IN THE SUPREME COURT OF FLORIDA

FRANK LEE SMITH,)
Appellant,)
vs.)
STATE OF FLORIDA)
Appellee.)

CASE NO: 68, 834

BRIEF OF THE APPELLANT

Appeal from the Circuit Court
Seventeenth Judicial Circuit in and for
Broward County, Florida
Judge Robert W. Tyson, Jr.
Case No: 85-4654 CF

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PRELIMINARY STATEMENT

The Appellant, FRANK LEE SMITH, was the Defendant in the trial court of the Circuit Court of the Seventeenth Judicial Circuit, the Honorable Robert W. Tyson, Jr. presiding; Appellee, State of Florida, was the Plaintiff in the trial court. They will be referred to in this brief as Appellant or SMITH, and Appellee or State.

STATEMENT OF THE CASE

The Appellant FRANK LEE SMITH was arrested on April 18, 1985 and was indicted by the Grand Jury in Broward County, Florida, charging First Degree Premeditated Murder of Shandra Whitehead, charging Sexual Battery upon Shandra Whitehead, a person eleven years of age or younger, and charging Burglary With Assault (Tr. vol. X, pg. 1446). Various pre-trial motions were filed and litigated, including a Motion to Disqualify the Trial Court, which was denied (Tr. vol. X, pg. 1493; vol. I, pg. 97), and a Motion to Suppress Statements which was granted in part and denied in part (Tr. vol. I, pgs. 87-88). The trial of the matter commenced before a jury on January 21, 1986, with the jury convicting the Appellant on all counts, as charged, on January 31, 1986 (Tr. vol. X, pgs. 1505-1507). On February 5, 1986, an advisory hearing was held before the same jury, with the jury recommending the death sentence by a unanimous vote. (Tr. vol. X, pg. 1527). A pre-sentence investigation was ordered by the trial court, and sentencing was reset until April 4, 1986, at which time the Appellant's Motion to Continue the sentencing for psychiatric examinations was granted by the trial court (Tr. vol. VIII, pg. 1376). On May 2, 1986, the trial court, upon agreement by all parties, considered the three psychiatric reports which were prepared,

and upon review, found the Appellant to be competent and sane for the purpose of sentencing (Tr. vol. IX, pg. 1395). The trial court then granted the State's previously filed motions to declare the Appellant an habitual offender regarding Count III (Burglary with Assault), and granted the corresponding Motion to Aggravate the Sentencing outside of the guidelines, with a life sentence imposed on Count III (Tr. vol. IX, pg. 1404). The Appellant was then sentenced to life with a mandatory twenty-five year sentence on Count II, which is the Capital Sexual Battery (Tr. vol. IX, pg. 1406), and the Appellant was sentenced to death on the first Count in accordance with the jury's recommendation with the finding of five aggravating circumstances (Tr. vol. IX, pgs. 1427, 1440). Appellant's Motion for New Trial and post-conviction relief was denied by the trial court (Tr. vol. X, pg. 1531). This timely appeald followed.

STATEMENT OF THE FACTS

As Dorothy McGriff finished her customary four-to-eleven shift of work as a nurse on April 14, 1985, she took some comfort in knowing that her two children, Reginald, age 9 and Shandra Whitehead, age 8, were being checked upon by her sister Shirley McGriff. In fact, Shirley McGriff, the aunt of Shandra Whitehead, had been to the house at 2970 NW 8th Place in Fort Lauderdale, Broward County, Florida, to visit the two children at approximately 10:30 PM on April 14 (Tr. vol. IV, pg. 607). As Shirley McGriff left the house that night, she left Reginald and Shandra watching a TV which was placed on a shelf in the living room (Tr. vol. IV, pg. 607).

