IN THE SUPREME COURT OF FLORIDA



KIRK ALLEN HANSBROUGH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 67,463

# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This case involves an appeal of the Appellant's conviction for first degree felony murder and the sentence of death, as well as an appeal from his conviction for armed robbery, arising out of the same transaction.

The Record on Appeal consists of forty volumes, consisting of 6,587 pages. The Record on Appeal includes the transcript of the two-week trial, transcripts of pre-trial hearings, transcripts of depositions, and all pleadings and orders in the case.

The Appellant, KIRK ALLEN HANSBROUGH, will be referred to herein as either the Appellant, the Defendant, or as Hansbrough. The Appellee, STATE OF FLORIDA, will hereinafter be referred to as the Appellee, the State, or the prosecution.

References to the appropriate pages in the Record on Appeal will be referred to by page number in parenthesis.

## STATEMENT OF THE CASE

The Defendant appeals from his judgment and conviction of first degree murder and armed robbery and sentence of death over the jury's majority recommendation of life imprisonment (6489-6503; 5243-5244). The Honorable Lawrence R. Kirkwood was the trial judge and Assistant State Attorney Belvin Perry prosecuted for the State.

The Defendant was indicted for the first degree murder of Pamela Jean Cole on August 31, 1984, the homicide occurring on June 20, 1984 (4798). The Defendant filed numerous pre-trial motions.

The Defendant filed a Motion to Suppress Physical Evidence directed to shoes taken from his person, and pants and a shirt seized from his home (4910-4912), along with a Memorandum of Law in Support of Said Motion (4955-4967). The Defendant also filed a Motion to Suppress Confession and/or Admission (4913-4918), with accompanying memorandum (4955-4967; 4968-4976; 4936-4939) and a Supplemental Motion to Suppress Confession and/or Admission, as well as Tangible Evidence (5046-5048). He further filed a Motion to Suppress All Statements of the Defendant and All Statements Past or In the Future of Witnesses Sharon Alden, Robert Alden, Sr., Robert Alden, Jr., and all Other Witnesses, as well as a Motion to Suppress All Physical Evidence with Memorandum (4945-4953). An evidentiary hearing was held on Defendant's Motions to Suppress on March 22, 1985.

The Defendant alleged in his Motions to Suppress that all statements derived from him and all derivative evidence in the case was obtained as a result of statements taken from him after a pretextual stop of the Defendant and his automobile and his subsequent arrest.

Officer Tim Halleran of the Orlando Police Department (O.P.D.),

a patrol officer, testified at the suppression hearing that he was the first officer to arrive at the James K. Ramsey Insurance Agency where the homicide occurred on June 20, 1984 (2427). While he was at the scene, there was no one in custody for the homicide and he knew of no suspects' names (2428-2430).

Officer Halleran testified that he stopped the Defendant on July 17, 1984, allegedly for driving with a cracked windshield and making an improper left turn (2432-2433). Officer Halleran admitted that just prior to stopping the Defendant, he received a call from the Tactical Intelligence Unit (TIU) that they wanted him to check an address attributable to the Defendant (2433-2434). Two officers from TIU parked in the parking lot where the Defendant was pulled over and gave information to Halleran concerning the Defendant (2437-2438). After his stop for the alleged infractions, the Defendant was arrested for driving while license suspended for failure to pay traffic fines, a traffic offense that often results in no arrest but merely the issuance of a traffic ticket (2473). No tickets were issued to him for the supposed driving with a broken windshield charge or the alleged improper turn charge, both civil traffic infractions (2439-2440). Officer Halleran admitted that he may have had a conversation with TIU concerning stopping the Defendant's car for intelligence purposes prior to making the decision to make the stop (2456). He testified that this would not be unusual to have a suspect stopped for an alleged traffic violation to get intelligence information (2451; 2453).

O.P.D. Officer Michael Bethea testified he was assigned to the Tactical Intelligence Unit at the time of the Defendant's stop. He was involved in surveillance of the Defendant from June 20, 1984 until the

traffic stop of the Defendant. Prior to the stop of the Defendant on July 17, 1984, he was aware of the Defendant's daily routine. He testified that he and another homicide detective, John Chisari, saw the Defendant's automobile driving near Bumby and Colonial Drive in Orlando, and Officer Bethea radioed for a uniformed unit to stop the Defendant, using the justification of a supposed cracked windshield on his car (2540-2542). Officer Bethea testified that he instructed Halleran to put any traffic violations he could see on the Defendant's vehicle so they could stop him for intelligence purposes (2542-2547). When asked what Officer Bethea hoped to achieve by having the Defendant's vehicle stopped for any traffic violations, he testified:

> Hopefully, we could maybe observe something that would tie him into the crime [the homicide], just in plain view. When the officer talked to him, we could find out maybe where he worked, where, in fact, he was living, and just general information (2549).

Officer Bethea testified that he knew the Defendant was a suspect in the homicide and that he knew that the cracked windshield would give the officer a chance to look for plain view evidence and to question the Defendant, as well as constitute a reason to get the Defendant downtown to question him further (2551-2556).

Officer Gary Strong, a sergeant with O.P.D., testified that there had been an earlier communication prior to July 17, 1984, between the homicide detectives and the TIU officers that they needed to speak with the Defendant to get information from him. He testified that before the Defendant was brought in on July 17, 1984, he knew a decision had been made to bring the Defendant in at some point (2558-2561).

The Defendant filed a Motion to Produce Copies of Transcripts of Radio and/or Telephonic Transmission (4924-4925) concerning the radio

transmissions between Officer Halleran and members of the TIU squad to further support his pretextual stop argument. However, the State informed the Defendant that those taped transmissions had been destroyed by being taped over, a month after they were utilized (2810-2811).

After the Defendant's arrest for driving while license suspended, Officer Halleran transported him to the Orlando Police Department to Detective John Chisari who intended to question him about any information and knowledge he had concerning the Ramsey homicide case since the Defendant was a suspect (2512; 2482-2485). Officer Chisari was aware of the Defendant's alleged traffic stop (he was at the scene) and he ordered the Defendant taken to him for questioning (4769). At this point, it was conceded that there was no probable cause to arrest the Defendant for the murder although he was a suspect and the police wanted to gain further information from him. The only knowledge the police had of the Defendant at this point was an anonymous telephone tip (4769).

From his July 17, 1984 conversation with the Defendant, Officer Chisari was able to secure the Defendant's shoes from him and he also obtained information from the Defendant concerning the existence of two crucial witnesses, Sharon and Robert Alden, Sr., who, when later interviewed by Chisari, linked the Defendant to the homicide. Chisari also determined the whereabouts of the Defendant that day, including information about going to the chiropractor's office (2527-2531; 4769-4770). The only persons who linked the Defendant to the homicide up to the time of the Defendant's arrest were Robert Alden, Sr., Sharon Alden, and Robert Alden, Jr. (2815). The police discovered the existence of Robert Alden, Jr. and other key witnesses and evidence as a result of

that interview with the Defendant.

Officer Chisari also admitted that he had a conversation with the Defendant about having the Defendant released on pre-trial release without the need for posting a bond and that he actually made a request from the pre-trial release officer to have the Defendant released on his recognizance (2582). Officer Chisari never told the Defendant that the police intended to perform blood tests on the shoes (2504).

The Defendant testified that when he was arrested on July 17, 1984, by Officer Halleran, he did not have the money to make a bond and he mentioned this to Officer Chisari. He testified that Chisari told the Defendant that if he gave him his shoes, he would be released without having to post a bond (2716-2718). He testified that he wrote out the permission form to surrender his shoes with Officer Chisari's help, including language provided by Officer Chisari (2744-2746). The Defendant, during that July 17, 1984 conversation, admitted that he was at the Ramsey Insurance Agency on the day of the killing to inquire about insurance, but denied any involvement in or knowledge of the homicide (2482-2486).

A continuation of the evidentiary hearing on the defense Motions to Suppress was held on April 10, 1985. Officer Chisari testified that he arrested the Defendant pursuant to an arrest warrant on July 23, 1984 and interviewed the Defendant at the Orlando Police Department in an interview room. The interview began at about 9:00 p.m. (2624-2625). Officer Chisari stated that the Defendant would not allow the conversation to be taped and that the Defendant also would not give a written statement (2626). For the first two hours of interrogation, the Defendant gave the same exculpatory statement as he had previously given

on July 17, 1984 (2627-2637).

The Defendant's girl friend, Nora Fussall, who had lived with the Defendant since 1981, was with the Defendant when he was arrested on July 24, 1984, and was directed to come to the police department for an interview (2633-2681). After two hours of the Defendant adhering to his previous exculpatory statement, Officer Chisari left the interview room to speak to Ms. Fussall (2636-2637). Ms. Fussall testified that Officer Chisari told her that the Defendant was not being truthful and he asked her to talk to Hansbrough about the case (2669-2670). Ms. Fussall further testified that Officer Chisari told her that, in his opinion, this was not a premeditated killing but just a young guy getting into trouble because of drugs (2671-2673). Ms. Fussall testified that she felt that Officer Chisari wanted her to speak with the Defendant in order to comfort the Defendant and get him to tell the truth (2673). Ms. Fussall testified that Chisari explained the penalties for first, second and third degree murder and indicated that it did not sound like this was a premeditated murder but that the Defendant would not tell him anything to support that it wasn't (2684-2685). Ms. Fussall testified that she went into the interview room and told the Defendant to tell Chisari the truth so it would be easier on him and so he could get help for his drug problem (2674; 2671-2673). John Boneff, another family friend who waited outside the interview room, testified that when Ms. Fussall came out of the interview room from talking with Kirk, she told Mr. Boneff that everything would be all right because the Defendant was going to make some kind of a statement (2697). After speaking with Ms. Fussall and after being repeatedly confronted with the statements of Sharon and Robert Alden, Sr. and Jr., the Defendant did give an

incriminating statement, implicating himself in the homicide, although denying that he remembered killing the victim (2638-2649). Officer Chisari testified he did not have a conversation with Ms. Fussall regarding the Defendant's drug usage or concerning the penalties for murder prior to leaving the Defendant and Ms. Fussall alone in the interview room.

Prior to the Defendant changing his previous statement, Officer Chisari repeatedly confronted the Defendant with raised voice about untruths in his story that he had uncovered from the information gleaned from the Defendant during the July 17, 1984 interrogation, including what the police learned from Sharon and Robert Alden when the Defendant gave Chisari their names during the July 17, 1984 interview (2640-2660).

The Defendant testified that after he was arrested on July 23, 1984, he did not finally give an incriminating statement until after Chisari had confronted him with Sharon and Robert Alden's statements (2725). He further testified that he would not have confessed had the police not allowed Ms. Fussall to come in and talk to him during the interview (2725-2726). Ms. Fussall testified she also told the Defendant to "do what you need to do to get these people to help you" (2687). The court denied all of the Defendant's pre-trial Motions to Suppress Statements and Evidence (5091-5094).

The State filed a Motion for Protective Order regarding the Defendant taking the depositions of the parents and the husband of the victim (5074-5075; 2837-2867). The State's Motion in Limine also requested the court to preclude the Defendant from eliciting any testimony concerning the facts surrounding a prior assault and battery on the victim on November 13, 1977. The State's position was that the

evidence was irrelevant (2868-2869).

The Defendant resisted both the State's Motions in Limine, arguing that the evidence concerning the prior sexual battery, which could be developed through police testimony and the testimony of the Defendant's family, was relevant to the issue of whether or not the victim grabbed the Defendant's hair and fought with the Defendant subsequent to the Defendant taking the money bag from the victim (2879-2880). The testimony was relevant to the theory of the Defendant's case and corroborated the Defendant's version of the facts. Furthermore, it helped corroborate the other psychiatrists' opinions that the unexpected event of the victim grabbing the Defendant's hair triggered the psychotic break of temporary insanity (2885-2891). The Defendant pointed out that the State's own expert witness, Dr. Ernest Miller, a board certified psychiatrist, testified that the prior assault on the victim was a relevant factor in the case and was important in his overall opinion because, in his experience, it was common for victims of prior assaults to resist subsequent assaults by such conduct (2875-2880). The Defendant cited case law during this argument (2879-2891). However, the court granted the State's Motions in Limine on both issues (2894).

The court again granted the State's renewed Motion in Limine made on the first day of trial directed to any evidence concerning the 1977 sexual battery and assault upon the victim (4). The court had previously prevented the Defendant from taking the depositions of the victim's mother, father and husband concerning that incident, pursuant to a Motion for Protective Order previously made by the State and granted by the court (3). Relating to this, the court granted the

State's Motion to Exempt from the Rule of Sequestration Michael Cole, husband of the victim, and Robert and Marie Burdick, parents of the victim (4-17; 72). The defense offered to proffer to the court in camera, with a court reporter present, additional reasons that the family's testimony would be helpful (13). The court denied the Defendant's Motion to Proffer Testimony In Camera, stating: "I don't want to hear it" (17).

During the trial testimony of the medical examiner, Dr. Guillermo Ruiz, and John David Hartsfield, a sergeant with the Orange County Sheriff's Department, the Defendant proffered the evidence concerning the prior sexual assault on the victim in 1977 (1533-1543; 1544-1556). The Defendant advised the court that the theory of the Defendant's case was that the victim, when she saw she was going to be the victim of a robbery, did the unexpected in grabbing the Defendant's hair, which plunged the Defendant into a psychotic break. Since said evidence, coupled with the evidence of the doctors, corroborated the Defendant's version of what occurred (in reference to the grabbing of his hair), the Defendant argued that he should be allowed to present such testimony in support of the theory of his case as it was relevant (1526-1556). In support of said argument, the Defendant cited to Dr. Ernest Miller's deposition as he had done during the two prior Motion in Limine hearings on this matter, which the court accepted as a proffer of evidence (1557) to support the relevancy of testimony concerning the previous assault on the victim in support of the theory of his case (1552-1554). Dr. Miller testified:

> Q MR. MULLER (Defense counsel): And if I hear you correctly, doctor, had this woman not grabbed at him unexpectedly, well, you tell me, what do you think would have happened?

> A DR. MILLER: I don't think there would be a murder charge. The great tragedy of this thing is the stranger-than-fiction, the history of this victim having been raped. And as a psychiatrist, I can only project her dynamics that she didn't know how far away she was from being raped again, or, perhaps, was acting in response to having been raped and responding with a vengeance, trying to, whatever, revenge as getting back at her assailant. This tragic circumstance of her life I think was a factor . . .
>
> Q MR. MULLER: Do you feel that this might account for her coming after him?
>
> A DR. MILLER: I don't know how we can possibly exclude that as a strong possibility. I think it's very unusual for there to be any other reason for one to rise in defense of their employer's money and subject themselves to possible death. (1551-1552)

Despite the Defendant's proffer and the fact that Dr. Miller testified he felt, as a psychiatrist, the prior attack on the victim was relevant to his opinion in the instant case, the court refused to allow such testimony (1552-1556).

During the testimony of Dr. Miller, the Defendant again proffered evidence that he considered the prior 1977 sexual assault on the victim as being relevant and important in rendering his opinion, and significant in the dynamics of what occurred at around the time of the homicide (1946-1949).

The court also granted a State Motion in Limine precluding the Defendant from questioning, on cross examination, the State's primary witness, Shadrick (Shad) Martin, a cellmate of the Defendant, or presenting other evidence through other witnesses, concerning the fact that Martin had previously been arrested for first degree murder and was prosecuted by the same Assistant State Attorney, Belvin Perry, who was prosecuting the Defendant's case (2895-2897). Martin had been acquitted of that charge. Mr. Martin was facing sentencing on a felony charge of

armed burglary before Judge Kirkwood (the presiding judge at the Defendant's trial) and the Defendant wanted to be able to argue, through such cross examination, that (1) Mr. Martin had a motive, bias and interest to want to please prosecutor Perry, who, in Martin's mind, would have been disappointed by not having obtained a conviction previously, by giving favorable testimony to the prosecutor in this trial (2897-2901); (2) to show that having previously been charged with first degree murder, he was familiar with statutory aggravating and mitigating factors that would help the prosecutor (2899); and (3) to show a prior relevant relationship between Martin and Perry. Importantly, Shad Martin was the main witness to support two aggravating factor arguments that the Defendant killed the victim to prevent his arrest and that it was a premeditated killing (2897). The Defendant vigorously argued that Martin had a motive to please this prosecutor because of Martin's perceived fear that Perry might otherwise go harder on him on the pending charge because Martin beat the previous charge (2897-2901). The court granted the State's Motion in Limine regarding any cross examination by the Defendant of Shad Martin concerning his prior arrest for first degree murder and the fact that Belvin Perry previously prosecuted him (2901), as well as keeping out the testimony from other witnesses on that issue. A pre-trial motion for a psychiatric examination of Martin was denied by the court (5120-5121; 2807; 2728-2783).

