackson's mother, as he could not recall specifically (R 428). He did, however, recall seeing Clinton Jackson and another unidentified individual in his truck on the day in question. (R 430)

John Schofield, a crime scene technician, was then tendered as an expert in crime scene technology. Schofield subsequently testified over defense counsel's objection as to the "freshness" of a print that had been lifted from the back of the cash register in Herbert Phillibert's hardware store. While he had stated the print to be "fresh", upon cross-examination, he admitted that there was no way he could accurately indicate the precise length of time the print had been present on the cash register. Upon redirect, he stated that in his opinion, the fingerprint had been left that day. This testimony was allowed over defense counsel's objection. (R 437-457)

Frank Reinhart, fingerprint technician for the St. Petersburg Police Department, then testified that of the six lifts turned in to him from the technicians on the scene, four were of sufficient quality for identification purposes. He stated that he then compared these lifts and eight additional quality lifts acquired from the black Toyota pickup truck aforementioned with the rolled known fingerprints and palm prints of Nathaniel Jackson. Reinhart then testified that, in his opinion and based upon his experience, several prints lifted from the crime scene and the Toyota truck belonged to Nathaniel Jackson. (R 463-475) State's Exhibits 15 A through I, latent prints of Nathaniel Jackson, and Exhibit 16, fingerprint card of Nathaniel Jackson were then entered into evidence. (R 479,

714-722)

Richard Quigley, identification technician with the St. Petersburg Police Department, then testified that he took custody of the bullet extracted from Mr. Phillibert after removal by Dr. Corcoran and placed it into evidence. (R 487-489)

James S. Kappell, a homicide detective with the St. Petersburg Police Department, later testified that he and his partner, Detective William Feathers, had investigated the crime scene and subsequently State's composite Exhibits 17 A through C (exterior photographs of store) were admitted into evidence. (R 504, 723-725) He further stated that they had received a detailed description of the vehicle which was passed out to all uniformed units at which time they received information of a possible owner of said vehicle. (R 511-512) This vehicle was located at a residence where Bennie Phillips and Marsha Jackson resided. Upon this information, Kappell developed Nathaniel Jackson, and his brother, Clinton Jackson, as suspects. He further stated that he requested that the prints lifted be immediately compared with the fingerprints of the Jacksons. (R 514) As a result of the print comparisons and other probable cause, Kappell obtained an arrest warrant for Nathaniel Jackson who was subsequently arrested in Valdosta, Georgia. Kappell stated that he traveled to Georgia to talk with Nathaniel Jackson on January 31, 1984. After identifying himself as a police officer and advising him of his Miranda rights, Kappell had Jackson sign a Rights Advisement form waiving those rights, and took a statement from Jackson. (R 520-525) The form and subsequent statement were entered into the record as State's Exhibits 13 and 14. (R 708-709) Detective Kappell related that Jackson admitted being with his brother, Clinton, on

the date of the robbery and that they had been driving around in a black Toyota pickup truck all day. Jackson related that Clinton told him of a place they could rob if they needed money and that they drove around the hardware store until nearly 5:00 p.m. when they entered the business. Jackson pretended to buy a box of nails and when the clerk opened the cash drawer to take the cash for the box of nails, Clinton drew a gun and pointed it at the clerk. Jackson related that he was standing near the cash register when Clinton ordered that he take the money from the cash drawer. He stated that as he began to reach around the corner to take the money, the clerk grabbed him, and that his brother reached over the counter with the gun and shot the clerk. He then related to Kappell that the clerk fell back into a chair and that he and his brother fled the business and ran to the Toyota pickup truck owned by Mr. Phillips and fled the scene. (R 527-532)

Detective William Feathers of the St. Petersburg Police Department then testified and basically corroborated the testimony of Detective Kappell. (R 556-564)

The State of Florida rested its case and the defense called no witnesses and offered no evidence in its behalf. (R 574)

In closing arguments, the State conceded that Nathaniel Jackson was not the man that pointed the gun and pulled the trigger on the date in question, but contended that he was equally responsible for every act that his brother had committed. (R 1005) In addition, the State argued that if the killing had been accidental it would have made no difference in terms of Nathaniel Jackson's liability (R 1006) and admitted that there was no concrete evidence that anyone fully intended to kill when they walked in

the door of the store. (R 1014)

The jury instructions were then given and the verdict forms distributed. The jury deliberated for two hours and twelve minutes, and found Nathaniel Jackson guilty of Murder in the First Degree as charged and guilty of Robbery during which the defendant or an accomplice carried a firearm as charged. The jury further found that the defendant did not personally carry a firearm.