As Shandra's mother, Dorothy McGriff, came home later that night at approximately 11:30 PM, she saw the figure of a man by the window of the room where Dorothy and her children slept, and the man appeared to be reaching for something in the window (Tr. vol. V, pgs. 636-637). When the car headlights and her shouts failed to chase the man away, Dorothy McGriff grabbed a sling blade used for yard work and chased the man away (Tr. vol. V, pg. 638). Dorothy McGriff then ran into the house shouting for her children, at which time Reggie woke up, but the victim Shandra did not, as she was badly hurt (Tr. vol. V, pg. 640). Dorothy McGriff ran

to the neighbor's house and police were called, with Deputy Earl Pearson being the first to arrive at the scene, finding the injured victim and the hysterical mother. (Tr. vol. IV, pgs. 504-506). Dorothy McGriff was able to give a description of the man that she chased, and a be-on-the lookout bulletin was issued with the general description (Tr. vol. IV, pg. 507).

In the meantime, Shandra Whitehead was taken to the hospital where Dr. Morris Epstein treated her, finding that she had no pulse or blood pressure when she was brought into the hospital and that she was, in fact, brain dead when brought in (Tr. vol. V, pgs. 714-715). It was found also that the victim was bleeding from vaginal and anal trauma (Tr. vol. V, pg. 716).

It was stipulated by all parties involved that as charged in the Indictment, Shandra Whitehead, in fact, languished and eventually died on April 23, 1986 (Tr. vol. IV, pgs. 569-570). An autopsy performed by Dr. Ronald Reeves indicated severe blows to the head, a small fracture of the skull, with the cause of death ultimately being determined to be multiple blows to the head and trauma to the brain (Tr. vol. IV, pgs. 578-582).

After seeing the police cars and ambulances at the scene of the murder, a neighbor of the family, Chiquita Lowe, came forward and told the police that earlier in the evening, around 10:30 PM, she was driving past the house of the victim

when she was flagged down by a man near the house (Tr. vol. IV, pg. 668). When the strange and somewhat delirious looking man asked her for fifty cents, Chiquita Lowe refused and drove away, noticing that the man then approached and talked to another neighbor, Gerald Davis (Tr. vol. V, pgs. 669, 672-673). Gerald Davis was then located and interviewed, and indicated that as he walked near the home of Shandra Whitehead, a man hissed at him from a vacant lot across from Whitehead's house (Tr. vol. V, pg. 746). Gerald Davis then saw Chiquita Lowe drive away, and was then approached by the same man who eventually made sexual advances toward Gerald Davis. (Tr. vol. V, pg. 749). When these advances were spurned, the man stated that he would have to then go into the woods and masturbate, and Davis last saw the man walking back toward the direction of Shandra Whitehead's house (Tr. vol. V, pgs. 749-750). Both Chiquita Lowe and Gerald Davis cooperated and helped Sheriff's Office artists compile a sketch of the suspect (Tr. vol. V, pg. 674; vol. VI, pg. 862; vol. IV, pg. 600), with the sketch being decided upon and distributed on April 17, 1985 (Tr. vol. VI, pg. 862). This sketch was distributed throughout the area (Tr. vol. VI, pg. 888) and eventually found its way into the hands of Roosevelt Delaney - a friend of Chiquita Lowe's uncle, Jack Lampley.

On April 18, 1986, Chiquita Lowe was asleep at the

home of her uncle, Jack Lampley, such home being approximately one block from the home of Shandra Whitehead (Tr. vol. VI, pg. 803). Chiquita was awakened by the sounds of a person trying to sell a TV set to Jack Lampley (Tr. vol. V, pgs. 876-877). She was able to see the putative salesman and recognized him as being the same person who had asked her for money on the night of the killing and as a person who looked like the sketch that was brought to the house by Roosevelt Delaney (Tr. vol. VI, pgs. 677, 806).

Chiquita Lowe's ensuing phone call to the police led to Lieutenant Phillip McCann going to the area with a sketch and with a citizen (Mobley) looking for the suspect (Tr. vol. VI, pg. 853). The Appellant was located and identified by Mobley, leading to his arrest at gunpoint on April 18, 1985 (Tr. vol. VI, pg. 854). Upon being returned to the police station, the Appellant was interviewed by Detectives Sheff and Amabile, both homicide detectives, who used an interviewing ploy: telling the Appellant that the older brother, Reginald, saw the person who did the rape and killing of Shandra, although this was not true. This ploy, meant to elicit a reaction, did just that, with the Appellant making the statement that there was no way that the kid could have seen the Appellant, as it was too dark in there (Tr. vol. VI, pgs. 900, 984). Photo lineups were also prepared and showed to Dorothy McGriff, Gerald Davis and Chiquita Lowe, with