The Defendant submitted to a polygraph examination prior to his arrest in the case (2985-3015). The State represented at a pre-trial hearing that it did not intend to elicit from any witness the fact that the Defendant offered to take a polygraph and that nothing would be

mentioned concerning said polygraph (2907-2908). Additionally, during trial, the prosecutor again assured the court that the fact of the polygraph would not be mentioned (847-848).

The Defendant filed a Motion to Compel Disclosure of Existence of Promises and Immunity, and disclosure of the record of prior convictions of Shad Martin (49-29-4930; 2816). The State objected to providing the defense with the prior arrests and conviction records of the witness (2818). The prosecutor also objected to providing information concerning disclosure of the existence of promises and preferential treatment on Shad Martin, arguing that the defense attorney could get such information from the Assistant State Attorney handling Martin's pending case rather than through him (2818-2820). The court denied the Defendant's Motion for Disclosure of Existence of Promises from the prosecutor in case, saying that the defense attorney could talk to the other Assistant State Attorney handling Shad Martin's pending case, and could look at a transcript of the plea of Shad Martin in that case (2820-2822).

The Defendant's two-week jury trial commenced on May 13, 1985, and ended on May 24, 1985 (1-2347). The Defendant filed a pre-trial Notice of Intention to Rely on the Defense of Insanity, giving notice that the Defendant was temporarily insane, suffering from a partial seizure disorder or temporal lobe disorder, exasperated by chronic drug addiction and withdrawal, as well as stress, at the time of the homicide of Pamela Jean Cole (5042-5045).

The Defendant, prior to jury instruction, objected to any attempt by the State to have challenged for cause persons who indicate opposition to the death penalty, citing Grigsby v. Mabry, 758 F.2d 226

(8th Cir., 1985), currently on writ of certiorari to the United States Supreme Court (20-21). That objection and a related defense Motion to Preclude any questioning by the State regarding prospective jurors' feelings regarding the death penalty were overruled and denied (22).

During jury selection, the Defendant objected to the court granting the State's Motion to Strike juror Roger Hill for cause, merely because he stated that he generally was opposed to capital punishment, notwithstanding that he stated that he could conscientiously follow the court's instructions even if he might not want to because of his beliefs (376-385).

The Defendant objected to the court granting the State's Motion to Strike juror Virginia Jax for cause, based upon her opposition, philosophically, to the death penalty, notwithstanding that she indicated that she would follow the law as the court instructed her (468-475).

The court denied the Defendant's Motion to Challenge juror William Lucas for cause (422-439). Mr. Lucas indicated that if he found the Defendant guilty of murder in the first degree, he would recommend that he be executed (428). When the Defendant's Motion to Strike juror Lucas was denied for cause, the Defendant was forced to use a preemptory challenge on him (498).

During the trial, the Defendant also objected to the admission into evidence of the Defendant's shoes, the consent form signed by the Defendant, the Defendant's shirt and trousers, based on his pre-trial objections (895), and also objected to the admission of shoes during John Chisari's testimony (989), based on the grounds in his pre-trial motions denied by the court.

After the State rested its case (1010), the Defendant moved for a judgment of acquittal, which was denied by the court (1010-1011).

During the Defendant's case, he called Omar Williamson, who was an inmate in the cell with Shad Martin and the Defendant during the time the Defendant supposedly confessed to Shad Martin (1474-1488) to discredit Martin's testimony. The Defendant proffered testimony out of the presence of the jury from Mr. Williamson concerning how Shad Martin had bragged that he had beat a murder charge with Belvin Perry as the prosecutor, and that he feared that Belvin Perry was after him on the pending charge he was facing sentencing for (armed burglary) because Martin had beaten Mr. Perry before. During this conversation, Shad Martin told Mr. Williamson that he would do anything to help himself on his pending charges (1489-1490). Defendant argued that those conversations, concerning the previous charges involving the same prosecutor in the instant case which Martin had beaten, were admissible to show motive, bias and interest on the part of Shad Martin to please the prosecutor, Belvin Perry, in this case, because of Martin's perceived fear that prosecutor Perry would go after him in the sentencing phase of the pending charge to make up for not convicting Martin during the last case. It was relevant that Shad Martin had expressed fear that Belvin Perry had some influence over his present charge for that reason (1490-1496). Indeed, Bruce Rhodes, an investigator with the State Attorney's Office, testified at trial that Belvin Perry made the decisions for the State Attorney's Office as to who was charged (969-972). The prosecutor argued that "whether or not Martin felt I was out to get him, really has no bearing on this case" (1493). The defense argued that the court was improperly restricting impeachment evidence of

Shad Martin. The defense argued that discrediting Martin went to the heart of the defense's case since the State's whole theory was that the Defendant did not suffer loss of consciousness and that he was lying when he said he did not remember (495). The only statement that the Defendant allegedly made that he did not lose consciousness and to support the elimination of the witness testimony came from Shad Martin (1495-1496). The Defendant argued that such impeachment was crucial since otherwise, the State would have unimpeached ammunition to ask the Defendant's medical witnesses on cross-examination, "Doctor, would you change your opinion if we were to show that the Defendant didn't lose consciousness?" (1495-1496). The court refused to allow the proffered evidence into evidence, ruling that his original Motion in Limine was still in effect and force and that the evidence was not relevant (1502; 1489-1505). Later in trial, the Defendant again renewed his prior proffer regarding impeachment evidence concerning Shad Martin's prior prosecution by prosecutor Perry during the testimony of Frank Burns, a psychiatric social worker at the Orange County Jail (1588-1585). The Defendant was also not allowed to impeach Shadrick Martin through medical files kept on him at the Orange County Jail (1557-1563).

The Defendant did not testify at trial. After the defense rested, the Defendant renewed all of his prior motions, including a renewed Motion for Judgment of Acquittal, all of those motions being denied (1833).

After the State initially rested, the Defendant presented testimony from three psychiatrists and two psychologists that the Defendant was legally insane at the time of the homicide, as well as presenting other witnesses in support of the insanity defense.

During the State's rebuttal case, one of the State's witnesses, Dr. Ernest Miller, a psychiatrist, mentioned the fact that he reviewed a polygraph examination conducted on the Defendant (1898). This was despite the fact that the Defendant, on two prior occasions, had reminded the State and the court of the Order in Limine preventing such testimony. The Defendant moved for a mistrial, based on the mention of the polygraph (1932-1936). The Defendant pointed out that especially in a case involving insanity where intent is important, the admission of any testimony to discredit the Defendant's version would be prejudicial. After hearing additional argument on the Motion for Mistrial, said motion was denied (1965-1975).

During the jury charge conference, the Defendant submitted four special jury instructions (5211-5214), to provide the jury with guidance since it was the theory of the Defendant's case that the Defendant was sane at the time of the robbery but insane at the time of the homicide. The Defendant argued that without such instructions, the jury would be confused as to how to treat the felony murder rule in light of the Defendant's theory of the case. The Defendant argued the standard jury instructions did not adequately instruct the jury that it could find the Defendant guilty of robbery but nevertheless find the Defendant not guilty of murder and felony murder by reason of insanity. The court denied all four special requested jury instructions (2064-2066).

The jury was given a special jury form which allowed them to choose between a finding of guilt as to murder in the first degree as charged in the indictment as premeditated, or to choose guilty of felony murder in the first degree (5222; 2078-2083).

The jury returned a verdict of guilty of felony murder in the

first degree and guilty as charged of armed robbery with a deadly weapon (2166; 5222-5223).

During the penalty phase jury charge conference, the State announced that it would not put on any more evidence and stated that it would rely on the testimony presented in trial (2170). The Defendant presented several witnesses but the Defendant himself did not testify.

During the penalty phase charge conference, the Defendant objected to any consideration by the court or the jury of two statutory aggravating circumstances: (1) that the capital felony was committed for purposes of avoiding or preventing a lawful arrest or effecting an escape from custody, and (2) that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, in light of the jury finding the Defendant guilty of felony murder rather than premeditated murder (2187-2192). Defendant argued that the jury specifically rejected the theory that the Defendant was guilty of premeditated murder and obviously rejected Shad Martin's testimony. The Defendant argued that only Shad Martin's testimony provided evidence of the aggravating circumstance of elimination of a witness and premeditation. The court overruled the Defendant's objections to consideration of those two aggravating circumstances by the court or by the jury (2196).

The Defendant asked for a special verdict form listing which aggravated circumstances and which mitigating circumstances the jury was to find. The court denied the Defendant's request (2196-2199). The Defendant requested the State to stipulate as to the existence of the mitigating factor that the Defendant had no significant history of prior criminal activity. The State refused to do so, stating that the

Defendant had one DWI conviction (2201-2202).

During the State's closing argument in the penalty phase, it argued that there were four aggravating factors: (1) that the homicide was committed during a robbery or for financial gain; (2) that the offense was committed for purposes of avoiding or preventing lawful arrest; (3) that the offense was especially wicked, evil, atrocious and cruel; and (4) that the offense was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (2296). The State conceded the existence of one mitigating factor of "any other aspect of the Defendant's character or record, or any circumstance of the defense" (2301).

The defense argued in the penalty phase that only one aggravating circumstance was arguably proved beyond a reasonable doubt: that the offense was committed during a robbery (2316). The defense specifically reminded the jury that it had rejected Shad Martin's testimony, so consideration of the other aggravating circumstances argued by the prosecutor were not present (2318). The defense argued that the evidence reasonably convinced the jury (as opposed to beyond a reasonable doubt for aggravators) of the existence of six statutory mitigating circumstances; those being (1) that the Defendant had no significant history of prior criminal activity (only one DWI conviction); (2) that the offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (3) that the Defendant acted under extreme duress; (4) the capacity of the Defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired; (5) the age of the Defendant at the time of the crime (22 years old);

and (6) the non-statutory mitigating circumstances conceded by the State of any other aspect of the Defendant's character or record, and any other circumstance of the offense. The Defendant argued numerous non-statutory mitigating circumstances applied, including early turbulent home life; history of physical abuse and neglect; history of drug abuse and drug addiction; history of alcohol abuse; organic brain dysfunction stemming from chemical dependence and manifesting in actual brain damage; periods of "black outs" and severe headaches; physical brain abnormality; low IQ or dull-normal intelligence (near retarded level in sub area of judgment); capacity for rehabilitation; evidence that the Defendant was intoxicated at time of offense; behavioral problems; no past history of violence; positive personality traits; and conversion to Christianity (6326-6329; 2211-2274; 2305-2335). Since the mitigating circumstances outweighed the aggravating circumstances six to one, the defense asked for an advisory sentence of life imprisonment.

The jury did recommend life imprisonment by a vote of seven to five (2347; 5243-5244).

The Defendant filed a Motion for New Trial (5252-5255) which was denied by the court (5264).

The Defendant filed a Sentencing Brief including legal memoranda in support of the position of a life sentence (6183-6373) and the State filed an opposing memorandum (5268-5276). In the State's memorandum, it urged the court to consider the testimony of Shad Martin to support two aggravating circumstances of premeditation and elimination of the witness (5270) despite the jury's verdict and life sentence recommendation.

The court imposed the death penalty, despite the jury's recommendation of life imprisonment (5279). In the court's Order of

Factual Findings supporting the imposition of the death penalty, the court stated, in finding the aggravating circumstance that the offense was committed for purpose of avoiding or preventing a lawful arrest, that the court believed the testimony of Shadrick Martin despite his impeachment by the defense (6491-6494). Despite the jury's verdict of guilty of felony murder rather than premeditated murder, the court, nevertheless, found the existence of the aggravating circumstance that the offense was committed in a cold, calculated and premeditated manner (6496-6497). The court found the existence of four aggravating circumstances as argued by the State, and the existence of only one mitigating circumstance conceded by the State previously (6502). The Defendant was twenty-two years old at the time of the offense.

As to Count II, the armed robbery charge, the court departed from the recommended guideline sentence of 4½ years to 5½ years (scoring 21 points for victim injury) and imposed a 75 year sentence, with the court retaining jurisdiction for release up to 25 years consecutive to Count I (5283). The trial court listed seven reasons for departure:

> (1) Defendant sentenced to death for Indictment--First Degree Murder Count I.
> (2) Excessive force in the homicide which occurred during this armed robbery.
> (3) Cruelty established by infliction of thirty-one stab wounds, pain and anguish of the victim.
> (4) Armed robbery planned in advance by the Defendant.
> (5) Used a dangerous weapon in the commission of the armed robbery.
> (6) Presumptive guideline range not commensurate with seriousness of case.
> (7) Department of Corrections recommendation was "dispose of this case in the most severe manner possible."

The Defendant filed a Motion for New Trial which was denied by the court. The Defendant timely filed a Notice of Appeal of his judgment and conviction and sentence as to both counts (6570).

## STATEMENT OF THE FACTS

The Defendant was charged by Indictment with first degree murder and armed robbery of Pamela Jean Cole on June 20, 1984, at the Ramsey Insurance Agency office off of Virginia Drive and State Road 17-92 in Orlando, Florida (4798). The theory of the Defendant's case was that the Defendant was temporarily insane at the time of the homicide although the defense conceded that the Defendant was sane at the time of the robbery (565-566).

The victim, Pamela Jean Cole, was killed around 3:00 p.m., while she was at work alone at the insurance agency (570-572). One of the victim's insurance customers, Trudie Fluharty, testified that when she arrived at the insurance office at about 3:45 p.m., she found the victim in the back office with blood and marks on her (572-574). The victim was found lying face down (1617).

A videotape of the homicide scene (583), as well as numerous photographs of the scene and the victim, were published to the jury (586; 604-610). Although latent prints were recovered from the scene and turned over for analysis (595; 600), none of those prints could be matched up to the Defendant (877-881).

A co-worker of the Defendant, Pamela Johnson, testified that money at the insurance agency was kept in a money bag with a zipper in a credenza in the victim's office behind the victim's desk (618). Ms. Johnson testified that it appeared approximately $110 had been stolen and the bank bag was missing (622).

Dr. Guillermo Ruiz, the medical examiner for Orange County, testified that he examined the victim's body at the Ramsey Insurance Agency on the day of the homicide. His examination revealed thirty-one

stab wounds to various areas of the body, which included ten defensive stab wounds (654-656; 659). The mortal wound was the one stab wound that pierced the right ventricle through the left lung (657). The doctor testified that the death of the victim took several minutes (659; 670). The cause of death was pericardiotomy due to perforation of the pericardial sac, with the time of death being approximately 3:30 p.m. (663; 669). The doctor could not tell how many stab wounds were administered while the victim was still conscious (670).

Other than the Defendant's own statements admitted at trial, the State's main non-medical witnesses were Shadrick Martin, Sharon Alden, Robert Alden, Sr., and Detective John Chisari.

Sharon Alden testified that she saw the Defendant on the date of the homicide outside of her house at about 12:30 to 1:00 p.m., looking for her husband, Robert Alden, Sr., who was the Defendant's drug supplier (672-674). The Defendant had come over to her house looking for her husband, whom she was separated from at the time but who lived across the street from her.

Ms. Alden testified she left her home with her son, Robert Alden, Jr., between 2:25 and 3:00 p.m., walking to a chiropractor's office for an appointment (675). She testified the Defendant offered her a ride in his car, which she accepted (677-678).

When the Defendant drove by the Ramsey Agency with Ms. Alden and her son a second time, he stated that he had to take care of an errand and wanted to see a friend. The Defendant parked his car behind a shopping center near the insurance agency, got out of his car, and asked Ms. Alden to get out of the car. Ms. Alden then saw the Defendant put something down his pants, which appeared to be a knife (679-680). The

Defendant told Ms. Alden to wait there and not even to turn off the motor on the car because it wouldn't take long. After the Defendant walked off, Sharon Alden left the scene in the Defendant's car and left her son waiting for the Defendant (680-681). On a previous day, the Defendant had told Ms. Alden that the Ramsey Agency looked like an easy place to rob (694).

Ms. Alden went home and came back a little past 3:00 p.m. The Defendant was waiting at the place he had exited the car, with her son (681). They then drove to the chiropractor's office. After she got out of the chiropractor's office, she saw the Defendant outside of the office with her husband, Robert Alden, Sr. (685). She testified that she could tell the Defendant had received a drug fix from her husband (685; 719-721).

Ms. Alden testified that when she saw the Defendant on the day of the homicide, the Defendant was sick; feeling achy, like he had a bad cold. She testified that the Defendant was "Jones'ng it" at the time, using that term to describe a sickened condition during drug withdrawal (700-716; 689-698). The Defendant, who was twenty-two years old at the time, had a Dilaudid habit at the time of the homicide (689-693).