The penalty phase commenced December 7, 1984 at 1:30 p.m. As a preliminary matter, the State requested that the change of plea document (R 141) in Case No. 84-7995 be introduced as evidence in this proceeding. Defense counsel questioned the validity of this as a procedural vehicle in an objection and additionally filed a Motion in Limine/Suppress. (R 137-138) The Court overruled both the objections and motions. The Court then took Judicial Notice of all the testimony that was previously presented in the guilt phase of the trial and instructed the jury that they could consider that testimony in their deliberations over the penalty phase. (R 615) The State entered into evidence State's Exhibit 1, a change of plea to nolo contendre, and adjudication of guilt on an attempted Armed Robbery dated October 31, 1984. (R 615-616)

After argument by both counsel, the Court then informed the jury that its sentence was advisory in nature and that the advisory sentence was to be based "upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R 646) The Court further stated that "your advisory sentence should be based upon the evidence that

was heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings." (R 646) The Court defined five aggravating circumstances for the jury to consider and if sufficient aggravating circumstances were found, the areas of mitigation that should be considered. (R 647) While the Court made it clear that a six to six tie of the jury would be a vote for life, he also instructed the jury to retire to consider their recommendation "and when seven or more are in agreement as to what sentence should be recommended to the court that form of recommendation should be signed by your foreman and be returned to the Court." (R 650) The jury deliberated for one hour and fifteen minutes and returned an advisory sentence by a vote of twelve to zero for the imposition of the death penalty. (R 652)

Sentencing on the matter was held on January 3, 1985 at 9:00 a.m. Defense counsel pointed out that the defendant, before his conviction, was offered the opportunity to plead to life in return for testimony against his brother which defense counsel advised him against. "I told him I would not be a party to it and I basically prevented him from doing it." (R 660) "I told him not to testify against his brother." (R 661) The Court stated that in this case, the jury considered all the aggravating factors and the lack of any mitigating circumstances. (R 682) In the case involving First Degree Murder, the Court imposed the death penalty. In the case involving the Robbery charge, the Court imposed a ninety-nine year sentence to run concurrent with other charges, which sentence was subsequently dropped. (R 683-684) The aggravating and mitigating factors utilized by the judge were expressed in written form as required by Section 921.141(3)(b), Fla. Stat. (1983). (R 211-216)

SUMMARY OF ARGUMENT

The sentence of death imposed upon Nathaniel Jackson is a violation of the 8th and 14th Amendments of the United States Constitution in that the record is insufficient to establish that he either killed, attempted to kill, or intended to kill. This principle of law was enunciated in Enmund v. Florida which, in citing several other United States Supreme Court rulings emphasized the need to focus upon the personal responsibility and moral guilt of the defendant himself before imposing the ultimate sanction of death.

The evidence adduced at trial clearly establishes that appellant neither killed, attempted to kill, or intended that life would be taken. For these reasons, it is appellant's contention that the imposition of death imposed is a violation of the 8th and 14th Amendment of the United States Constitution and should be vacated.

The trial court erred in two instances during its instructions to the jury in the penalty phase of the trial. The court first instructed the jury that if sufficient aggravating circumstances were found to exist, the jury would need to determine if mitigating circumstances existed which outweighed the aggravating circumstances. Appellant urges that this instruction served to give the erroneous impression that the mitigating circumstances must outweigh the aggravating circumstances before an advisory sentence of life imprisonment can be properly rendered. Such an understanding is an impermissible allocation of the proper burden of proof.