identifications being tentatively made of the Appellant (Tr. vol. VI, pgs. 902, 907, 909). A live lineup was shown to Davis with an identification (Tr. vol. VI, pg. 613), although all of the identifications were somewhat tenuous and based upon widely varying descriptions of the person seen. No physical evidence - fingerprints, blood tests, hair samples, etc. tied the Appellant to the crime in any way. (Tr. vol. VIU, pgs. 839, 851).

Other facts will be cited as appropriate throughout the body of the brief.

SUMMARY OF THE ARGUMENT

Despite a specific request by the Appellant's attorney, the trial court refused to conduct a Richardson hearing, thereby refusing to allow the Appellant to speak to the prejudice in his trial preparation resulting from the prosecutor giving two separate and late witness lists, including crucial witnesses, the last list being given on the day of trial. This has been held to be, per se, reversible error without consideration of harmless error principles.

The culumative actions of the prosecutor amounted to fundamental error in violation of the Appellant's right to a fair trial, paricularly dealing with the prosecutor's comments on the Appellant's non-testimonial actions in the court - such comments being direct comments on Appellant's failure to testify and his remaining silent (actions speak louder than words) and including comments on the Appellant's guilty knowledge (what does he know ... what does he have to hide). Also, the prosecutor mounted an improper character attack for unrelated criminal activities and appealed to the sympathy and prejudice of the jury by emphasizing the emotional breakdown of the victim's mother during her testimony. This fundamental error requires reversal.

The trial court erred in allowing the prosecutor to call a critical witness, Gerald Davis, as a court witness,

with the stated reason being that the prosecutor could not vouch for the credibility - this reason being a subterfuge. The intent of the prosecutor clearly became to elicit inconsistent statements from Davis which would then be used as substantive evidence in support of the State's theory of the case. This was done improperly, as there was no predicate to call Davis as a court witness, and as Davis did not answer the questions in such a way as to make such earlier statements admissible.

The evidence produced at trial was insufficient to support conviction, as there was no eyewitness to the crime, no physical evidence whatsoever which connected the Appellant to the crime (hair, blood, semen, fiber, etc. all being negative regarding the Appellant) and the testimony that was brought in, entirely circumstantial, had the earmarks of unreliability based upon faulty descriptions and identification procedures.

The cumulative effect of various court rulings prevented the Appellant from having a fair trial, including the denial of a Motion to Suppress Stop and Arrest, denial of the Motion to Suppress Statements of the Appellant, etc.

The trial court erred in imposing a life sentence on the burglary charge as an improper departure sentence, as it was based upon the Appellant's status as an habitual offender.

The death sentence was improperly imposed, as the aggravating circumstances of cold and calculated and heinous,

atrocious and cruel were not supported by the record, the case did not withstand a statewide review for proportionality, and the trial court failed to consider psychiatric and psychological testimony regarding mitigating circumstances.

The death sentence is also flawed because of the use of a twenty-six year old juvenile conviction for manslaughter (when the Appellant was thirteen) before the jury and in consideration by the trial court.

Finally, the death sentence must be reversed, as the trial court improperly minimized the role of the jurors in the capital sentencing procedure.

POINT I

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A FORMAL INQUIRY INTO THE DISCOVERY VIOLATION OF THE STATE, ACCORDING TO RICHARDSON v. STATE.