Ms. Alden, who herself had been a patient at a Methadone Clinic for treatment with her husband, testified that she met the Defendant at the Methadone Clinic through the Defendant's father, Charles Hansbrough, who also was treated at the Methadone Clinic (695). She stated that she had seen the Defendant in the past shoot up with Dilaudid with his own father, Charles Hansbrough (697-700). The Defendant's father would sometimes prepare heroin for him and then call the Defendant in to be shot up (700). She explained that when the Defendant was "Jones'ng it,"

as on the day of the homicide, he would get possessed to the extent that all he could think about was getting funds to purchase Dilaudid because he would get sick, shaking, queasy, and have trouble functioning (700-715). She explained that the Defendant's condition had deteriorated psychologically and physically the last two months before the homicide (701-707). The Defendant's problem became more severe after Christmas 1983 when his father, the Defendant's previous drug supplier, was sent to prison again (710).

Ms. Alden testified that she had seen the Defendant's father give the Defendant drugs before (724). She explained that the Defendant had at least a $90 to $150 a day drug habit (725-736). She explained that even when Hansbrough was sick because of his drug addiction, he was still able to talk, walk, and recognize people (728-730).

Robert Alden, Jr., the twelve year old son of the Aldens, testified that he waited for Hansbrough and when Hansbrough came back, the Defendant used the bathroom and washed his hand (746-747). He saw his father speaking with the Defendant outside of the chiropractor's office and said his father and the Defendant were very good friends (749-752). Later, when Robert Alden, Jr. went with Hansbrough to his house, he changed his shirt (749).

Robert Alden, Sr., who had been on Methadone for fifteen years (787), testified that he had known the Defendant for two years, having met him through the Defendant's father, Charles Hansbrough. He said that he would supply the Defendant with Dilaudid, usually one or two pills each time (762). The Defendant had asked him the morning of the homicide if he could get Diluadid for him and that while the Defendant did not have the money at the time, he would get it later in the day

(770). Mr. Alden testified that the Defendant's eyes were dilated and he was perspiring and pacing, symptomatic of withdrawal (792-796). The Defendant had told him he had been without drugs for four days (771-772). Later that afternoon, the Defendant bought two Dilaudid from Robert Alden, Sr. for $90. He testified the Defendant was in a hurry to get into the bathroom to use the Dilaudid pills (777-779). The Defendant told Robert Alden, Sr., two to three weeks after the homicide, that the victim had fought with him when he grabbed the money bag (781).

Robert Alden, Sr., who had been granted immunity to testify in the trial (787), stated that the Defendant was a bad drug addict (792-796). Alden testified that he had been one of the Defendant's drug suppliers for the last six months since the Defendant's father, his previous supplier, had gone to prison (799).

A crime lab analyst testified that the shoe print impression found in the soil outside of the insurance agency could have been made by the shoes seized from the Defendant, but this was not conclusive (810-812). Another analyst testified that blood splatter samples from the desk of the victim could have come from the Defendant but not from the victim (834-835). The analyst also testified that he found positive results of blood on ten different stained areas on the Defendant's shirt, seized from the Defendant's house, but could not determine if the blood was human or testify to the origin of the blood (835-837). The analyst did testify that he found human blood on the shoes seized from the Defendant but could not determine the blood type (835-839). He also found blood on the Defendant's pants, seized from the Defendant's home, but like the shirt, could not tell whether or not it was human blood.

John Chisari, a homicide investigator with the Orlando Police

Department, testified that he found a footprint in the dirt driveway on the west side of the insurance agency during his investigation of the homicide (979; 861). His first contact with the Defendant was on July 17, 1984, at about 1:00 p.m. at the Orlando Police Department after the Defendant had been arrested on the traffic charge. During that interview, the Defendant made a statement that he had been at the insurance agency on the date of the homicide to inquire about insurance, but that he was not involved in any homicide. This conversation was tape recorded (980-985). He did say during that interview that he had been with Sharon and Bob that day, and had taken Sharon to a chiropractor's office that he gave a location for (977-988; 853-854). During that interview, the Defendant signed a consent form and turned over his sneakers to Chisari (988).

Officer Chisari testified that he arrested the Defendant on the evening of July 23, 1984, and transported the Defendant to an interview room at the Orlando Police Department (991-994). During the first two hours of that interview, the Defendant adhered to his prior statement that while he had been to the Ramsey Insurance Agency on the date of the homicide, he knew nothing about the robbery or homicide (994).

After the Defendant was allowed to talk with his long-time girl friend, Nora Fussall, the Defendant confessed to Officer Chisari that he went into the Ramsey Insurance Agency on June 20, 1984, to rob it for money because he needed to buy drugs. He said he went in under the auspices of getting change for a twenty dollar bill. When the victim took a bank bag out to make change, he grabbed for the bank bag, at which time the victim fought him off and grabbed his hair. At that point, the Defendant stated he did not remember anything that happened

until he realized he was covered with blood and the victim was lying on the floor, also covered with blood. He stated that he did not remember stabbing the victim. He then left the business and ran away with the money bag. He washed his hands at a service station restroom nearby, put the money bag in a trash receptacle, went home later and showered. The Defendant stated that he later purchased two Dilaudid from Robert Alden, Sr. with money from the agency. The Defendant stated that he did not remember what happened and that he did not intend to kill the victim (944-947).

Richard DuPuis, an investigator with the Orlando Police Department and a blood splatter analyst (881-885), said some of the blood splatters found at the scene of the homicide indicated that they were caused while the victim was lying in a down position. He also was involved in seizing trousers, a belt and a shirt from the Defendant's residence on the evening of the Defendant's arrest (892-894). The shoes, consent form, shirt and trousers were admitted into evidence over objection (895).

The State's most important witness in supporting its theory of premeditation and killing to eliminate a witness was Shadrick (Shad) Martin, a cellmate of the Defendant after the Defendant was incarcerated on the murder charge (931). Shad Martin was the only State witness to rebut the Defendant's stated version of the incident that the Defendant did not intend to kill the victim and that he lost consciousness after the victim grabbed his hair. Martin testified that the Defendant told him, while they were incarcerated together, that the Defendant intended to kill the girl because she had punched him in the nose. Martin testified that the Defendant told him that he intentionally stabbed her

and that he was conscious during the entire incident (933-939).

A substantial portion of the Defendant's case concentrated on discrediting Shad Martin's testimony since the State relied heavily on it to discount the Defendant's temporary insanity defense and to support two statutory aggravating factors in the death penalty phase (that the homicide was cold, calculated and premeditated; to eliminate a witness). Shad Martin denied on cross examination that he had read through the depositions and correspondence that the Defendant's lawyer had sent to the Defendant for his review, that were in the cell with the Defendant (941). However, two other cellmates of the Defendant and Martin at the time, Omar Williamson (1474) and David Bonham (1518) testified that they caught Shad Martin rummaging through the Defendant's files and depositions numerous times, including reading depositions and the autopsy report (1481; 1522-1524).

Shad Martin admitted on cross examination that he was facing sentencing for an armed burglary charge in front of the same judge presiding at the Defendant's murder trial, the Honorable Lawrence R. Kirkwood. He admitted that he knew that he could be sentenced to up to life imprisonment on the charge (943). Martin had served substantial jail time in the past , sometimes in maximum security, and had used several narcotics in the past. He also admitted that he had seen psychiatrists in the past (945-964).

Omar Williamson testified that Martin told him that he would do anything to get out of jail, and that he was not going to do any jail time this time. He said that Shad Martin had a reputation for being very untruthful (1482-1488). David Bonham testified to the same facts as Williamson (1523), and also that Martin had said he feared he would

be sentenced as a habitual offender (1525-1526).

Daniel Golwyn, M.D., Shad Martin's personal psychiatrist, testified under court order against his will, after the court had pierced the psychotherapist/patient privilege, that Martin was a sociopath with an antisocial personality who was manipulative (1813-1817). Dr. Golwyn testified that Martin would lie, especially if it would help him, feel no guilt, and that Martin had a great disregard for the truth (1827). Frank Burns, a psychiatric social worker employed at the Orange County Jail, also testified that Martin was a sociopathic manipulator who would lie, especially if it would help him (1589-1601). Mr. Burns also testified that Martin had previously been hospitalized in a psychiatric ward (1596).

During the Defendant's case, he presented the testimony of three psychiatrists and two clinical psychologists who stated that the Defendant, at the time of the homicide, was legally temporarily insane due to suffering a psychotic break as a result of drug withdrawal, and preexisting brain dysfunction, triggered by the victim pulling the Defendant's hair.

Dr. William Scott, a psychiatrist specializing in addictive disease medicine, testified that the Defendant's psychotic break caused him to become disassociated with reality at the time of the homicide (1016-1027). He stated it was significant that the Defendant suffered a traumatic birth due to a high forceps delivery, causing some deformity of his head that persisted for some time after his birth (1030-1031). He stated that the Defendant had a history of physical abuse as a child. The Defendant's father, who was in and out of prison during the Defendant's childhood, introduced the Defendant to alcohol at age three

(1032-1033). He stated that the Defendant's functional development and personality development were greatly affected by his upbringing (1033-1034).

In May, 1981, the Defendant was referred to a neurosurgeon who performed a CAT scan of the Defendant, showing an asymmetrical brain with a large left ventricle. Additional testing in 1981 showed a positive EEG and indicated a right posterial parietal lesion (1034-1035). A later EEG, done months after the Defendant's incarceration, was negative (1202-1203). Dr. Scott testified, as did several other doctors, that the Defendant had brain tissue damage. Dr. Scott also found it significant that the Defendant's father introduced the Defendant to and injected the Defendant physically with Dilaudid and other drugs during the Defendant's teens when the Defendant was at a non-volitional age (1040). He testified that coupling the Defendant's nervous system, emotional system, characterological development, personality features, and introduction at an early age to drugs by his father, would impair his personality development (1041).

Dr. Scott testified that the Defendant suffered from a low-normal, dull-normal range IQ, with subscales in the IQ test range showing a retarded level in areas of judgment (1050). He testified the Defendant's score record was consistent with someone who had diminished capacity to function intellectually and behaviorally (1051). The Defendant was also a bed wetter up to sixteen years of age (1051).

Dr. Harry Krop, a Ph.D. in clinical psychology and part-time psychologist at the Gainesville Veterans' Administration, also testified that the Defendant suffered an acute psychotic break at the time of the homicide, rendering him legally insane (1199-1200). He also testified

to the Defendant's IQ being in a dull-normal range (1201-1202). He testified the Defendant had organic brain damage (1204-1206). The psychotic break was caused by withdrawal from drugs. He indicated that the Defendant had had disassociative reactions before (1213) and that the Defendant had a personality disorder, primarily organic based (1194-1197; 1213).

Dr. Brad Fisher, a correctional clinical psychologist and professor at Duke University (1297-1298), also testified to the Defendant's psychotic break and legal insanity at the time of the homicide (1330; 1333; 1314-1315). Dr. Fisher testified that in his long experience, he had never seen a case as aggravated as the Defendant's, involving the combination of early drug introduction, child abuse, and a chaotic personality development (1318). He stated that the Defendant's addiction to drugs occurred at a non-volitional age by the Defendant's father before the Defendant, himself, had the maturity to make his own decisions (1319-1322).

Dr. Michael Gilbert, a board certified psychiatrist and neurologist (1388-1391), testified the Defendant was legally insane at the time of the homicide. He testified concerning the high forcep delivery (1401) and brain damage (1401). He testified the Defendant suffered a psychotic break, caused by extreme drug withdrawal, which caused him to have a loss of contact with reality (1411). He testified concerning the Defendant's dull-normal IQ and stated that the Defendant's IQ test was consistent with brain damage (1414). He stated that with the Defendant's social, medical and psychiatric background, as well as his personality, he would be more susceptible to the consequences of narcotic withdrawal than a more intact person (1420).

The evidence showed that the Defendant's only prior conviction was for a DWI (1058), although he had completed a deferred prosecution agreement resulting in a dismissal of a drug charge in 1981 in North Carolina (6515).

Nora Fussall, the Defendant's girl friend, testified to three other incidents where the Defendant lost consciousness for brief periods of time (1716; 1718; 1727; 1720-1724).

Dr. J. Lloyd Wilder, a psychiatrist and former president of the Florida Psychiatric Association, testified that the Defendant was legally insane at the time of the homicide (1753-1806). He testified the Defendant suffered minimal brain damage and that all of the evidence was consistent with drug withdrawal causing the psychotic break. Dr. Wilder also testified that the Defendant's dissociative reaction caused him not to know the nature and quality of his acts and not to know the difference between right and wrong at the time (1806).

The State, in its rebuttal case on the insanity issue, presented the testimony of three psychiatrists and one psychologist that the Defendant was not legally insane at the time of the homicide. The State also called a neurologist who reviewed medical records and stated that, in his opinion, the Defendant did not suffer from brain damage. That neurologist never interviewed or saw the Defendant but just reviewed records (1951-1953).

Dr. Ernest Miller, a psychiatrist from Jacksonville (1894-1895), although testifying that the Defendant was legally sane, agreed that the Defendant had a drug dependency and addiction (1909). However, he testified that he could not exclude the possibility that the Defendant did suffer a psychotic break (1922). Dr. Miller agreed that the

Defendant was impaired at the time of the incident and agreed that the Defendant had a very disturbed background and a severe drug addiction (1924). Dr. Miller also agreed that the Defendant suffered from hyperkinesis, which is a manifestation of minimal brain damage (1927) and that the Defendant had a dull-normal range IQ (1927). Dr. Miller agreed that the Defendant was exposed to narcotics at a non-volitional age by his father (1931), which explained his addiction (1904-1909).

Dr. George Barnard, a psychiatrist, although testifying that the Defendant was legally sane (1996), acknowledged that a drug addict in withdrawal could have a dissociative episode or psychotic break (2007-2009). Dr. Barnard was aware of the Defendant's history of his father injecting him with Dilaudid at age sixteen (1988).

Joyce Kurht, Director of Nursing at the Orange County Jail (2016), testified that medical jail records showed the Defendant complained of constant headaches and stomach problems after his arrest (2030-2038).

Dr. Robert Kirkland, a psychiatrist, although rendering an opinion that the Defendant was sane (2046), testified that he felt that the Defendant "went into a frenzy or crazy" at the time of the homicide (2046-2049).

The jury convicted the Defendant in Count I of first degree felony murder versus premeditated murder, and in Count II of armed robbery with a dangerous weapon.

The State emphasized the testimony of Shadrick Martin, both in its opening argument as well as defending Martin in its closing argument (2103-2105; 2107-2108; 2136).

The State presented no evidence during the penalty jury

recommendation phase (2017). The Defendant presented testimony from John Cassady, staff psychologist for the Orange County Jail (2210-2225). He testified the Defendant would be a good inmate. Frank Burns, the psychiatric social worker with the Orange County Jail, testified the Defendant was an asset to the jail as a cell coordinator and had no behavioral problems while incarcerated (2231-2234). The Defendant's brother, Chuck Hansbrough, Jr., testified the Defendant was a good brother (2235-2240). Terry Hansbrough, the Defendant's sister, testified the Defendant was a good brother (2241-2244). Paula Cox, the Defendant's aunt, testified about the Defendant's troubled upbringing (2247-2254). Brad Fisher, a clinical psychologist, testified that in his opinion, within a reasonable degree of medical certainty, the homicide was committed while the Defendant was under the influence of extreme mental or emotional disturbance or duress, and that at the time, the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (two statutory mitigating circumstances) (2261-2262).

As the Defendant did during his closing argument in the guilt or innocence phase, the defense argued again in the penalty phase that Shadrick Martin was a liar and not to believe his testimony which the State was utilizing in an attempt to prove two aggravating factors (2318; 2323-2324).

The jury's majority recommendation was for life imprisonment (2347), which the court overrode by imposing the death sentence (5279-5281).

## SUMMARY OF ARGUMENT

1. The trial court erred in failing to suppress the Defendant's statements and all evidence and witnesses which were obtained as a derivative source of those statements because those statements were obtained as a result of the Defendant's pretext stop by police. The police admitted that they were looking for a reason to stop the Defendant, who they had received an anonymous tip concerning, in order to debrief him to secure intelligence information. The police would not have stopped any other motorists under the same circumstances. All derivative evidence must be suppressed as fruit of the poisonous tree.