The court also instructed the jury that they were to consider the evidence heard during the guilt phase of the trial in arriving at an advisory sentence of life or death. Such an instruction constituted error in light of the Enmund decison which forbids a jury to use the transferred intent theory in the penalty phase. Appellant urges reversal of the death penalty imposed upon him in light of the court's erroneous instructions.

A review of the facts in the case at bar reveals that sufficient aggravating circumstances did not exist which would warrant the imposition of the death penalty. It is clear that this crime was not committed for the purpose of avoiding or preventing an arrest or effecting an escape and was not especially heinous, atrocious or cruel under applicable case law interpreting those circumstances. It is also clear that the State did not prove by competent evidence that the defendant had previously been convicted of a felony involving the use of threat or violence to the person in that the only evidence introduced and admitted into evidence was a Change of Plea document reflecting that the defendant had previously pled no contest to a charge of Attempted Robbery. Absent a certified copy of a judgment and sentence properly introduced, this particular aggravating circumstance cannot be properly used against the appellant. While it is conceded that the capital felony of murder was committed during the commission of a robbery, relevant case law mandates that this aggravating circumstance standing alone cannot, in and of itself, warrant the imposition of the death penalty.

The death penalty imposed upon Appellant is unconstitutionally disproportionate to the crime he committed when one looks at the particular circumstances of his involvement. The Supreme Court has a responsibility

to conduct a review of the facts of the case with particular attention to the defendant's individualized culpability to assure that the punishment imposed is graduated and proportional to the offense. The record establishes that appellant neither carried a weapon or had any intent to commit a murder independent of the intent the law imposes under the felony murder doctrine. To reiterate, it is impermissible in the penalty phase to use the same transfer theory for imposition of the death penalty. The penalty imposed upon appellant is clearly disproportionate to penalties imposed on other individuals whose crimes are unarguably more reprehensible. Thus, it is appellant's position that the death penalty imposed upon him be vacated and his sentence be reduced to life imprisonment.

I. SENTENCING NATHANIEL JACKSON TO DEATH WHEN IT WAS NOT ESTABLISHED THAT HE KILLED, OR ATTEMPTED TO KILL, OR INTENDED TO TAKE A LIFE, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS A VIOLATION OF THE 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The United States Supreme Court in the landmark decision of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) concluded that a violation of the 8th and 14th Amendments to the United States Constitution occurs when a death sentence is imposed on an individual who aides and abetts a felony in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, intend to kill or contemplate that a life will be taken.

In Enmund, petitioner and a co-defendant were convicted at jury trial of First Degree Murder and Robbery of two elderly persons at their farmhouse, and were sentenced to death. This Court, in affirming, held that, although the record supported no more than an inference that petitioner was the person in a car parked by the side of the road near the farmhouse at the time of the killings waiting to help the robbers and killers escape, this was enough under Florida law to make petitioner a constructive aider and abettor and hence a principal in the First Degree Murder upon whom the death penalty could be imposed. It was thus irrelevant to petitioner's challenge to the death sentence that he did not himself kill and was not present at the killings or whether he intended that the victims be killed or anticiated that legal force might be used to effectuate the robbery or escape.

The United States Supreme Court in reversing and remanding emphasized the need to focus upon the personal responsiblity and moral guilt of Enmund himself in rejecting his death sentence for Enmund was merely an accomplice

in a robbery during which someone else shot and killed the victims. The thrust of Enmund is that the sentencer must look to the individual culpability of the defendant in deciding whether the death penalty may properly be imposed upon him. During its analysis, the Court in citing other previous rulings stated:

> The question before us is not the disproportionality of death as a penalty of murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his own culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which means that we must focus on 'relevant facets of the character and record of the individual offender.' Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally" H. Hart, Punishment and Responsibility 162 (1978). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the 8th Amendment. Id. at 798.