After litigating many pre-trial motions in separate hearings on separate days, including July 8, 1985 (Tr. vol. I, pg. 3), August 27, 1985 (Tr. vol. I, pg. 28) and November 18, 1985 (Tr. vol. I, pg. 96), the parties came to court on January 21, 1986 for the purpose of finalizing any last-minute issues and proceeding to trial. At the hearing of January 21, it was brought to the court during the Appellant's Motion in Limine regarding the proffered similar act testimony (sale of the stolen TV set) that the Appellant had just received notice of such testimony and an amended witness list on January 10, 1986 (Tr. vol. I, pg. 123). After the discussion regarding the similar act testimony, it was brought to the court's attention that yet another amended witness list was brought to the Appellant on the very day of trial, January 21, and it included four to five new witnesses (Tr. vol. I, pg. 131). It should be noted by this court that the witnesses were not peripheral witnesses nor were they rebuttal witnesses, but were crucial to the presentation of the State's case, including Jack Lampley, the person who was solicited by the suspect to buy the TV set. (Tr. vol. I, pg. 136; vol. VI, pg. 804). Also included on the witness list were Pat and

Pearl Lampley, persons who were present during the attempted sale, and Roosevelt Delaney, the person who brought the composite sketch to the Lampley residence. (Tr. vol. I, pg. 136; vol. VI, pg. 806). Even more important than the connecting of the chain between the stolen TV set and the sighting of the suspect again by Jack Lampley's niece Chiquita Lowe, was the fact that Jack Lampley testified for the State and testified to the effect that he actually knew the suspect from before and knew that the suspect had scars on his chest, causing the improper in-court demonstration at the expense of the Appellant and causing the misconduct of the prosecutor in commenting on the Appellant during closing argument. (Tr. vol. VI, pgs. 810, 812; vol. VII, pg. 1167). Appellant's trial attorney initially objected as to the nature of the evidence regarding the stolen TV set and the fact that the witnesses suddenly cropped up on the day of the trial (Tr. vol. I, pg. 132). In response, the trial court noted that he did not think that it was similar act evidence, but it was relevant testimony. The court then mentioned that the question before the court is, "Are there newly discovered witnesses that are going to testify who should be subject to taking their deposition, otherwise being prepared for trial?" (sic) (Tr. vol. I, pg. 132). The court went on to state that "If there's a violation as to the rule as to notice, we are certainly going to have to take the depositions of these witnesses and prepare."

(Tr. vol. I, pgs. 132-133). When the Appellant's trial attorney emphasized that he had no idea of the identity or knowledge of the witnesses brought to him on the day of the trial, and further noted that when he filed a demand for speedy trial that he was ready for trial at that point and not at the point of receiving a new discovery list for the last five days before trial (Tr. vol. I, pg. 135), the court noted that the demand meant that the Appellant was ready for trial and the State was not precluded from amending their witness list and that the court would allow that evidence but would also allow the taking of the deposition prior to the beginning of the trial (Tr. vol. I, pg. 136). This ruling was followed by an oral motion to exclude the testimony of the witnesses and a motion for a full Richardson hearing on the subject (Tr. vol. I, pgs. 136-137). The trial court then specifically denied the Motion to Exclude, citing sua sponte that the witnesses could have been discovered but that their statements could have been taken prior to trial. (Tr. vol. I, pg. 137). The court went on to emphasize that the Appellant asked for a speedy trial and that he was ready for trial (Tr. vol. I, pgs. 137-138). When the Appellant's trial attorney tried to differ with the trial court, stating that he was ready at the time, based upon the evidence, the court again reiterated that a speedy trial was filed for, later mentioning that the trial court was not even saying that he was going to allow

the Motion to Withdraw Speedy Trial anyway: "He cannot file a speedy trial, say he's ready and then withdraw it every time the State changes their witness list, which they have the right to do." (Page 139) At this point, the only motions before the court were the Motion to Exclude the Witnesses and for a formal Richardson hearing, but the trial court took it upon himself to effectively preclude the possibility of a continuance to further prepare, with his comment about withdrawing the speedy trial demand. Without explicitly saying so, the court effectively denied the Appellant's Motion for a formal Richardson hearing, and such hearing was never conducted - the trial court relying on the demand for speedy trial as a justification for admitting the evidence, along with the allowance of the taking of depositions by the Appellant. It was reversible error for the trial court to deny such a hearing.