2. The trial court erred in restricting cross examination of one of the State's main witnesses, Shadrick Martin, concerning his relationship with the prosecutor, Belvin Perry. Martin had been previously prosecuted by Belvin Perry for first degree murder and was acquitted. Martin faced a pending sentencing for armed burglary in front of the same judge presiding at the Defendant's trial. Martin had indicated to cellmates that he feared that prosecutor Belvin Perry would retaliate against him during his sentencing because Martin had beat the prior charge. The trial court refused to allow the Defendant to cross examine Martin or present testimony through other witnesses to show a motive for Martin to lie to please prosecutor Perry because of his perceived fear of him and to show his familiarity with aggravating circumstances that would help the State.

3. Defendant's Motion for Mistrial, based upon a State witness mentioning a polygraph result of the Defendant was denied. The State witness, a psychiatrist, testified that the polygraph was one of the materials he relied on in rendering his opinion. Defendant, on two

prior occasions, had reminded the court of the State's concession of a Motion in Limine on this point.

4. The court erred in failing to allow the Defendant to present evidence concerning a prior sexual battery and assault on the victim. This evidence was relevant to the testimony of the medical witnesses to bolster that the victim acted in the manner that the Defendant described, to-wit: pulling his hair during the robbery. The State contested that the incident happened as the Defendant described it.

5. The trial court erred in excluding for cause jurors Roger Hill and Virginia Jax because of their general opposition to the death penalty, notwithstanding that they said they could follow the court's instructions. The record reflects that their personal feelings would not have substantially impaired their ability to be fair to both the State and the Defendant and to follow the court's instructions.

6. The trial court erred in failing to exclude for cause juror William Lucas when he indicated that, if he found the Defendant guilty, he would recommend the Defendant be executed. Juror Lucas' ability to follow the law as to the possibility of life imprisonment clearly was substantially impaired. Nevertheless, the Defendant's motion to have him excluded for cause was denied and the Defendant had to exercise a preemptory challenge on him.

7. The trial court erred in overruling the Defendant's objection to exclude for cause persons opposing the death penalty. The Defendant cited Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), which this court has previously rejected. The Defendant asked that this court reconsider its position in this matter.

8. The trial court erred in sentencing the Defendant to death

over the jury's recommendation of life imprisonment. Under a "Tedder" analysis, the death sentence in the instant case is clearly disproportionate when compared to other similar cases in light of the jury's recommendation. Furthermore, the trial court erred in finding certain aggravating circumstances, especially in light of the jury's special verdict finding the Defendant guilty of felony murder rather than premeditated murder. Furthermore, the trial court erred in failing to find certain mitigating circumstances which the jury obviously did find and which there was substantial evidence to support.

9. The court erred in imposing a 75-year term of imprisonment on the Defendant on the armed robbery charge in light of the fact that the court was limited by statute to a 30-year term of years sentence.

10. The court erred in scoring the Defendant with 21 points for victim injury on the armed robbery charge since victim injury is not an element of armed robbery, resulting in an improper guidelines range.

11. The court improperly departed from the recommended guideline range of 4½ to 5½ years to impose a 75-year sentence on the Defendant for the armed robbery charge. This constituted a departure of 13 times the recommended sentence. The departure was an abuse of discretion and clearly excessive.

12. The court erred in sentencing the Defendant for armed robbery as well as felony murder since armed robbery is a lesser included offense of felony murder under the facts and circumstances of this case.

13. The court erred in retaining jurisdiction for one-third of the Defendant's sentence on the armed robbery charge for purposes of parole since parole is not a possibility under a guidelines sentence.

## POINT I

THAT THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL PHYSICAL EVIDENCE, ALL STATEMENTS OF THE DEFENDANT, ALL STATEMENTS PAST OR IN THE FUTURE OF WITNESSES SHARON ALDEN, ROBERT ALDEN, SR., ROBERT ALDEN, JR., AND ALL OTHER DERIVATIVE EVIDENCE OBTAINED AFTER THE DEFENDANT'S TRAFFIC STOP AND ARREST

### A. That the Defendant's Initial Stop on July 17, 1984, by the Police, was an Illegal Pretext Stop, and the Trial Court Erred in Failing to Suppress All Derivative Evidence Resulting from that Pretext Stop

Prior to July 17, 1984, the police received an anonymous telephone tip that the Defendant was involved in the homicide (4769). The Defendant was under surveillance subsequent to that time. On July 17, 1984, Officer Halleran of the Orlando Police Department (O.P.D.), who was very familiar with the homicide in the instant case, testified he stopped the Defendant for driving with a cracked windshield and making an illegal left turn. He admitted that prior to stopping the Defendant, he had conversations with someone from the Tactical Intelligence Unit (T.I.U) concerning the Defendant.

O.P.D. Officer Michael Bethea, who had been previously involved in the surveillance of the Defendant, testified that he and another homicide detective, John Chisari, saw the Defendant's automobile driving near Bumby and Colonial Drive in Orlando, and Officer Bethea radioed for a uniformed unit to stop the Defendant, using the justification of the supposed cracked windshield on his car. Officer Bethea testified that he instructed Halleran to put any traffic violations he could see on the Defendant's vehicle so that they could stop him for intelligence purposes. He testified:

> Hopefully, we could maybe observe something that would tie him into the crime (the homicide), just in plain view. When the officer talked to him, we could find out maybe where he worked, where, in fact, he was living, and just general information (2549).

Bethea testified that they were looking for a reason to stop the Defendant. Another O.P.D. officer, Gary Strong, testified that before the Defendant was brought in that day, a decision had been made to bring the Defendant in at some point. Since radio communications were essential for the Defendant to prove this point, he filed a Motion to Produce Copies of Transcripts of Radio and/or Telephone Transmissions. However, the Defendant was informed that those transmissions had been destroyed by being taped over, a month after the July 17, 1984, stop of the Defendant.

Subsequent to the Defendant's arrest for driving while license suspended, which the officers determined after his arrest, the Defendant was transported to an interview room at the Orlando Police Department to be questioned by Officer Chisari. During that conversation, Officer Chisari learned of the Defendant's whereabouts that day, including the fact that he had gone to a chiropractor's office off of Edgewater Drive, and that he had been with a woman named "Sharon" and a man named "Bob" (later determined to be Sharon and Robert Alden, Sr.) around the time of the homicide. Further, as a result of the Defendant being transported to the Orlando Police Department for this traffic arrest, the detectives secured his tennis shoes.

By following up on leads provided by the Defendant during this July 17, 1984 interview for the Defendant's traffic arrest, the officers determined who Sharon and Robert Alden were from records at the chiropractor's office described by the Defendant. Those two persons

were interviewed and other evidence was obtained against the Defendant, all a derivative result of information obtained from the initial stop.

When the Defendant was arrested pursuant to this information on July 23, 1984, Officer Chisari confronted the Defendant with all of this evidence after the Defendant refused to give an incriminating statement after approximately two hours of interview. After being confronted with this evidence, the Defendant finally made incriminating statements of his involvement in the homicide. All evidence derived from the Defendant resulted from information obtained from the Defendant after his initial traffic stop on July 17, 1984.

It is a well-established rule that a minor traffic violation may not be used as a pretext to stop a vehicle and search it for evidence that may indicate a violation of the law. Byrd v. State, 80 So.2d 694 (Fla. 1955); Riddlehoover v. State, 198 So.2d 651 (Fla. 3d DCA 1967); Gagnon v. State, 212 So.2d 337 (Fla. 3d DCA 1968); State v. Gray, 366 So.2d 137 (Fla. 2d DCA 1979). Furthermore, where police officers use the pretext of a minor traffic violation to stop and search a defendant's car for evidence of a violation of an unrelated offense, the courts have found the search to be unreasonable. See Riddlehoover v. State, supra; State v. Gray, supra; Mullins v. State, 366 So.2d 1162 (Fla. 1978).

As stated in Diggs v. State, 345 So.2d 815 (Fla. 3d DCA 1977), cert. denied, 353 So.2d 697:

> The test for determining whether a traffic arrest which is the basis for seizure of evidence of a serious crime is a "pretext" for the search, as set forth in State v. Holmes, 256 So.2d 32 (Fla. 2d DCA 1971), is whether the facts in the case suggest the strong possibility that the arrest was one which would have been made by a traffic officer on routine patrol against any citizen driving in the same manner or whether the

> arrest was one which would not have been made but for some other motive of the arresting officer. 345 So.2d 815 at 816.

In Diggs, a police officer who had information that the defendant did not have a valid driver's license stopped the defendant's car, arrested him for the criminal traffic offense of no valid driver's license, and searched the defendant's car, finding illegal drugs. The appellate court reversed the defendant's conviction, holding that the arrest of the defendant for driving without a valid driver's license was pretextual and therefore invalid, rendering the fruits of the arrest--the illegal drugs found--inadmissible. See also Bascoy v. State, 424 So.2d 80 (Fla. 3d DCA 1982); State v. Holmes, 256 So.2d 32 (Fla. 2d DCA 1971).

As stated in State v. Gray, supra:

> It would have been improper for Herne to use the missing tail light, tag light or the lack of clearance lights as a pretext to stop the truck and investigate a bare suspicion of illegal activity. 366 So.2d 137.

The instant case is indistinguishable from the situation in Byrd v. State, supra, a Florida Supreme Court case, in which the court stated:

> The trial court was of the opinion that the sheriff had a right to stop the truck for the purpose of ascertaining whether or not the driver was duly licensed. This is true, but it is not the case before us. Since the sheriff did not stop the truck to check appellant's license, but "because (he) was informed it was loaded with moonshine whiskey." And the sheriff himself referred to the information on the basis of which he acted as a "tip."
>
> We have repeatedly held that a minor traffic violation cannot be used as a pretext to stop a vehicle and search it for evidence of violation of other laws . . . Since the sheriff could not have used the checking of appellant's license as a pretext to stop and search his vehicle, and since the avowed purpose of the sheriff in stopping the vehicle had no connection with the appellant's license in any event, the trial court's reasoning upon this issue must necessarily fail. 80 So.2d 694.

It is respectfully but strongly submitted that it is obvious that the stop of the Defendant was for intelligence purposes and not because the Defendant had a cracked windshield or because he supposedly made an illegal left turn. It is absolutely clear that the Defendant would not have been stopped and subsequently arrested as a situation "one which would have been made by a traffic officer on routine patrol against any citizen driving in the same manner." Bascoy v. State, supra. Rather, the Defendant's initial stop and subsequent arrest was "one which would not have been made but for some other motive of the arresting officer." Diggs v. State, supra, at 817.

Since the initial stop and subsequent arrest of the Defendant were based on a pretextual stop, all evidence seized as a result of the illegal detention must be suppressed. Carter v. State, 454 So.2d 739 (Fla. 2d DCA 1984), citing Wong Sun v. United States, 371 U.S. 471 (1963); Coladonato v. State, 348 So.2d 326 (Fla. 1977). Likewise, where there has not been an unequivocally clear break in the chain of illegalities stemming from an illegal arrest, statements that are the product of an illegal detention are inadmissible. Smith v. State, 424 So.2d 726 (Fla. 1982); State v. Delgado-Armenta, 429 So.2d 328 (Fla. 3d DCA 193); Taylor v. Alabama, 457 U.S. 687 (1982).

The fact the even in the instant case the Defendant was later given Miranda warnings does not, by itself, purge the primary taint which pervades any oral statements obtained from the Defendant following his illegal detention. Brown v. Illinois, 422 U.S. 590 (1975); Salazar v. State, 398 So.2d 831, 832 (Fla. 5th DCA 1980), review denied, 399 So.2d 1145 (Fla. 1981). The Defendant's illegal arrest resulted from an illegal pretextual stop. An illegal arrest or stop presumptively taints

a confession, rendering it inadmissible. Smith v. State, supra; State v. Rogers, 427 So.2d 286 (Fla. 1st DCA 1983). The only exception exists where there has been a clear and unequivocal break in the chain of illegalities sufficient to dissipate the taint; and it has been held that such a break would indeed be rare. State v. Rogers, supra, at 288.

Moreover, since the Defendant's arrest warrant was predicated on tainted evidence seized as a result of the illegal pretextual detention, said warrant was likewise defective and the Defendant's arrest in this matter subsequently on July 23, 1984, was an illegal arrest. See Wong Sun v. United States, supra.

As stated in Oregon v. Elstadt, 105 S.Ct. 1285 (1985):

> This figure of speech is drawn from Wong Sun v. United States, 371 U.S. 471 (1963), in which the court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence. The Wong Sun doctrine applies as well when the fruit of the Fourth Amendment violation is a confession. It is settled law that "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'efficiently an act of free will to purge the primary taint'."

See also Taylor v. Alabama, supra; Brown v. Illinois, 422 U.S. 590 (1975).

The Defendant brought all of these matters to the trial court's attention and provided case law to the court on this matter (4945-4953).

The State did not even argue the "inevitable discovery doctrine" during the suppression hearing, since the State's derivative evidence was solely dependent on the information derived from the Defendant after his pretextual stop. Therefore, the State is precluded from arguing the "inevitable discovery" of the existence of Sharon and Robert Alden, Sr. and Jr., and all of the substantial derivative evidence that resulted

from their discovery after the Defendant's statements given after his traffic arrest on July 17, 1984. See Nix v. Williams, 104 S.Ct. 2501 (1984); State v. Williams, 462 So.2d 69 (Fla. 1st DCA 1985). It is clear that absent the "leads" furnished by the Defendant as a result of his initial illegal detention, the State would have been unable, in good faith, to discover any of the illegal information it sought to introduce against the Defendant in this action (4963-4967).

The trial court erred in failing to grant defense Motions to Suppress on the pretextual stop basis. The trial court, therefore, erred in failing to suppress all derivative evidence resulting from the pretextual stop which, in the instant case, constituted the Defendant's statements, the identities of several crucial witnesses and the seizure of crucial physical evidence.

B. That the Defendant's Statements After His Arrest on July 23, 1984, Were Not Freely and Voluntarily Made But Were Derived as a Result of the Police Utilizing the Defendant's Girl Friend to Persuade the Defendant to Make an Incriminating Statement

For the first two hours after the Defendant's arrest on July 23, 1984, he adhered to his previous exculpatory statement that while he had been at the insurance agency on the day of the homicide, he did not know anything about the homicide. At that point, Officer Chisari left the interview room and went out to speak with the Defendant's long-time girl friend, Nora Fussall. Ms. Fussall testified that Chisari told her that Hansbrough was not being truthful and he asked her to talk to the Defendant about the case. Ms. Fussall further testified that Chisari indicated that, in his opinion, this was not a premeditated killing but just a young guy getting into trouble because of drugs, and suggested

that the Defendant could get help for his problem. Ms. Fussall testified that she went into the interview room and told the Defendant to tell Chisari the truth so it would be easier on him.

The Defendant himself testified that he would not have given a statement unless he were allowed to talk with Ms. Fussall. He communicated that to Officer Chisari and Officer Chisari allowed him to speak with her. Chisari denied that he spoke with Ms. Fussall about the penalties for various degrees of murder or that he discussed the Defendant's drug problem with Ms. Fussall. However, Chisari did admit that the Defendant would not give a statement unless he were allowed to talk with Ms. Fussall.

The Defendant's statement was not freely and voluntarily given. It was made as a result of a promise that the Defendant would be allowed to be comforted and have a contact visit alone with his long-time, live-in girl friend. Furthermore, as Ms. Fussall testified, she encouraged the Defendant to give a statement, based on her conversation with Chisari that the Defendant would receive help for his drug problem and that Chisari wanted evidence to support Chisari's belief that this was not a first degree murder case. Ms. Fussall was acting as a police tool to entice the Defendant to make a statement by promising benefit to him for doing so. Certainly, it is very unusual for a person arrested for first degree murder to be allowed to visit with his girl friend alone in an interview room after two hours of police interrogation without the police expecting some benefit from allowing such a contact visit. Chisari used Ms. Fussall as a police tool to extract the statement.

In Taylor v. Alabama, 457 U.S. 687 (1982), the defendant was allowed to speak with his girl friend and a male companion after the

defendant's illegal arrest and before he had given any incriminating statement. The State argued that the fact that the defendant visited with his girl friend before finally confessing was a sufficient intervening, purging event of the prior illegal arrest. The United States Supreme Court disagreed, stating:

> The State fails to explain how this five--ten minute visit, after which petitioner immediately recanted his former statements that he knew nothing about the robbery and signed the confession, could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will. This suggestion is particularly dubious in light of petitioner's uncontroverted testimony that his girl friend was emotionally upset at the time of this visit. If any inference could be drawn, it would be that this visit had just the opposite effect. 457 U.S. at 691-692. (emphasis added)

It is well established that a confession, to be admissible, must not be extracted by any sort of direct or implied promises, however slight, or by the exertion of any improper influence. Leon v. Wainwright, 734 F.2d 770, 772 (11th Cir., 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984). At the time of the making of a confession, the mind of the defendant should be free to act uninfluenced by either hope or fear. A confession should be excluded if the attending circumstances or if the declaration of those present at the making of the confession are calculated to delude the prisoner as to his true position or to exert improper and indue influence over his mind. Brewer v. State, 386 So.2d 232 (Fla. 1980); N.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1975); Miranda v. Arizona, 384 U.S. 436 (1966).