In arriving at its decision, the Court, citing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) reiterated the two purposes traditionally said to be served by the imposition of the death penalty - retribution and deterrance. The Court stated that unless the death penalty when applied to the individual facts of the case at hand measurably contributes to the one or both of these goals, it is "nothing more than the purposeless and needless imposition of pain and suffering", and hence an

unconstitutional punishment. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The Court in Enmund concluded that capital punishment can serve as a deterrent only when murder is a result of premeditation and deliberation. As far as retribution being a justification for executing Enmund, the Court looked to Enmund's culpability - what his intentions, expectations and actions were. American crime law has long considered the defendant's intentions and therefore his moral guilt to be critical to the degree of his criminal culpability. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

Under the auspices of Enmund, it is appellant's contention that this Court must now look specifically to his intentions, expectations and actions. This Court must ask whether appellant killed, attempted to kill, intended to kill or contemplated that life would be taken before the imposition of death can be affirmed.

The evidence in the case at bar clearly showed, and the Court found, that the only shot fired in the death of Herbert Phillibert was not and could not have been fired by Nathaniel Jackson. The State in its closing argument conceded that there existed no evidence that anyone fully intended to kill this man when they walked in the door of the store and that there existed no evidence in the Record that appellant ever attempted to take life or contemplated that life would be taken. The Record is insufficient to show that there existed any discussions between appellant and his co-defendant prior to the killing as to the actual use of deadly force. Instead, the Record merely establishes that appellant's co-defendant displayed a gun and demanded money. Only when Mr. Phillibert, for unknown reasons grabbed appellant, did the co-defendant fatally shoot him.

It is also important to note that the factors in Enmund are not to be construed merely as a circumstance in mitigation, but acts as a complete constitutional bar to the imposition of the death penalty. Unless it can be shown by competent evidence that appellant killed, intended to kill or attempted to kill he cannot, under the authority of Enmund, be sentenced to death.

The Court in Jones v. Thigpen, 741 F.2d 805, (5th Cir. 1984), in vacating a death sentence interpreted Enmund to establish an 8th Amendment principle at two levels. The first level dictating that an accused may not constitutionally receive a death penalty except upon the finding that he himself killed, attempted to kill or intended to kill and second, the Court concluded that he may not be sentenced to death unless that finding is supported by sufficient evidence in the record, id. at 812.

Similarly, in Bullock v. Lucas, 743 F.2d 244, (5th Cir. 1984), the Court vacated the death sentence because of a defect in the jury instructions. That Court held that a sentence of death could not stand in light of a jury instruction which permitted imposition of the death penalty merely because the defendant participated in a robbery with or without any design to effect the death of the victim. Id. at 248. The instructions given in the case at bar likewise allowed the jury to find appellant guilty of First Degree Murder without a finding of intent to kill and therefore, the death penalty subsequently imposed cannot stand.

The case of Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985), established the respective roles of the Court and the jury in making the factual findings necessary under Enmund. The Court in rejecting the 5th Circuit's requirement of a jury finding of intent, stated that where there is no jury

finding of intent, the courts must review the record to determine whether the sentence of death is lawful under Enmund. The Court stated:

> We see no reason why the Enmund inquiry need be characterized as an additional element that the State must prove to the jury beyond a reasonable doubt at the guilt or sentencing phase before the death penalty lawfully can be imposed, so long as a reviewing court can determine from the record that the eighth amendment has been satisfied. Id. at 1488.

Florida cases involving Enmund claims do not address the standard of review of the evidence, but have analyzed the evidence in the light most favorable to the State and have drawn inferences in favor of the State. White v. State, 10 F.L.W. 247 (Fla., April 25, 1985); Tafero v. State, 459 So.2d 1034, (Fla., 1984).

Even when analyzing the evidence in the instant case in a light most favorable to the State, one cannot escape the conclusion that appellant did not kill, intend to kill or attempt to kill. While a showing of intent is not necessary under the doctrine of Felony Murder due to the fact that the intent is transferred from the felony to the subsequent killing for guilt purposes, this type of transferred intent under the mandate of Enmund is totally inappropriate in the penalty phase of the bifurcated trial and demands reversal of the death penalty.

II. THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY DURING THE PENALTY PHASE SO AS TO REQUIRE REVERSAL OF THE DEATH PENALTY IMPOSED.

It is appellant's contention that the trial judge erred on two separate occasions in its instructions to the jury which, independent of each other, require reversal of the death penalty imposed.