A promise of leniency or favorite treatment may not be utilized to induce a defendant's confession. Fex v. State, 386 So.2d 58 (Fla. 2d DCA 1980); Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977), cert. denied, 374 So.2d 101 (Fla. 1979).

Of course, the issue of voluntariness depends on the totality of the circumstances on a case-by-case basis. United States v. Castenada-Castenada, 792 F.2d 1360 (11th Cir., 1984). In the instant case, the totality of the circumstances shows that the Defendant was given assurances that if he gave a confession, he would be allowed an immediate solitary contact visit with his girl friend, help for his drug problem and help in showing that the murder was not premeditated first degree murder but rather a lesser degree of homicide. The court cannot measure the force of the influence utilized concerning its affect upon the mind of the Defendant. Henthorne v. State, 409 So.2d 1081 (Fla. 3d DCA 1982). Here, the Defendant had refused to make an incriminating statement for two hours prior to the allowance of the contact visit and had refused to give any incriminating statement during a previous interview by Officer Chisari six days earlier on July 17, 1984. The Defendant's incriminating statements were not freely and voluntarily given but were made as a result of promises and pressure exerted on him by Officer Chisari and Nora Fussall, operating as a police agent. For this reason, the trial court erred in refusing to suppress the Defendant's statements and all derivative evidence derived therefrom.

### C. That the Defendant's Statement on July 23, 1984, Subsequent to His Arrest, was Made in Violation of His Miranda Rights

It is conceded that the Defendant refused to give either a written statement or a taped statement after his arrest. The Defendant did end up giving an oral statement. The Defendant would submit that by stating that he did not want to give either a written or a taped statement, he had effectively exercised his Miranda rights.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked.

See also, Bain v. State, 440 So.2d 454 (Fla. 4th DCA 1983); Michigan v. Mosley, 96 S.Ct. 321 (1975). The Defendant would submit that by stating that he did not want to give a taped statement or a written statement, he had effectively exercised his Miranda rights to remain silent, and questioning of him at that point should have stopped. As stated in Bain v. State, supra, the defendant does not have to necessarily state outright that he does not want to be questioned for Miranda to be applied. In the instant case, the Defendant's actions were sufficient to place Officer Chisari on notice that the Defendant had exercised his right to remain silent. Therefore, the trial court erred in failing to grant the Defendant's Motion to Suppress for this reason (4936-4939).

## POINT II

THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW THE DEFENDANT TO CROSS EXAMINE STATE WITNESS SHADRICK MARTIN AND TO PRESENT THROUGH OTHER WITNESSES EVIDENCE OF SHADRICK MARTIN'S BIAS, MOTIVE AND INTEREST TO LIE IN HIS TESTIMONY BECAUSE OF HIS PRIOR RELATIONSHIP WITH BELVIN PERRY AS IT RELATED TO MARTIN'S PENDING SENTENCING ON A SEPARATE CHARGE

The court granted a State Motion in Limine precluding the Defendant from questioning, on cross examination, a key State witness, Shadrick Martin, a cellmate of the Defendant, or presenting evidence through other witnesses concerning the fact that Martin had previously been arrested for first degree murder and was prosecuted by the same Assistant State Attorney, Belvin Perry, who was prosecuting the Defendant's case. Martin had been acquitted of the prior murder charge, but was facing sentencing on a felony charge of armed burglary before Judge Kirkwood.

In a proffer out of the presence of the jury, Shadrick Martin's cellmate, Omar Williamson, testified that Martin had bragged of how he had beat a murder charge with Belvin Perry as the prosecutor, and that he feared that Belvin Perry was after him on the pending charge he was facing (sentencing for the armed burglary), because Martin had beaten Mr. Perry before. During this conversation, Martin also told Williamson that he would do anything to help himself on his pending charges. The Defendant argued that those conversations concerning the previous charges involving the same prosecutor in the instant case and Martin were admissible to show motive, bias and interest on the part of Martin to please the prosecutor, Belvin Perry, in this case, because of

Martin's perceived fear that Perry would go after him in the sentencing phase of the pending charge to make up for not convicting Martin during the last case. The Defendant vigorously argued that Martin had expressed fear that Belvin Perry had some influence over his present charge for that reason. Indeed, Bruce Rhodes, an investigator for the State Attorney's Office, testified at trial that Belvin Perry made the decisions for the State Attorney's Office as to who was charged. Ironically, the prosecutor argued that "whether or not Martin felt I was out to get him, really has no bearing on this charge." The Defendant would very strongly submit that the prosecutor's acknowledgment of Shadrick Martin's fear of him has tremendous relevance to Martin's motive, interest and bias in trying to please Mr. Perry in the instant case.

Discrediting Martin went to the heart of the Defendant's case, since the State's whole theory was that the Defendant did not suffer loss of consciousness and that he was lying when he said he did not remember. The only statements that the Defendant allegedly made that he did not lose consciousness and to support the elimination of the witness testimony came from Shad Martin. Defendant argued that such impeachment was crucial since otherwise, the State would have unimpeached ammunition to ask the Defendant's medical witnesses on cross examination: "Doctor, would you change your opinion if we were to show that the Defendant didn't lose consciousness?" The court refused to allow the proffered evidence into evidence or to allow cross examination of Martin on the issue. The court also refused to allow the Defendant to present similar evidence through testimony of Frank Burns, and through medical files kept on him at the Orange County Jail.

Prosecutor Perry acknowledged that Martin had a perceived fear

of him because of the pending charges in light of Martin having beaten Perry on the previous charge. The Defendant was clearly denied his right to confront and cross examine Martin by bringing out this very strong motive, interest and bias on Martin's part to please and curry favors with Belvin Perry because of his perceived fears of what Mr. Perry would do to him on his pending charges. This prior relationship is extremely relevant and went to the heart of the Defendant's case in discrediting Martin.

In Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980), in a similar situation wherein the Defendant attempted on cross examination to show a relationship between certain witnesses, the court stated:

> The prosecuting attorney objected to defense counsel's question directed to Detective Geisenburg: "and do you know Officer Strubbie, sir?" The court sustained the objection. On proffer, Geisenburg indicated he was aware of the fact that Officer Strubbie had been discharged from the department and was facing criminal charges based upon the incident with appellant. He denied knowing about the Strubbie incident at the time of his questioning of appellant on January 20th, in sharp conflict with appellant's later testimony that Geisenburg was angry and hostile on that occasion, and told her she was telling a "damn lie" about the Strubbie matter. The court denied defense counsel's proffer and restricted inquiry into this area. We find this to be error. Geisenburg's knowledge of an acquaintance with Officer Strubbie was a legitimate subject of inquiry by appellant's attorney, and he should have been allowed to fully explore the relationship. A defendant should be afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as he has. (emphasis added). 394 So.2d 121, 124-125.

Martin's prior relationship with Belvin Perry was extremely relevant. Additionally, it was not enough that the Defendant be allowed to bring out facts on cross examination through other witnesses that Martin was presently facing sentencing on a pending felony charge without going into the factors in Martin's mind that would be relevant to currying favors from the State to affect that charge. The Defendant

was not presenting such testimony to impeach Martin of a prior arrest that did not result in a conviction [Florida Statute §90.610(1) (1983)]. Rather, such testimony related to showing Martin's relationship to Belvin Perry and his perceived fear as to how their past relationship (Martin's and Perry's) would affect the present charges [Florida Statute §90.608(b) (1983)]. Furthermore, the Defendant argued that this evidence was relevant to Martin's knowledge as having previously been charged with first degree murder of the statutory aggravating factors which would help Mr. Perry.

A criminal defendant is to be afforded wide latitude when he cross examines a witness against him, especially a key witness such as Shadrick Martin, and seeks to demonstrate bias or prejudice on the part of the witness. Robinson v. State, 438 So.2d 8 (Fla. 5th DCA 1983); Cruz v. State, 437 So.2d 692 (Fla. 1st DCA 1983); Lee v. State, 422 So.2d 928 (Fla. 3d DCA 1982); Mendez v. State, 412 So.2d 968 (Fla. 2d DCA 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

The amount of cross examination which would satisfy the Sixth Amendment is not measured by a quantitative test, but rather by a pragmatic qualitative approach, looking at whether the Defendant has had an opportunity to expose to the jury the facts from which the jurors could appropriately draw inferences relating to the reliability or unreliability of the witness. United States v. Berkowitz, 662 F.2d 1127 (5th Cir., 1981).

Although, generally, impeachment of a witness on the basis of prior criminal activity or dishonesty is limited to past convictions and not past arrests or pending charges, Fulton v. State, 335 So.2d 280 (Fla. 1976), there is an exception when a prosecution witness is under

pending criminal charges by the same prosecuting agency. Causey v. State, 11 F.L.W. 127 (1st DCA, January 3, 1986). Defense counsel is entitled to bring this fact before the jury for impeachment based upon motive or bias. Moreover, defense counsel is entitled to bring out all of the circumstances of the pending prosecution so that the jury will be

> . . .fully apprised as to the witness' possible motive for self interest with respect to the testimony he gives. Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974).

Davis v. Alaska, 415 U.S. 308 (1974).

This evidence concerning Martin's perceived fear of prosecutor Perry because of his prior relationship with Perry on the murder charge and his desperation to please prosecutor Perry in Hansbrough's case to curry favor for him because of his perceived fears of prosecutorial revenge in going after him on his present sentencing for armed burglary should have been allowed to be presented to the jury. This impeachment evidence was more substantial than any of the other impeachment evidence that the Defendant was able to present against Shadrick Martin. For this reason, the Defendant's judgment and sentence should be reversed.

## POINT III

THAT THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER A STATE PSYCHIATRIST, ON DIRECT EXAMINATION BY THE STATE, MENTIONED THAT HE HAD REVIEWED A POLYGRAPH OF THE DEFENDANT AS PART OF THE MATERIALS HE RELIED UPON IN RENDERING HIS OPINION THAT THE DEFENDANT WAS LEGALLY SANE AT THE TIME OF THE HOMICIDE

The Defendant submitted to a polygraph examination prior to his arrest in the case. The State represented at a pre-trial hearing and later during trial that it would not elicit from any witness the fact that the Defendant took a polygraph.

During the State's rebuttal case on the insanity issue, the State psychiatrist, Dr. Ernest Miller, mentioned the fact that he reviewed a polygraph examination conducted on the Defendant as part of the materials he relied upon in rendering his opinion concerning the insanity issue. The Defendant moved for a mistrial based on the mention of the polygraph. The Defendant pointed out that especially in a case involving insanity where intent is crucial, the admission of any testimony to discredit the Defendant's version would be prejudicial. After hearing additional argument on the Motion for Mistrial, the motion was denied.

The rule that polygraph evidence is inadmissible is well established in Florida. Delap v. State, 440 So.2d 1242 (Fla. 1983). In the instant case, the Defendant's credibility as to his version of the incident that he suffered a loss of consciousness went to the heart of the Defendant's case. The admission of the fact that the Defendant took a polygraph would seriously shake the Defendant's credibility in the eyes of the jury.

This case is governed by Kaminski v. State, 63 So.2d 339 (Fla. 1952). In that case, this court held that the testimony of a prosecuting witness, on redirect examination, that he had voluntarily submitted to a lie detector test prior to trial, offered for the purpose of rehabilitating the prosecuting witness whose credibility had been seriously shaken and upon whose testimony the State's whole case depended, was inadmissible. The court ordered a new trial.

As this court stated in Walsh v. State, 418 So.2d 1000 (Fla. 1982), in discussing the trial court's order granting a mistrial in a previous trial of the defendant:

> We agree with the trial court that this type of testimony [evidence that the defendant took a polygraph test] would be difficult for the jurors to disregard and that the evidence would likely influence the jury's decision. 418 So.2d at 1003.

The instant case is distinguishable from Sullivan v. State, 303 So.2d 632 (Fla. 1974). In Sullivan, this court held that the admission of the polygraph evidence did not constitute reversible error where evidence as to the defendant's guilt was overwhelming and where it was not clear if the reference to the polygraph was that the witness had already passed the polygraph or whether he would pass the polygraph if same was taken. The Defendant in the instant case took the polygraph in contrast to a witness in Sullivan taking the polygraph test. Furthermore, in the instant case, the evidence was not overwhelming since three psychiatrists and two psychologists testified that the Defendant was legally insane. Where the credibility of the Defendant was crucially at issue, admission of this evidence in the instant case constituted harmful error and requires the Defendant's convictions to be reversed.

## POINT IV

THAT THE TRIAL COURT ERRED IN FAILING TO GIVE THE DEFENDANT'S SPECIAL REQUESTED JURY INSTRUCTIONS

During the charge conference, the Defendant submitted four alternative written special requested jury instructions concerning how the jury was to deal with the felony murder issue in light of the unique situation wherein the Defendant was conceding sanity at the time of the alleged robbery but not at the time of the homicide (5212-5214). The reason for the special requested jury instructions was to advise the jury that even if they found the Defendant sane at the time of the robbery, if they found the Defendant insane at the time of the killing, then they could not find the Defendant guilty of first degree felony murder.

Defendant's second special requested jury instruction provided, in part:

> However, if you find the Defendant was insane at the time of the killing and that his insanity caused a definite break in the chain of circumstances, then you may not find the Defendant guilty of first degree felony murder (5211).

The Defendant's third special requested jury instruction was a variation of the latter, stating, in part:

> However, if you find the Defendant was insane at the time of the killing and that his insanity caused a definite break in the predictable chain of circumstances of the robbery, then you may not find the Defendant guilty of first degree felony murder (5212).

The Defendant's fourth special requested jury instruction was another variation of the latter two instructions stated above. This instruction provided, in part:

> However, if you find the Defendant was insane at the time of the killing and that his insanity caused a definite break in the

> chain of circumstances such that the killing was not a predictable result of the robbery, then you may not find the Defendant guilty of first degree felony murder (5213).

Finally, the Defendant's fifth special requested jury instruction constituted another variation of the previously referred to three instructions. This instruction stated, in part:

> However, if you find the Defendant was insane at the time of the killing and that his ability to distinguish right from wrong caused a definite break in the chain of events such that the killing was not a predictable or inevitable result of the robbery, then you may not find the Defendant guilty of first degree felony murder (5214).

The Defendant cited as authority in support of all four special requested written jury instructions the cases of Mills v. State, 407 So.2d 218 (Fla. 1981); and Campbell v. State, 227 So.2d 873 (Fla. 1967).

The standard jury instructions read by the trial court concerning felony murder (2145) and insanity (2154-2156) were not adequate to apprise the jury of the law as to the theory of the Defendant's case in light of the unique posture of concession of sanity at the time of the robbery but temporary insanity caused by a psychotic break at the time of the subsequent homicide. This is most noteworthy in light of the jury's finding of felony murder in the instant case.

This case is different from the situation in Alexander v. State, 326 So.2d 456 (Fla. 4th DCA 1976) wherein the trial court's refusal to give the Defendant's requested instruction on the defense of insanity was not error where the defendant's defense therein was covered by the standard instructions given by the court. Special requested jury instructions on insanity have been ruled proper in other cases to make the law clear to the jury. Smith v. State, 344 So.2d 915 (Fla. 2d DCA 1977). Special jury instructions to alleviate jurors' confusion have

been approved in other situations. Brown v. State, 426 So.2d 76 (Fla. 2d DCA 1977).

The jury, in the instant case, without being instructed as requested by the defense in its special requested jury instructions, could very well have become confused as to the applicability of insanity under the facts and circumstances of the instant case. The jury could have determined that the Defendant was insane for purposes of premeditated murder but, finding the Defendant sane at the time of the robbery, rendered a finding of guilt as to felony murder because of being inadequately instructed on the affect of a definite break in the chain of events triggering temporary insanity, as covered by the Defendant's special requested jury instructions.

It is respectfully but strongly submitted that the standard jury instructions on insanity and felony murder do not adequately cover the factual situation involved in the instant case and are not adequate to present the law on the theory of the Defendant's case in this situation.

A defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 103 S.Ct. 3129 (1983). The trial court erred in refusing to grant the Defendant's special requested jury instructions and the Defendant should be granted a new trial for this reason.

## POINT V

THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO INTRODUCE EVIDENCE CONCERNING A PRIOR ASSAULT AND SEXUAL BATTERY ON THE VICTIM NOTWITHSTANDING THAT EVIDENCE WAS RELEVANT TO SUPPORT THE TESTIMONY OF DEFENDANT'S MEDICAL WITNESSES THAT THE VICTIM ACTED IN THE MANNER DESCRIBED BY THE DEFENDANT PRIOR TO THE HOMICIDE

The Defendant intended to elicit testimony through the medical examiner, an Orange County Sheriff's deputy, the victim's parents, and the victim's husband, evidence concerning the fact that the victim had been previously assaulted and sexually battered in 1977. The Defendant intended to offer that evidence as relevant to the issue of whether or not the victim grabbed the Defendant's hair in response to him taking the money bag from her. The Defendant argued that said prior violent act perpetrated upon the victim was a relevant and important factor to the testimony of the Defendant's medical witnesses, as well as one of the psychiatrists for the State, Dr. Ernest Miller. That evidence was relevant to explaining the victim's actions and to corroborate the Defendant's version that the incident occurred as he described. Dr. Miller testified in a proffer to the relevance of said testimony in rendering his opinion:

> The great tragedy of this thing is the stranger-than-fiction, the history of this victim having been raped. As a psychiatrist, I can only project her dynamics that she didn't know how far away she was from being raped again, or, perhaps, was acting in response to having been raped and responding with a vengeance, trying to, whatever, revenge as getting back at her assailant. The tragic circumstance of her life I think was a factor . . .

Florida Statute §90.402 (1983) states:

> All relevant information is admissible, except as provided by law.

Florida Statute §90.401(1983) states:

> Relevant evidence is evidence tending to prove or disprove a material fact.

The trial court ruled that the fact that the victim of the homicide was previously a victim of a prior sexual assault had no relevancy to the issues at hand. However, according to Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982):

> Where evidence tends in any way, even indirectly, to prove a criminal defendant's innocence, it is error to deny its admission. (emphasis added).

Furthermore, the court in Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978), stated:

> A party is entitled to present evidence upon facts that are relevant to his theory of the case so long as the theory has support in law.

The Zamora court stated that relevancy describes evidence that has a legitimate tendency to prove or disprove a given proposition that is material to the case. In the instant case, the evidence of the prior victimization of the victim was relevant as it had a legitimate tendency to prove the Defendant's contention that the prior assault made it likely that she acted in a manner that the Defendant described, to-wit: the victim grabbing the Defendant's hair.

Psychiatrists and psychologists, of course, have specific knowledge of the way persons behave in certain situations and are competent to give opinions to explain how a person would probably behave in a given situation. Certainly, a psychiatrist or psychologist, given the history of a person's prior victimization, is qualified to testify how the person would likely be affected in the future by such victimization. A psychiatrist or psychologist would be competent to

render such an opinion.

To be relevant, and therefore admissible, evidence must prove or tend to prove a fact in issue. Coler v. State, 418 So.2d 238 (Fla. 1982), cert. denied, 459 U.S. 1127 (1983). Additionally, the person seeking admission of testimony must demonstrate its relevance. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982). In the instant case, the Defendant showed the relevancy of the prior victimization in explaining the victim's actions and corroborating the Defendant's version of how she reacted. All five medical witnesses for the Defendant stated that the incident of the victim grabbing the Defendant's hair triggered the psychotic break, causing the temporary legal insanity of the Defendant. The proffered evidence is relevant to the testimony of the medical witnesses. Furthermore, the hearsay rule poses no obstacle to expert testimony premised, in part, upon tests, records, data, opinions of others, or history and reports prepared by non-testifying witnesses. Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985) (and cases cited therein).

The trial court erred in granting the State's Motion in Limine and in refusing the Defendant's proffer.

## POINT VI

THAT THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE PROSECUTOR IN THE INSTANT CASE TO DISCLOSE THE EXISTENCE OF ANY PROMISES OF IMMUNITY, LENIENCY OR PREFERENTIAL TREATMENT TO SHADRICK MARTIN ON THE RECORD WITHOUT REQUIRING THE DEFENDANT TO ATTEMPT TO OBTAIN THAT INFORMATION FROM OTHER SOURCES

Shadrick Martin was the key witness for the State in rebutting the Defendant's assertion that he was not conscious during the homicide. Also, he served to establish the State's basis to argue premeditation and homicide for elimination of a witness.

The Defendant filed a Motion to Compel Disclosure of Existence of Promises and Immunity directed specifically to Shad Martin. The state objected to providing the defense with the prior arrest and conviction records of the witness. Additionally, the prosecutor objected to providing information concerning disclosure of the existence of promises and preferential treatment to Shad Martin, arguing that the defense attorney could get such information from the Assistant State Attorney handling Martin's pending case for armed burglary rather than through him (2818-2820). The court denied the Defendant's Motion for Disclosure of Existence of Promises from the prosecutor in the case, saying that the defense attorney could talk to the other Assistant State Attorney handling Martin's pending case, and look at a transcript of the plea of Shad Martin in that case (Martin had not been sentenced) (2820-2822).

The trial court improperly refused to require the State to itself disclose on the record any promises or suggestions of leniency it had offered Shad Martin. The defense attorney should not have been

required to talk to some other Assistant State Attorney to try to find out the existence of promises. Furthermore, the defense attorney should not have been limited to looking at a transcript of the plea of Martin to determine what promises, if any, were made to Martin. Martin had not yet been sentenced at the time of the Defendant's trial. Promises or assurances to Martin certainly would not necessarily be on the plea transcript record. The trial court placed an onerous and unreasonable burden on the Defendant to have to affirmatively seek from other sources other than the prosecutor handling the case for the State, the existence of any promises of leniency to Martin. Rather, the trial court should have placed the responsibility on the prosecutor to submit, on the record, all recommendations of benefit, leniency and compensation for Shad Martin's testimony. Brady v. Maryland, 373 U.S. 83 (1963); Jackson v. Wainwright, 390 F.2d 288 (5th Cir., 1968); Wilcox v. State, 299 So.2d 48 (Fla. 3d DCA 1974).

The trial court erred in placing the obligation on the Defendant rather than the State to determine the existence and substance of the promises of immunity and other preferential treatment of Shad Martin. For this reason, this cause should be reversed with instructions to the trial court to order the State, on the record, to disclose any such promises of immunity or leniency to Shad Martin.

## POINT VII

THAT THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE JURORS ROGER HILL AND VIRGINIA JAX SINCE THOSE JURORS, ALTHOUGH BEING OPPOSED PHILOSOPHICALLY TO THE DEATH PENALTY, STATED THAT THEY COULD FOLLOW THE LAW AS THE COURT INSTRUCTED THEM

The Defendant objected to the court granting the State's Motion to Strike Juror Virginia Jax and Roger Hill for cause. Both of those jurors, although indicating opposition philosophically to the death penalty, stated that they would follow the law as the court instructed them.

The United States Supreme Court recently rejected the previous test for exclusion for cause of jurors in opposition to the death penalty set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968). In Wainwright v. Witt, 105 S.Ct. 844 (1985), a Florida case, the court clarified the "general confusion surrounding the application of Witherspoon." It held that the proper standard for excluding jurors opposed to capital punishment was set forth in a later case, Adams v. Texas, 448 U.S. 38 (1980). In Adams, the court discussed its prior opinions dealing with juror exclusion and, in doing so, it noted the Witherspoon language in footnote 21. However, it did not apply the Witherspoon test; rather, the Adams court concluded:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

In the instant case, both jurors Roger Hill and Virginia Jax did indicate opposition to the death penalty. However, both of those jurors indicated during questioning that they would follow the law. Juror Hill even indicated that he could vote to recommend the death penalty (377; 380-381). Juror Jax, although struggling philosophically with the question, stated that she would follow the law (474). Clearly, the attitudes of jurors Hill and Jax concerning capital punishment would not prevent or substantially impair their performance of duties as a juror in accordance with the court's instructions and their oath as jurors. The Defendant would strongly submit that the dialogue with both jurors Hill and Jax indicates both jurors were very conscientious in their responses and attitudes concerning jury duty. The trial court erred in excluding those two jurors for cause.

## POINT VIII

THAT THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION TO EXCLUDE FOR CAUSE JUROR WILLIAM LUCAS

Juror Lucas indicated during voir dire that if he found the Defendant guilty of murder in the first degree, he would recommend that he be executed (428). The defense Motion to Strike Juror Lucas for cause was denied, and the Defendant was forced to use a preemptory challenge on him (498).

Certainly, a reading of the voir dire of juror Lucas shows that his strong belief in the death penalty in murder cases would substantially impair the performance of his duties to act as a juror in accordance with the trial court's instructions and his oath when considering mitigating and aggravating circumstances. The converse of the Wainwright v. Witt, supra, holding should apply to death-prone jurors whose attitudes substantially impair their ability to consider mitigating circumstances and to consider the appropriateness of a life sentence recommendation. Mr. Lucas could not lay aside his prejudice or bias in favor of the death penalty, therefore substantially impairing his ability to follow the court's instructions. For this reason, the trial court erred in failing to exclude for cause juror Lucas. See Davis v. State, 461 So.2d 67 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, 105 S.Ct. 229 (1984).

## POINT IX

THAT THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO EXCLUSION FOR CAUSE OF VENIRE PERSONS WHO INDICATED OPPOSITION TO THE DEATH PENALTY, INCLUDING JUROR ROBERT HILL AND JUROR VIRGINIA JAX

The Defendant, prior to voir dire, objected to any attempt by the State to have challenged for cause persons who indicated opposition to the death penalty, citing Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), currently on writ of certiorari to the United States Supreme Court. The Defendant acknowledges that this court rejected Grigsby in Witt v. State, 465 So.2d 510 (Fla. 1985). However, the Defendant raises this issue to preserve same on appeal, realizing the U.S. Supreme Court probably will resolve the issue in the near future. The Defendant also asks this court to reconsider its position on this issue. The Defendant's objection, and a defense motion to preclude any questioning by the State regarding prospective jurors' feelings regarding the death penalty, were overruled and denied.

During jury selection, the Defendant objected to the court granting the State's Motion to Strike Juror Robert Hill and Juror Virginia Jax for cause, based on general opposition to the death penalty.

In Grigsby v. Mabry, supra, the Eighth Circuit Court of Appeals recently held that a defendant's Sixth Amendment right to a jury comprised of a cross section or representation of a given community at the guilt-innocence phase of a trial was denied when venire persons who held even absolute scruples against the death penalty were excluded for cause. The court held that a Sixth Amendment violation occurs because

the State, by being able to have jurors excluded for cause for this reason, enjoys a conviction-prone jury. The court held that venire persons who stated they would never be able to impose the death penalty or would refuse to even consider the imposition of the death penalty regardless of the evidence constituted a "distinct and qualified group" under the constitutional principle which holds that the systematic exclusion of distinct qualified groups from jury service violates the cross-sectional representation of the community requirement of the Sixth Amendment.

In the instant case, it does not matter that the jury recommended life imprisonment. Under the "Grigsby" principle, under representation of a distinct group from the petit jury brought about by systematic challenge for cause affected the integrity of the entire jury system and no actual prejudice need be shown by the defendant. The exclusion for cause of those jurors caused the jury in the instant case to be more conviction prone. As the court in Grigsby pointed out, the State cannot assume that jurors with scruples regarding the death penalty will violate their oath and refuse to follow the law. The court erred in excluding those jurors for cause and overruling the Defendant's objection to the exclusion of jurors for cause who exercised opposition to the death penalty. The Defendant's conviction should be reversed for this reason.

## POINT X

THAT THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT

The trial court erred in imposing the death penalty after a death-qualified jury, by a majority vote, recommended life imprisonment. In Tedder v. State, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court announced the strict standard by which all jury override cases are measured:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts justifying a sentence of death should be so clear and convincing that virtually no reasonable person could differ. 322 So.2d 908, 910. (emphasis added)

The jury's consideration in the penalty phase is not a mere counting process of "x" number of aggravating circumstances and "y" number of mitigating circumstances, but a reasoned judgment in light of all the circumstances. Cf. Chambers v. State, 339 So.2d 204 (Fla. 1976) (Justice England, concurring). In a subsequent explanation of the Tedder principle, this court in Walsh v. State, 418 So.2d 1000 (Fla. 1982) ruled:

> This court has repeatedly held that the trial court must weigh heavily the sentencing jury's advisory opinion of life imprisonment. . . . We have allowed the trial court to overrule a life recommendation only where the facts justifying death are so clear and convincing that no reasonable person could differ. . . . And we have reversed the death sentence and directed the trial court to impose life imprisonment where there was a reasonable basis for a jury's recommendation. 418 So.2d 1000, 1003. (emphasis added; citations omitted)

See also Odom v. State, 403 So.2d 936 (Fla. 1981). A jury override is improper if the jury's recommendation of life is based upon mitigating

factors (both statutory and non-statutory) discernible from the record, Brown v. State, 473 So.2d 1260, 1270 (Fla. 1985); Porter v. State, 429 So.2d 293 (Fla. 1983), cert. denied, 104 S.Ct. 202 (1983).

The Defendant's sentence of death in the instant case must be reversed and a sentence of life imprisonment imposed in reviewing the Defendant's sentence in light of the Tedder principle, proportionality review, and in light of the trial court's errors in finding certain statutory aggravating factors and failing to find certain statutory mitigating factors.

### A. That the Defendant's Death Sentence Must Be Reversed in Light of a Proportionality Review

In applying the Tedder standard to jury override cases, this court often compares the case at hand with previously decided cases, either involving similar factual situations and/or similar aggravating and mitigating factors. See McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

In Burch v. State, 343 So.2d 831 (Fla. 1977), the Defendant was convicted of premeditated first degree murder of a victim he stabbed thirty-five to thirty-six times with a knife. Prior to the killing, the Defendant raped the victim. Two of three psychiatrists testified that the appellant therein was sane when the attack occurred but lost contact with reality as he continued. The third psychiatrist testified that he was uncertain whether the appellant became temporarily psychotic before or after he began stabbing the victim. The trial court imposed the death sentence over a jury recommendation of life. Upon review, this court reversed the death sentence and imposed a life sentence. The court noted that the jury's recommendation was predicated upon the

appellant's mental condition. More aggravating factors were present in Burch than in the instant case. The factual scenario in Burch is more aggravated than the factual scenario in the instant case, and the appellant's mental condition in Burch was not as pronounced as Hansbrough's mental condition at the time of the instant offense. That case also involved a jury finding of premeditated murder, whereas the Hansbrough jury found only felony murder.

During the Defendant's case, three psychiatrists and two clinical psychologists testified that the Defendant was legally insane at the time of the offense due to suffering a psychotic break as a result of drug withdrawal and preexisting brain dysfunction, triggered by the victim pulling the Defendant's hair. Additionally, even some of the State's expert witnesses conceded to Hansbrough's drug problem and addiction. Dr. Ernest Miller, a psychiatrist for the State, testified that although the Defendant was legally sane, the Defendant did have a drug dependency and addiction. In fact, he could not even exclude the possibility that the Defendant did, in fact, suffer a psychotic break at the time of the incident. Dr. Miller agreed that the Defendant was impaired at the time of the incident and agreed that the Defendant had a very disturbed background and severe drug addiction.

Another State psychiatrist, Dr. Robert Kirkland, testified that he felt that the Defendant "went into a frenzy or crazy" at the time of the homicide. Obviously, the testimony on the mental and physical impairment of the Defendant at the time of the incident is much stronger in the instant case than the situation in Burch. Furthermore, there was substantial evidence for the jury to find several non-statutory mitigating factors and several statutory mitigating factors in the

instant case that the trial court erroneously failed to find, to be described infra. Additionally, in the instant case, the trial court improperly found several aggravating factors which the jury obviously rejected, to be discussed infra.

In Norris v. State, 429 So.2d 688 (Fla. 1983), this court reversed the trial court's imposition of the death penalty over a jury recommendation of life in a case involving similar mental impairment by a defendant during the commission of a robbery resulting in death to the victim. The defendant in Norris broke into a residence occupied by a seventy-two year old woman and her ninety-seven year old mother. After beating both women, he ransacked the house and stole money and jewelry. The mother died a month after the beating due to blows to her head. The Defendant claimed to have been intoxicated at the time the crime was committed and claimed to have blacked out. The factual scenario in Norris was more aggravated than the facts in the instant case. Furthermore, more statutory mitigating factors exist in the instant case than in Norris. As in Norris, the Defendant in the instant case was convicted of felony murder rather than premeditated murder.