It is well settled law in this state that no defendant can be sentenced to capital punishment unless the statutory aggravating factors outweigh the mitigating factors. Alford v. State, 322 So.2d 533, 540 (Fla., 1975). It is also well established that at least one aggravating factor must be found before the defendant may be eligible for the capital penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973).

If the statutory circumstances are found to be proven, those factors must be examined to determine whether they are sufficient to warrant the death sentence. Section 921.141(2)(3), Fla. Stat. (1983), Fla. Std. Jury Instr. (Crim.) 78, 80.

Should sufficient aggravating factors be established, then all evidence of mitigation must be considered by the jury. These aggravating factors that have been established must also be found to outweigh the factors in mitigation.

In the case at bar, the Court incorrectly instructed the jury that their advisory sentence was to be based "upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R 646) The Court again incorrectly informed the jury on the proper burden when it later stated "should you find sufficient aggravating

circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (R 648)

The factual situation in Arango v. State, 411 So.2d 172 (Fla. 1982) is strikingly similar to the instant case in this regard. The trial judge in Arango, in a like fashion, instructed the jury that if it found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances" id. at 174. The appellant in that case asserted that the instruction violated the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and Dixon, supra.

In Mullaney, the United States Supreme Court ruled that a Maine law which required the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter violated due process. The Court found the law repugnant to the 14th Amendment guaranteeing that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon, it was held that the statutory aggravating circumstances were like elements of a capital felony requiring the State to establish them.

The Court in Arango concluded that the instruction advising the jury that it had the duty to determine if sufficient mitigating circumstances existed which outweighed aggravating circumstances did not impermissibly allocate the constitutionally proscribed burden of proof where the trial judge had first instructed the jury that the State must establish existence of one or more aggravating circumstances and then instructed that such a

sentence could only be given if the State showed that the aggravating circumstances outweighed the mitigating circumstances. It appears that the Court found no violation of the due process clause enunciated in Mullaney and Dixon only because of the subsequent "corrective" instructions mentioned above, a clear indication being given when the Court stated that "the jury instruction if given alone, may have conflicted with the principals of law enunciated in Mullaney and Dixon." Arango at 174.

A careful review of the record in the case at bar reveals no "corrective" instructions preceding or following the constitutionally infirmed instruction. In addition, it is important to point out that the improper instructions were given to the jury twice. Due to the erroneous instructions, appellant argues that the jury was under the impression that the mitigating circumstances must outweigh the aggravating circumstances before an advisory recommendation of life can be properly rendered. Such an understanding is an impermissible allocation of the burden of proof.

The trial judge also instructed the jury that "your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the defendent and evidence that has been presented for you in these proceedings" (R 646).

The Court in instructing the jury to consider evidence presented in the guilt phase of the trial committed fundamental reversable error in light of the Enmund decision which forbids the jury to use the transferred intent theory in the penalty phase.

These two instances of the Court's improper instructions to the jury demand that the death sentence imposed on the defendant be vacated.

III. THE COURT ERRED IN FINDING SUFFICIENT AGGRAVATING CIRCUMSTANCES SO AS TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

The Court found four aggravating circumstances in the instant case which it felt constituted sufficient cause for the imposition of the death penalty.

1. The defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to the person.
2. The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of or attempt to commit a robbery.
3. The crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
4. The crime was especially heinous, atrocious, or cruel (R 211-214)

As to the Court's finding that the defendant was previously convicted of another capital felony or of a felony involving the use of force or violence, it is appellant's contention that the Court found this factor erroneously. The conviction relied upon by the Court was an adjudication of guilt for an attempted Armed Robbery resulting from a Change of Plea document in Circuit Court Case Number 84-7995. (R 141) This document was introduced over defense counsel's motion questioning the validity of the document as a proper procedural vehicle. (R 608-609)

It is clear that this conviction must be proven by competent evidence such as a certified copy of the judgment and sentence and cannot be established by a Change of Plea document which is no more competent or compelling than the recitation of defendant's record in a pre-sentence investigation report. Williams v. State, 386 So.2d 538 (Fla. 1980) This requirement has been established as a procedural safeguard due to the

immensity of the punishment in a death penalty case and mandates strict compliance. The Court's consideration of the plea document as competent evidence is erroneous and requires that this aggravating factor be stricken.