Other cases that are either proportionally similar or proportionally more aggravated than the instant case in which death sentences were reversed after jury recommendations of life imprisonment are Rivers v. State, 458 So. 2d 762 (Fla. 1984) (emphasizing mental impairment); Thompson v. State, 456 So.2d 444 (Fla. 1984) (relying on psychiatric testimony of appellant's mental capacity in support of mitigating circumstances as in the instant case); Jones v. State, 332 So.2d 615 (Fla. 1976) (death resulting from stabbing in which the pathologist counted thirty-eight significant stab wounds as well as many

other superficial scratches, indicative of a "frenzied attack" as described by the testifying pathologist. State psychiatrist, Dr. Kirkland, testified in the instant case that the stab wounds were inflicted when the Defendant "went into a frenzy or crazy"); Swan v. State, 322 So.2d 485 (Fla. 1975); Brown v. State, 367 So.2d 616 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980) (where this court found, in light of the jury's recommendation of mercy, that one statutory mitigating circumstance and several non-statutory mitigating circumstances were sufficient to outweigh the four statutory aggravating circumstances); Hawkins v. State, 436 So.2d 44 (Fla. 1983) (double murder but finding of felony murder versus premeditated murder as in the instant case); McCampbell v. State, 421 So.2d 1072 (Fla. 1982) (where this court held that entirely non-statutory mitigating factors outweighed three statutory aggravating factors in light of the jury's recommendation); Welty v. State, 402 So.2d 1159 (Fla. 1981) (this court emphasizing the jury's consideration of non-statutory mitigating factors in a case involving apparently no statutory mitigating factors but apparently two statutory aggravating factors).

The instant case also is proportionally similar to Ross v. State, 474 So.2d 1170 (Fla. 1985), wherein this court reversed a defendant's sentence of death notwithstanding that the jury also recommended death in that case. Ross was convicted of first degree premeditated murder of his wife. The victim suffered multiple head injuries caused by a blunt instrument, one resulting in death by embolism. The victim's face was extensively bruised, scratched and lacerated. Injuries on the victim's arms and hands indicated that she had fought her attacker. Ross testified and denied the killing. Two

cellmates of Ross testified that Ross confessed to them and that he also advised them that he raped the victim prior to killing her. This court, despite a jury recommendation of death, and despite upholding the trial court in finding the statutory aggravating factor that the offense was especially heinous, cold and calculated, reversed for imposition of a life sentence. This court found the trial court erred in not considering as a significant mitigating factor Ross' drinking problem and the fact that the defendant was apparently intoxicated at the time of the homicide (despite the fact that the defendant testified he was "cold sober" on the night of the murder during testimony in the sentencing proceedings).

In the instant case, the jury's recommendation was based upon mitigating factors (both statutory and non-statutory), clearly discernible from the record. Porter v. State, 429 So.2d 293 (Fla. 1983) cert. denied, 104 S.Ct. 202 (1983). The trial court itself found the existence of one mitigating factor, that being any other aspect of the defendant's character or record or any other circumstances of the offense.

Of course, the jury was instructed that mitigating circumstances need not be proved beyond a reasonable doubt. The jury was told that if it found it reasonable that a mitigating circumstance existed, that mitigating circumstance may be considered as established. See Florida Standard Jury Instructions in Criminal Cases (1981). Substantial evidence was presented in the record to support the non-statutory mitigating circumstances of (1) early turbulent home life, background and upbringing, Middleton v. State, 465 So.2d 1218 (Fla. 1985); Herring v. State, 446 So.2d 1049 (Fla. 1984); (2) evidence of the Defendant's

dull-normal intelligence, approaching the retarded range in the area of judgment, Mills v. State, 462 So.2d 1075 (Fla. 1985); Ruffin v. State, 397 So.2d 277 (Fla. 1981); (3) evidence of the Defendant's behavioral problems, Medina v. State, 466 So.2d 1046 (Fla. 1985); (4) evidence that the Defendant was intoxicated at the time of the incident, Buckrem v. State, 355 So.2d 111 (Fla. 1978); (5) evidence that the Defendant had no past history of violence, Jacobs v. State, 396 So.2d 713 (Fla. 1981); (6) the Defendant's positive personality traits presented through the Defendant's family and through John Cassady, a psychologist employed by the Orange County Jail, and Frank Burns, a counselor employed by the Orange County Jail, McCampbell v. State, 421 So.2d 1072 (Fla. 1982); (7) evidence of any potential capacity for rehabilitation, Mills v. State, supra; Menendez v. State, 419 So.2d 312 (Fla. 1982); and (8) evidence that the Defendant has converted to Christianity, Daugherty v. State, 419 So.2d 1067 (Fla. 1982).

In Barclay v. State, 470 So.2d 691 (Fla. 1985), this court reversed the trial court's imposition of the death penalty over the jury's recommendation of life, notwithstanding the court found that the trial court properly found two statutory aggravating circumstances and no statutory mitigating circumstances. The court found that under a Tedder review, reasonable persons could have differed as to the applicability of the jury recommendation, and so that recommendation should have been followed.

This court has emphasized the importance of testimony by psychiatrists and psychologists in providing evidentiary support for a jury's finding of both statutory and non-statutory mitigating circumstances. Clark v. State, 379 So.2d 97 (Fla. 1977); Patten v.

State, 10 F.L.W. 244 (Fla. S.Ct., January 10, 1986).

B. That the Trial Court Erred in Failing to Find the Existence of the Statutory Mitigating Circumstance that the Offense was Committed While the Defendant was Under the Influence of Extreme Mental or Emotional Disturbance F.S. §921.141(6)(b)

As stated above, mitigating circumstances need not be proved beyond a reasonable doubt but if there is a reasonable belief that a mitigating circumstance exists, that mitigating circumstance may be considered as established. The jury obviously had substantial evidence before it from which to find that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the incident. In light of the jury's recommendation of life imprisonment, the jury must have found the existence of this factor.

Three psychiatrists (Drs. Wilder, Scott and Gilbert) and two psychologists (Drs. Krop and Fisher) testified that the Defendant was actually legally insane at the time of the incident. All of the defense experts and some of the State's experts acknowledged that the Defendant was in drug withdrawal at the time of the offense which seriously impaired the Defendant's mental and physical condition. The defense experts testified to brain damage and the dull-normal IQ of the Defendant. The jury was presented with testimony that the Defendant was a drug addict, having been introduced to hard drugs at a non-volitional young age by his own father, who had been in and out of prison during his life. A 1981 EEG showed positive for the Defendant and a previous CAT scan of the Defendant showed an asymmetrical brain with a large left ventricle.

The State's own psychiatrist, Dr. Ernest Miller, agreed that the

Defendant was impaired at the time of the incident and agreed that the Defendant had a very disturbed background and a severe drug addiction. Another State psychiatrist, Dr. Robert Kirkland, testified that he felt the Defendant "went into a frenzy or crazy" at the time of the homicide. Certainly, there was substantial evidence presented to support the statutory mitigating circumstance of extreme mental or emotional disturbance of the Defendant. As stated in Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 451 U.S. 916:

> The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. 390 So.2d 332 at 337.

In Burch v. State, supra, a case involving a rejected insanity defense, this court expressly recognized the applicability of the "extreme mental or emotional disturbance" mitigator and held that the jury could have properly considered this circumstance in rendering its advisory sentence of life imprisonment. Burch, 343 So.2d 831, 834.

In Jones v. State, 332 So.2d 615 (Fla. 1976), the court noted:

> Extreme emotional conditions of defendants in murder cases can be a basis of mitigating punishment. The defendant clearly had a mental deficiency. The court should have followed the jury's recommendation of a life sentence. 332 So.2d 615, 619.

In Cannady v. State, 427 So.2d 723 (Fla. 1983), this court indicated that judicial disagreement over the weight to be accorded expert testimony is not sufficient to override the jury's recommendation of a life sentence. See also Huckaby v. State, 343 So.2d 29 (Fla. 1977); Kampff v. State, 371 So.2d 1007 (Fla. 1979). In the instant case, there was a plethora of evidence regarding Hansbrough's alcohol and drug use, his chronic chemical dependency and his severe withdrawal from Diluadid at the time of the murder. As the above cases indicate,

these mental disturbances support the jury's obvious finding of this statutory mitigator.

C. That the Trial Court Erred in Failing to Find as a Statutory Mitigator that the Defendant had No Significant History of Prior Criminal Activity, F.S.§921.141(6)(a)

The Defendant's only criminal conviction presented to the jury was a conviction for DWI, although the Defendant had apparently been placed on pre-trial diversion which did not result in a conviction or finding of guilt in a previous incident in North Carolina. Although this court has never required that any particular definition be given to the mitigating circumstance "no significant history of prior criminal activity," Funchess v. State, 449 So.2d 1283 (Fla. 1984), the court has indicated general criteria for application of this factor. In Dixon v. State, 283 So.2d 1 (Fla. 1973), this court stated:

> As to what is significant criminal activity, an average man can usually look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represent significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance. 283 So.2d 1 at 9.

In light of the jury's recommendation of life imprisonment, and in light of the relaxed burden of proof to support mitigating circumstances, the trial court erred in failing to find this statutory mitigating circumstance.

D. That the Trial Court Erred in Failing to Find the Existence of the Statutory Mitigating Circumstance that the Defendant Acted Under Extreme Duress at the Time of the Homicide F.S.§921.141(6)(e)

Trial testimony in the case demonstrated that Hansbrough was

suffering from severe withdrawal from Diluadid at the time of the homicide. Moreover, expert medical testimony indicated that as a result of his chronic drug addiction, the Defendant suffered from an organic brain dysfunction and a physical brain abnormality. Medical experts for both the Defendant and the State acknowledged that aggressive action directed towards an individual in the Defendant's condition (the victim pulling the Defendant's hair) could trigger a dissociative psychotic break.

In Miller v. State, 373 So.2d 882 (Fla. 1977), this court stated:

> The court specifically finds from the testimony of the Defendant, the psychiatrists, medical records, various witnesses who observed and followed the defendant after the purchase of the knife and the witness who testified about the defendant's behavior at the jail, that the defendant was suffering from mental illness at the time the murder was committed and that this mental sickness or illness met the criteria of mitigating circumstances set out above and designated by the statute as §921.141(6)(b),(e) and (f). Id., at 888.

The court in Miller found such evidence supported the finding of three statutory mitigating factors.

In light of the jury's recommendation and substantial evidence presented on this issue, the trial court erred in failing to find this statutory mitigating circumstance.

### E. That the Trial Court Erred in Failing to Find the Existence of the Statutory Mitigating Circumstance that the Capacity of the Defendant Defendant to Appreciate the Criminality of His Conduct or to Conform His Conduct to the Requirements of Law Was Substantially Impaired F.S.§921.141(6)(f)

The three psychiatrists and the two psychologists called by the Defendant all testified to the existence of this factor in the "guilt

and innocence phase." Additionally, two psychiatrists for the State, Dr. Ernest Miller and Dr. Robert Kirkland, agreed that the Defendant was impaired at the time of the incident. During the penalty phase, Dr. Brad Fisher, a clinical psychologist, testified that within a reasonable degree of medical certainty, the homicide was committed while the Defendant was under the influence of extreme mental or emotional disturbance or distress, and that at the time, the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. There is substantial evidence in the record to support the existence of this mitigating factor which the jury obviously found to exist in light of their penalty recommendation.

In Toole v. State, 479 So.2d 731 (Fla. 1985), the court found the testimony concerning the defendant's mental condition supported two mitigating circumstances, those being that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The instant case is indistinguishable from Toole v. State, supra.

In Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 4051 U.S. 916 (1981), the court held that in a situation in which the defendant was suffering from a mental deficiency, those two statutory mitigators [§921.141(6)(b) and (f)] should be considered.

Although the instant mitigating factor is applied in many of the same cases in which the "mental and emotional disturbance" mitigators apply, this court treats these as separate and distinct circumstances in

mitigation. See e.g., Burch v. State, 343 So.2d 831 (Fla. 1977); Cannady v. State, supra, at 727; Jones v. State, 332 So.2d 615 (Fla. 1976). The trial court clearly erred in failing to recognize the jury's finding of the existence of this factor.

F. That the Trial Court Erred in Failing to Find the Existence of the Statutory Mitigating Circumstance of the Age of the Defendant at the Time of the Offense F.S.§921.141(6)(g)

The Defendant was twenty-two years old at the time of the homicide. The evidence showed that he had an IQ level in the dull-normal range, with subscales in the IQ test range showing a retarded level in areas of judgment. A psychiatrist, Dr. William Scott, testified that the Defendant's IQ was consistent with someone who had diminished capacity to function intellectually and behaviorally. Several witnesses testified that the Defendant had organic brain damage.

This court, in Peek v. State, 395 So.2d 492 (Fla. 1981) stated:

> There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of the finding with respect to this circumstance depends upon the evidence adduced at trial, and at the sentencing hearing.

In Thompson v. State, 389 So.2d 197 (Fla. 1980), the trial court found the age mitigation circumstance applicable where the defendant was twenty-six years old. In Brown v. State, 381 So.2d 690 (Fla. 1980), the defendant, as with Hansbrough, was twenty-two years of age at the time of the offense. Both the trial court and the Florida Supreme Court found the defendant's age to be a mitigating circumstance. Similarly, in King v. State, 390 So.2d 315 (Fla. 1980), a defendant's age of twenty three was sufficient to support application of the instant factor. See also, Hoy v. State, 353 So.2d 826 (Fla. 1977) (trial court finding age

twenty two to be a mitigating circumstance); Oats v. State, 446 So.2d 90 (Fla. 1984) (trial court finding age twenty two to be sufficient mitigating circumstance).

In light of the jury recommendation, the jury must have found age as a mitigating circumstance in the instant case. Record evidence the instant case indicates the Defendant's mental age was exceeding lower than his actual chronological age in light of his intellectual level and reported brain tissue damage. The trial court erred in failing to find the existence of this mitigating factor.

G. That the Trial Court Erred in Finding the Existence of the Statutory Aggravating Factor that the Capital Felony was Committed for Purposes of Avoiding or Preventing a Lawful Arrest or an Escape from Custody F.S.§921.141(5)(e)

Initially, the Defendant would state that the evidence arguably supports only the existence of one aggravating factor--that the offense was committed for pecuniary gain. The Defendant, during the penalty phase, objected to any consideration of the instant aggravating factor in light of the jury verdict of guilty of felony murder rather than premeditated murder. The defense argued that neither the jury nor the trial court could legally consider this factor since the existence of premeditation must be a necessary mental element for a person to kill another for the purpose of avoiding or preventing a lawful arrest or to eliminate a witness. The trial court was bound by the factual determination of the jury. The trial court's finding of this aggravating circumstance is a logical impossibility. Additionally, this aggravator, as any aggravator, must be established beyond a reasonable doubt. Clark v. State, 443 So.2d 973 (Fla. 1983). Because the jury did not find

premeditation, the trial court erred in finding the existence of this statutory aggravator.

Furthermore, when the victim is not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1978). The State relied upon the testimony of the Defendant's cellmate, Shadrick Martin, to support the existence of this aggravating circumstance. However, Martin was substantially discredited by defense counsel during cross examination and during the presentation of several witnesses, including Martin's own psychiatrist, who testified to factors which indicated Martin was a liar. Both during the Defendant's closing argument and the "guilt and innocence phase," as well as the Defendant's argument in the penalty phase, the Defendant argued to the jury to reject Martin's testimony. In light of the jury's finding of felony murder, the jury obviously did reject Martin's testimony. Despite the jury's recommendation, the trial court, in its Order of Factual Findings, stated that it chose to believe the testimony of Shadrick Martin despite his impeachment by the defense. The trial court was bound by the jury's special verdict finding of felony murder versus premeditated murder. The trial court clearly erred in finding the existence of this aggravating factor. See Griffin v. State, 474 So.2d 777 (Fla. 1985).

The instant case is similar to Rivers v. State, 458 So.2d 762 (Fla. 1984). As in the instant case, Rivers was convicted of first degree felony murder and robbery. The jury's verdict specified felony murder rather than first degree murder as charged as the basis for liability. The trial court imposed the death sentence over the jury's recommendation of life. Among the aggravating circumstances found by

the trial court was that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. On appeal, this court held that the trial court erred in finding that the murder was committed for the purpose of avoiding a lawful arrest, stating:

> We find this conclusion to be speculative and the evidence insufficient to prove beyond a reasonable doubt that this was the reason appellant shot the waitress. Past cases show that a finding of this circumstance should be based on direct evidence as to motive or at least very strong inference from the circumstances (citations omitted). Our ruling is also supported by the fact that the jury found appellant guilty of felony murder, not premeditated murder. 458 So.2d at 765. (emphasis added.)

The trial court erred in finding the existence of this factor. See also, Armstrong v. State, 399 So.2d 953 (Fla. 1981).

H. That the Trial Court Erred in Finding the Existence of the Aggravating Factor that the Offense was Committed in a Cold, Calculated and Premeditated Manner F.S.§921.141(5)(i)

This court has held that the "cold, calculated and premeditated" component of this aggravating circumstance requires some sort of heightened premeditation, something in the perpetrator's state of mind beyond the specific intent required to prove premeditated murder. Wright v. State, 473 So.2d 1277 (Fla. 1985); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). This court has further held that the heightened premeditation and advanced planning are the kinds of factors that properly bear on the "cold, calculated" circumstance. McCray v. State, 416 So.2d 804, 807 (Fla. 1982) (circumstance ordinarily applies to "executions or contract murders"). The factor places a limitation on the use of premeditation as an aggravating circumstance in the absence of some quality setting the crime apart from mere ordinary premeditated murder. Combs v. State, 403

So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

As stated above, the jury found the Defendant guilty of felony murder, not premeditated murder. In another felony murder case, Rembert v. State, 445 So.2d 337 (Fla. 1984), this court rejected the trial court's application of this factor in a case indistinguishable from this case. See also, Peavey v. State, 442 So.2d 200 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Blanco v. State, 452 So.2d 520 (Fla. 1984) (aggravating factor of cold, calculated and premeditated not applicable where evidence susceptible of interpretation that the defendant entered the victim's residence with the intent to steal and was surprised by the victim's attempt to take a gun from him. The defendant fired subsequent shots immediately after the attempt by the victim to get the gun; no showing of heightened premeditation or planning); Cannady v. State, 427 So.2d 23 (Fla. 1983).

The jury specifically rejected the theory of premeditation in the instant case and the trial court was bound by that factual finding. Since the jury found that no premeditation existed, there obviously can be no heightened premeditation to support this aggravating factor. The trial court's finding completely ignored the jury's finding and constitutes a logical impossibility. Furthermore, no other circumstances are present to prove this fact beyond a reasonable doubt. The trial court clearly erred in finding the existence of this factor.

I. That the Trial Court Erred in Finding the Aggravating Statutory Circumstance that the Homicide was Especially Heinous, Atrocious or Cruel F.S.§921.141(5)(h)

In Dixon v. State, 283 So.2d 1 (Fla. 1973), the court 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, or 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--a consciousless or pitiless crime which is unnecessarily torturous to the victim. 283 So.2d 1 at 9.

In Huckaby v. State, 343 So.2d 29 (Fla. 1977), this court recognized that mental deficiency and/or incapacity could negate application of this factor. Although the jury in the instant case rejected the insanity defense, there was substantial evidence that the Defendant was mentally impaired. Indeed, one of the State's psychiatrists testified that the Defendant went in to a "frenzy or crazy" at the time of the homicide. Actually, the evidence shows that the homicide took place during an altercation between the Defendant and the victim and the death of the victim took several minutes, according to the medical examiner. For these reasons, especially in light of the jury's recommendation of life imprisonment, the trial court erred in finding this aggravating factor proven beyond a reasonable doubt.

### J. That if this Court Reverses for a New Trial, this Court Should Order that the Only Legal Sentence the Defendant Can Receive, if Again Convicted, is Life Imprisonment

The trial court clearly erred in imposing the death penalty. If this court reverses for a new trial, the Defendant should not again be forced with a possible death sentence if convicted, in light of this jury's recommendation of life imprisonment. Otherwise, the Defendant would be punished for appealing the judgment of guilt as well as the sentence. North Carolina v. Pearce, 395 U.S. 711 (1969).

## POINT XI

THAT THE TRIAL COURT ERRED IN IMPOSING AN ILLEGAL SENTENCE ON THE DEFENDANT ON THE ARMED ROBBERY CHARGE BY SENTENCING THE DEFENDANT TO 75 YEARS IN THE DEPARTMENT OF CORRECTIONS IN VIOLATION OF FLORIDA STATUTE §775.082(3)

The Defendant was convicted of armed robbery, a first degree felony, punishable by up to life imprisonment (5283). The court ruled his guidelines sentence range was 4½ years to 5½ years. The court departed from the recommended guideline sentence and imposed a sentence of 75 years in prison with the court retaining jurisdiction for release up to 25 years, consecutive to Count I. This constitutes an illegal sentence.

Florida Statute §775.082(3) (1983) provides:

> A person who has been convicted of any other designated felony may be punished as follows: . . . (b) by a felony of the first degree, by a term of imprisonment not exceeding 30 years or, where specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

The court in the instant case was limited to a sentence of 30 years imprisonment on a departure. Compare F.S.§775.082(4) (1983) (term of imprisonment for life or by a term of imprisonment not exceeding 40 years, for a life felony committed after October 1, 1983). Had the Defendant been convicted of a life felony, the court would have been limited, if it imposed a term of years sentence versus a life sentence, to 40 years of imprisonment. If this court upholds the Defendant's conviction on the armed robbery charge, it should direct the trial court, on resentencing, to impose a sentence not exceeding 30 years imprisonment.

## POINT XII

THAT THE TRIAL COURT ERRED IN SCORING THE DEFENDANT FOR VICTIM INJURY ON THE ARMED ROBBERY CHARGE, RESULTING IN AN IMPROPER GUIDELINES RANGE

The Defendant was given 21 points for victim injury (death) on the guidelines score sheet for the armed robbery charge. With that improper scoring of 21 points, the Defendant received a total of 108 points, which placed him in the 4½ to 5½ year recommended guidelines range (5284). However, without that scoring, the Defendant would have fallen into the 3½ to 4½ year recommended guidelines range.

In Hendry v. State, 460 So.2d 589 (Fla. 2d DCA 1984), the court held that victim injury points should not have been included in scoring the defendant for armed robbery because it was not an element of the crime. The trial court in the instant case improperly scored the Defendant for victim injury on the armed robbery charge which resulted in him being placed in an improper recommended range for sentencing. The Defendant's recommended range should be changed to 3½ to 4½ years and the Defendant legally sentenced within that range.

## POINT XIII

THAT THE TRIAL COURT ERRED IN IMPROPERLY DEPARTING FROM THE RECOMMENDED GUIDELINES RANGE PERIOD AND SENTENCING DEFENDANT TO 75 YEARS IN THE DEPARTMENT OF CORRECTIONS FOR THE ARMED ROBBERY CONVICTION

The trial court departed from the recommended guidelines sentence range of 4½ years to 5½ years (improper guidelines range in light of Point 12) and sentenced the Defendant to 75 years in the Department of Corrections. The trial court relied upon seven reasons for departure.

Fla.R.Crim.Pro. 3.701(b)(7) states that while the sentencing guidelines are not intended to usurp judicial discretion, the sentencing judgments must support departures in writing with clear, convincing reasons. Furthermore, Fla.R.Crim.Pro. 3.701(b)(11) states:

> Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating defendant's sentence.

This court has held that this section of the rules is intended to discourage departures, without eliminating judicial discretion in sentencing. Hendrix v. State, 475 So.2d 136 (Fla. 1985). The standard for review is whether the sentencing judge abuses his discretion in pronouncing sentence, i.e., whether the sentence and reasons for departure are legal and supported by clear and convincing reasons.

This court has held that if a sentence is grounded on both permissible and impermissible reasons, the case must be reversed and remanded for resentencing unless the State can prove beyond a reasonable doubt that the sentence would have been the same without the impermissible reasons. State v. Young, 476 So.2d 161 (Fla. 1985);

Albritton v. State, 476 So.2d 158 (Fla. 1985). However, as stated in a previous point, the Defendant's recommended guideline range is improper. Furthermore, all or several of the seven reasons for departure were not proper grounds for departure. Choosing from a "laundry" or "shopping" list of reasons for departure as the trial court did in the instant case is not proper. Brooke v. State, 456 So.2d 1305 (Fla. 1st DCA 1984).

A. That the Trial Court's Reliance Upon the Fact that "Armed Robbery Planned in Advance by the Defendant," was an Improper Reason for Departure

The fact that Hansbrough may have planned the robbery is not a valid reason for departing from the guidelines. In Karney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), the trial court used the fact that the robbery the defendant had committed was premeditated as a basis for departure from the guidelines. On appeal, the First District Court of Appeal held:

> The factors that the robbery was premeditated and calculated and for pecuniary gain and that there was no provocation for the robbery are, practically speaking, an inherent component of any robbery and, hence, may be properly viewed as already embodied in the guidelines recommended sentencing range.

See also, Frances v. State, 10 F.L.W. 2293 (October 4, 1985). The court improperly utilized this ground for departure.

B. That the Trial Court Improperly Utilized the Reason "Used a Dangerous Weapon in the Commission of the Armed Robbery" as a Reason for Departure

Use of a dangerous weapon is an inherent component of armed robbery and hence, may properly be viewed as already embodied in the guidelines recommended sentencing range. C.f. Karney v. State, supra.

In Bowdoin v. State, 464 So.2d 596 (Fla. 4th DCA 1985), the defendant was convicted of robbery with a deadly weapon. The sentencing

court used the fact that a firearm was used during the commission of the offense to depart from the sentencing guidelines. The Fourth District Court of Appeal held that use of a firearm was already factored into the presumptive sentence; therefore, this was an invalid reason for departure from the sentencing guidelines. Callahan v. State, 462 So.2d 832 (Fla. 4th DCA, 1984); Allen v. State, 10 F.L.W. 2336 (October 9, 1985). The trial court improperly utilized the factor that the Defendant used a dangerous weapon in the commission of the armed robbery as a reason for departure.

C. That the Trial Court Improperly Utilized the Factor Department of Corrections' Recommendation was 'Dispose of this Case in the Most Severe Manner Possible'" as a Reason for Departure

The trial court improperly utilized a recommendation by the Department of Corrections that the case be disposed of in the "most severe manner possible" as a reason for departure from the sentencing guidelines range. Certainly, this reason constituted an improper delegation of the trial court's responsibility to sentence to a probation interviewer. This ground is also vague. Moreover, the Department of Corrections' recommendation was based upon the Defendant's conviction for murder rather than for the armed robbery conviction. This is clearly an improper reason for departure.

D. That the Trial Court Improperly Considered as a Reason for Departure "Defendant's Sentence to Death for Indictment--First Degree Murder Count I"

The fact that the Defendant was sentenced to death for the other charge in this matter should not be a valid basis for departure in the armed robbery case. This case is dissimilar from Smith v. State, 454

So.2d 90 (Fla. 2d DCA 1984), wherein a defendant committed a murder approximately twelve hours before committing an armed robbery. The court held that the sentencing court properly considered the fact on the prior capital felony as a reason for departure from the guidelines. However, in the instant case, the armed robbery and the homicide were committed virtually at the same time. Moreover, the mere fact that the Defendant was sentenced to death for a separate charge is not a proper reason for departure.

E. That the Trial Court Improperly Utilized as a Reason for Departure "Presumptive Guideline Range Not Commensurate with Seriousness of Case"

It has been held that it is improper for a trial court to depart from the guidelines sentencing range on the ground that the guidelines sentence would not be commensurate with the seriousness of the crime. In Allen v. State, supra, the defendant was convicted of manslaughter, kidnapping, robbery and burglary. The sentencing court used the reason "imposition of a guidelines sentence would depreciate the seriousness of the crime" to depart from the guidelines sentence. The Second District Court of Appeal held that this was an invalid reason for departing from the guidelines. Furthermore, the seriousness of the crime is already factored into the sentencing guidelines.

In the instant case, this reason does not constitute a "clear and convincing reason" for departure, and the trial court's error in applying said reason.

F. That the Trial Court Improperly Considered Two Other Reasons for Departure "Excessive Force in the Homicide with Occurred During this Armed Robbery;" and "Cruelty Established by Infliction"

The Defendant would acknowledge that these factors have been determined to be appropriate in certain circumstances. Hendry v. State, 460 So.2d 589 (Fla. 2d DCA 1984); Green v. State, 455 So.2d 588 (Fla. 2d DCA 1984).

The Defendant would submit that under the particular facts of the instant case, the armed robbery charge was a lesser included offense of the felony murder charge. For this reason, the Defendant would submit that these two reasons for departure were improper.

G. That the Trial Court Clearly Abused its Discretion in the Extent of its Excessive Departure in Sentencing the Defendant to 75 Years Imprisonment When the Recommended Guideline Range Suggests a Sentence of 4½ to 5½ Years

In McBride v. State, 477 So.2d 1090 (Fla. 4th DCA 1985), the court held that the standard of review to determine if the extent of departure from the sentencing guidelines is proper is whether there was an abuse of discretion. The court held that to determine whether an abuse of discretion has occurred, the reviewing court must consider the following issues: (1) the indicated guidelines sentence; (2) extent of departure; (3) reason for departure; (4) the record.

In McBride, the court held that the trial court abused its discretion in departing five times the recommended guidelines sentence range. A defendant is not to be foreclosed from asserting that the extent of departure is an abuse of discretion. See also Albritton v. State, supra. Otherwise, if the exercise of discretion as to the extent of departure is not reviewable, unwarranted disparity will remain in sentencing practices. In Booker v. State, 10 F.L.W. 2751 (December 13, 1985), the court certified the question to this honorable court to

determine what criteria should be used to determine if the extent of departure from the guidelines is valid. In the instant case, since the Defendant was sentenced separately for the homicide charge, Defendant would submit that the trial court abused its discretion in the excessive departure from the guidelines range. Furthermore, the trial court in the instant case departed over thirteen times the maximum recommended sentencing range, clearly an abuse of discretion under the McBride standard.

## POINT XIV

THAT THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT ON THE ARMED ROBBERY CHARGE SINCE, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, ARMED ROBBERY CONSTITUTES A LESSER INCLUDED OFFENSE OF THE FELONY MURDER CHARGE FOR WHICH THE DEFENDANT WAS ALSO CONVICTED

In State v. Enmund, 10 F.L.W. 441 (Fla. S.Ct., August 29, 1985), this court held that an underlying felony is not a necessarily lesser included offense of felony murder, overruling State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). This court, in receding from past cases, held in that case that the defendant could be convicted of and sentenced for both felony murder and the underlying felony. However, the Enmund case, by stating that "an underlying felony is not a necessarily lesser included offense of felony murder" seemed to leave unanswered whether in all cases under the particular facts and circumstances, a defendant could be sentenced for both the underlying felony as well as for felony murder.

In the instant case, the armed robbery charge and the murder charge are based on a continuous or successive transaction. There is only a very short time lag between the armed robbery and the homicide. Both occurred in the same location. The Defendant would respectfully submit that under the facts and circumstances of this case, it would be improper for him to be convicted of and sentenced for both felony murder and the underlying felony of armed robbery.

Alternatively, the Defendant would ask the court to reconsider its decision in State v. Enmund, supra, especially in light of Justice Overton's opinion in that case, dissenting from the majority's overruling of Hegstrom, supra. As Justice Overton stated in Enmund:

> Because the elements of the felony are the elements utilized as a substitute for premeditation establishing first degree murder, I conclude that two separate sentences cannot be imposed for the identical conduct. By holding that a defendant may be sentenced for both the underlying felony and first degree felony murder, the majority's opinion, in my view, jeopardizes our felony murder rule and all the convictions we have affirmed on the basis of felony murder. 10 F.L.W. 441 at 442 (Overton, J., concurring in part, dissenting in part).

For the above reason, the trial court erred in sentencing the Defendant for the armed robbery conviction.

## POINT XV

THAT THE TRIAL COURT ERRED IN RETAINING JURISDICTION OVER THE DEFENDANT FOR REVIEW OF PAROLE RELEASE ORDER AND JUSTIFICATION THEREFORE SINCE, UNDER A GUIDELINE SENTENCE, THE DEFENDANT IS NOT ELIGIBLE FOR PAROLE

The trial court entered an "Order Retaining Jurisdiction Over the Defendant for Review of Parole Release Order and Justification Therefore," retaining jurisdiction over one-third of the 75 year sentence imposed, pursuant to Florida Statute §947.16(3) (1984) (6504-6505). However, the Defendant was sentenced pursuant to the sentencing guidelines, and thus is not eligible for parole. Therefore, the trial court erred in retaining jurisdiction over the Defendant to review parole release since the Defendant, on a guidelines sentence of a term of years, is not eligible for parole. The Order Retaining Jurisdiction Over the Defendant for Review of Parole Release on the armed robbery charge should therefore be stricken.

## CONCLUSION

Based on the foregoing arguments and citations of authority, the Defendant would submit that this court should reverse the Defendant's convictions for first degree felony murder and for armed robbery and order a new trial. If the court does not grant this relief, the Defendant would strongly submit that the trial court erred in sentencing the Defendant to death over the jury recommendation of life imprisonment. Furthermore, the court imposed an illegal sentence and otherwise improperly sentenced the Defendant to seventy-five years on the armed robbery charge and that sentence should be reduced accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Margene A. Roper, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014, this 19th day of February, 1986.

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