Additionally, the Change of Plea document should have been suppressed under defense counsel's Motion in Limine/Suppress (R 137-138) which motions were denied by the Court.

In the instant case, the Court found that the murder was committed while the defendant was engaged, or was an accomplice in the commission of or attempt to commit a robbery. Appellant admits this to be a constitutionally valid aggravating circumstance and without waiving the Enmund constitutional safeguards discussed supra, does not dispute that Nathaniel Jackson was convicted of a robbery in which a killing occurred.

However, this court found in the case of Rembert v. State, 445 So.2d 337 (1984) that compared to other First Degree Murder cases, the death penalty was unwarranted in a First Degree Felony Murder given the facts and circumstances of that case, particularly in light of the fact that the only aggravating factor found was that the murder occurred during the commission of the felony. In the case at bar, the court erroneously found other aggravating circumstances to exist, which in fact did not exist and therefore, this aggravating circumstance alone cannot, under Rembert, warrant the imposition of the death penalty.

As to the Court's finding that the crime was for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, appellant concedes that this factor encompasses the murder of the witness to a crime as well as law enforcement personnel. Riley v. State, 366 So.2d

19 (Fla. 1978) When however, the killing is of someone other than a law enforcement official, the mere fact of a death is not enough to invoke this factor and proof of requisite intent to avoid arrest and detection must be very strong id. at 22.

This issue was also present in the cases of Menendez v. State, 368 So.2d 1278 (Fla. 1979) and Armstrong v. State, 399 So.2d 953 (Fla. 1981) which 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 murder was the elimination of witnesses.

In the instant case, the victim did not know the defendant Nathaniel Jackson. It is illogical that his death was effectuated to eliminate witnesses to the robbery. Additionally, evidence was adduced at trial that two witnesses observed two individuals leaving the store on the day in question and therefore, it does not appear that the defendant took measures not to be observed by witnesses. Thus, elimination of the victim would not have necessarily eliminated witnesses who could place the defendant at the scene of the crime. Additionally, it is also important to note that appellant and his co-defendant did not wear gloves and thus, fingerprints found to be that of appellant's were introduced into evidence. (R 479, 714-722)

There is no evidence in the record to rebut the reasonable presumption being made here that Nathaniel Jackson's co-defendant committed the killing in an absolute, spontaneous fashion which was precipitated by the resistance offered by Mr. Phillibert. Certainly the facts at hand do not rise to the level of Riley, Menendez and Armstrong which require very strong proof of intent to avoid arrest and detection. Thus, this

aggravating circumstance was erroneously applied by the Court, when in fact, it is inappropriate and warrants being stricken.

The case of State v. Dixon, supra, sets forth the meanings of the aggravating circumstance provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravating capital felony. The Court in Dixon stated:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, and even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies .... the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Id. at 9.

It is appellant's contention that this particular killing was no more shocking than the majority of murder cases reviewed by this Court. In the case at bar, the killing was effectuated by a single gunshot wound unaccompanied by any additional acts that would set it apart from other capital felonies. As brutal as it may seem, it must be admitted that this particular series of facts occurs each and every day in this country -- two individuals entering a business establishment with the sole purpose and intent to rob but carry a weapon and during the robbery an unanticipated event occurs, which results in a murder being committed. The facts in the case at bar, cannot be said to be anything but the norm of capital felonies as discussed in Dixon. In the same light, it cannot be said that this particular crime is wicked, shockingly evil or outrageously wicked and vile, or was designed to inflict a high degree of pain. Indeed, there is absolutely no evidence in the record to rebut the assertion that Mr.

Phillibert may have gone into shock immediately following the shooting, thus feeling little pain if any and died moments later. It is observed that the gunshot wound to the victim was not in an area of the body where one would normally think that death is certain. A shot to the head or in the area of the heart could arguably show a more clear intent to kill.

This particular aggravating circumstance has been typically applied only in instances involving much more than a single gunshot type killing.

The cases of O'Callaghan v. State, 429 So.2d 691 (Fla. 1983) wherein the defendant first beat and later shot the victim several times and Martin v. State, 420 So.2d 583 (Fla. 1982) where the defendant first attempted to strangulate the victim unsuccessfully with a piece of rope and then stabbed her several times in the throat, and Dobbert v. State, 409 So.2d 1053 (Fla. 1982) which involved the child abuse and tortious murder of defendant's nine-year-old daughter are prime examples of the Court's finding the acts of the defendant to be within the parameters of this aggravating circumstance.

The facts in the case sub judice however, are more closely aligned with those of Cooper v. State, 336 So.2d 1133 (Fla. 1976) wherein the victim was killed by two gunshot wounds to the head. Although the Court in Cooper affirmed the death sentence, the trial court's finding that the murder was especially heinous, atrocious or cruel was reversed reasoning that the victim was killed instantaneously and painlessly, without additional facts which made the killings "heinous" within the statutorily announced "aggravating circumstance". Id. at 1144. This Court, in the cases of Maggard v. State, 399 So.2d 973 (Fla. 1981), Fleming v. State, 374 So.2d 954 (Fla. 1979) and Antone v. State, 382 So.2d 1205 (Fla. 1980)

expressed similar views in finding this particular aggravating circumstance not to exist in these cases which involved shooting deaths with no additional facts being present.

The case of Kampff v. State, 371 So.2d 1007 (Fla. 1979) however, best demonstrates the Court's reluctance in affirming a death sentence unless it is clearly established that the killing was especially heinous, atrocious or cruel. In Kampff, the defendant purchased a gun and ammunition the day before he planned to kill his ex-wife. On the day of the killing, he followed her to her place of employment and discharged his pistol five times, two shots striking the deceased once in the head after he had carefully leaned over the counter to aim at her. The Court found that in the absence of any additional facts, "directing a pistol shot straight to the head of the victim does not establish this aggravating circumstance" id. at 1010.

A careful review of the record in the case at bar establishes without doubt that the victim died from a single gunshot to the abdominal area which does not warrant a finding that the killing was especially heinous, atrocious or cruel and thus, this aggravating circumstance must also be striken.

Since there were no aggravating circumstances properly found with a possible exception of number 2 discussed above, which under Rembert is insufficient standing alone, areas of mitigation need not be addressed here and the death penalty imposed must be vacated.

IV. IN LIGHT OF THE SUPREME COURT'S DUTY TO CONDUCT A MANDATORY PROPORTIONALITY REVIEW, THE FACTS OF THE CASE AT BAR DO NOT WARRANT THE IMPOSITION OF THE DEATH PENALTY.

It is appellant's contention that the penalty imposed upon him is unconstitutionally disproportionate to the crime he committed.

The 8th Amendment concept of proportionality was first fully explained in Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed 793 (1910). In that case, the defendant was sentenced to 15 years at hard labor for falsifying a public document. The Court concluded that the sentence was cruel and unusual stating that "it is a precept of justice that punishment for crimes should be graduated and proportional to offense", id. at 367.

The United States Supreme Court on more than one occasion has emphasized that sentencing decisions must focus "on the circumstances of each individual homicide and individual defendant" Proffitt v. State, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). It is exceedingly clear that the facts in the case at bar do not involve a situation, in light of other murder cases in which the defendant received life imprisonment, that requires the imposition of the death penalty. The record is absent of any proof showing that Nathaniel Jackson had any discussions relevant to shooting anyone or had any intent to commit a murder. The record instead clearly reveals that he did not carry a gun and did not shoot the victim, the victim being shot by his co-defendant brother in an apparently spontaneous fashion.

In Slater v. State, 316 So.2d 539 (Fla. 1975), the defendant together

with two other individuals participated in a robbery that resulted in the death of a hotel manager. It was established that Slater was not the triggerman, but merely an accomplice to the robbery. The defendant was found guilty of Murder and Robbery and was sentenced to death. The Court in quashing the death sentence and remanding for the imposition of a life sentence expressed their disturbance by the difference in the sentences accorded to Slater and his co-defendants. The Court, in concluding that a death sentence under such circumstances was unconstitutional, stated:

> We pride ourselves on a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law. ... We recognize the validity of the Florida death penalty statute as expressed in State v. Dixon, 283 So.2d 1 (Fla. 1973), but it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Id. at 542.

Although it can be argued that the ruling in Slater was predicated on the fact that his two co-defendants were given life imprisonment and five years imprisonment respectively thus rendering the imposition of the death penalty on Slater unconstitutional, it is appellant's contention that he should be treated differently than his co-defendant on which the death penalty was imposed. This contention is made in light of the admitted differing degrees of culpability between Jackson and his co-defendant brother.

In Swan v. State, 322 So.2d 485 (Fla. 1975), the defendant was convicted of murdering a woman caretaker in a Dade County home. She was found the day after the murder in a semi-conscious condition and died

approximately one week later. The record in that case established that the victim was tied with strips of cloth and her mouth was gagged with a silk stocking. The Court found sufficient proof that death resulted from the severe beating administered by Swan and his co-defendant. The Court, in remanding the cause to the trial court for reduction of the sentence to life imprisonment stated:

> While we recognize that the statute leaves the sentencing to the trial court, there is a specific duty imposed on this court to consider the record in order to assure that the punishment accorded a criminal will meet the standards prescribed in Furman v. Georgia. Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty, id. at 489.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), the defendant was convicted of murdering his mother-in-law. The Court held that although the defendant had formed sufficient distinct and definite purpose to take a life, it was error to impose the death penalty. The Court stated:

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty by any decent standard of decency, in allowing his victim to languish without assistance or the ability to obtain assistance. Still, we believe that the legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for murder. Id. at 910.

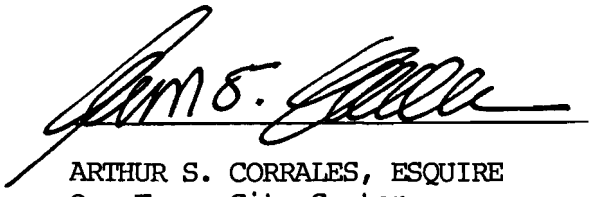
These two cases along with the previously cited cases of Cooper, Maggard, Fleming, Antone and Kampff clearly illustrate factual situations in which the defendant's actions were much more socially reprehensible than the actions of the defendant in the case at bar. In all of these cases however, the defendants ultimately received penalties of life imprisonment while Nathaniel Jackson presently faces the death penalty. The factual

situation in the instant case, when considering appellant's actions, real and intended does not rise to the level of criminality the legislature intended to punish with the imposition of the death penalty and thus, after appropriate proportionality review, the death penalty imposed must be vacated.

CONCLUSION

Nathaniel Jackson, appellant in this case, respectfully asks this Court that his death sentence be vacated and reduced to life imprisonment, or in the alternative, requests that said cause be remanded for a new sentencing hearing before a new jury and trial court.

Respectfully submitted,



ARTHUR S. CORRALES, ESQUIRE
One Tampa City Center
Nineteenth Floor, Suite 9
Tampa, Florida 33602
(813) 273-8027
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: MARTIN MURRY, ESQUIRE, 424 Central Avenue, Suite 702, St. Petersburg, Florida 33701; OFFICE OF THE ATTORNEY GENERAL, Park Trammell Building, 8th Floor, 1313 North Tampa Street, Tampa, Florida 33602; LARRY SANDEFER, Assistant State Attorney, Post Office Box 5028, Clearwater, Florida 33520, KARLEEN F. DeBLAKER, Clerk of the Circuit Court, 5100 144th Avenue North, Clearwater, Florida 33570; and that the original and seven copies have been mailed to the SUPREME COURT OF FLORIDA, Supreme Court Building, Tallahassee, Florida 32301 this 20TH day of January, 1986.

ARTHUR S. CORRALES, ESQUIRE
One Tampa City Center
Nineteenth Floor, Suite 9
Tampa, Florida 33602
(813) 273-8027
Attorney for Appellant