Rule 3.220(a)(1)(i) of the Florida Rules of Criminal Procedure provides a mandatory and continuing obligation upon the prosecutor to supply the names and addresses of all persons known to the prosecutor to have information which may be relevent to the offenses charged and to any defenses with respect thereto. This rule has been interpreted to include witnesses called for impeachment and for purposes of rebuttal, and has been found to be a rule which puts each party under a continuing duty to disclose. Hicks

v. State, 400 So.2d. 955 (Fla. 1981). Not only does this rule provide a continuing duty, but it has been held by this court that the parties are entitled to rely on such full and fair compliance with the discovery rule and the preparation of other cases for trial. Kilpatrick v. State, 376 So.2d. 386 (Fla. 1979). As regards the case at bar, the trial prosecutor's now standard excuse that he was new to the case as a justification for his failure to comply with his discovery obligation in a timely fashion (Tr. vol. I, pg. 133), it must be recalled that witnesses to be included in the discovery response are all persons that the State knows or reasonably should know to have information about the incident. Hicks, supra, pg. 956. Similarly, this discovery obligation has been held to include material and knowledge in the constructive possession of the State, that is, within the knowledge of the investigating officer or detective, even if the current Assistant State Attorney doesn't have actual knowledge. Hutchinson v. State, 397 So.2d. 1001 (Fla. 1st DCA 1981), pg. 1002. Certainly, applying the law of the State of Florida to the instant matter, the investigating officers in the case had the information regarding the Lampley family, and about Roosevelt Delaney from the very outset of the case - these witnesses being the link leading to the eventual arrest of the Appellant. It also must be recalled that the Appellant was arrested on April 18, 1985, with the case being actively

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pursued and litigated until the trial date and discovery amendment date of January 21, 1986. Consequently, there can be no doubt that the untimely attempt at discovery response by the new prosecutor was a violation of Rule 3.220, as it prevented the Appellant from proper use of such witnesses in the preparation of this case.

Of course, the tardy disclosure by the prosecutor could well have been harmless error under the situation, and the trial court had discretion to so determine only after the court had made an adequate inquiry into all of the surrounding circumstances. Richardson v. State, 246 So.2d. 771 (Fla. 1971); Cumbie v. State, 345 So.2d. 1061 (Fla. 1977). The purpose of such an inquiry, commonly known as a Richardson inquiry, is to ferret out procedural rather than substantive prejudice. This inquiry should ascertain at the very least whether the State's violation was inadvertant or willful, whether the violation was trivial or substantial, and most importantly, what effect if any it had upon the defendant's ability to prepare for trial. Richardson, supra, pg. 775; Wilcox v. State, 367 So.2d. 1020 (Fla. 1979), pg. 1022. In deciding whether or not there existed simple procedural rather than substantive prejudice to the defendant, the trial court must be cognizant of two separate but interrelated aspects: first, the judge must decide whether the discovery violation prevented the defendant from properly preparing

for trial, and second, the court must decide the proper sanction to invoke for such a discovery violation, ranging from an Order to Comply to exclusion of evidence or even a mistrial. Wilcox, supra, pg. 1023. In Wilcox, where a Richardson hearing was not held, this court held, as a practical matter, that

> The court did not require the State to explain the reason for its discovery violation, nor was the defendant given the opportunity to show prejudice. Indeed, the trial judge had no evidence on which to rely in making the difficult determination of whether the violation had prejudiced the defendant, and which, if any, discovery sanction was warranted. Pages 1022-1023.

This language from Wilcox shows clearly how prejudicial the trial court's actions were in the instant case. Although the prosecutor attempted to explain away his untimely discovery revelations (certainly inadequate under a reading of Richardson), the Appellant was never given the opportunity to proffer the prejudice which he suffered from such late discovery. Quite the contrary, the trial court placed his emphasis upon the demand for speedy trial, and ultimately decided the discovery issue, without a Richardson hearing, upon the speedy trial issue (supplemented by the right of the Appellant to take last-minute depositions).

The effect of Jack Lampley's testimony must again be emphasized: not only did he claim to know the Appellant from before, but knew the Appellant to have scars on his chest, prompting the in-court demonstration and laying a basis for the prosecutor's prejudicial closing argument (Tr. vol. VI, pgs. 805, 810; vol. VII, pg. 1167). Again, Wilcox is dispositive in a factual nature. Just as the Appellant Smith was precluded from timely knowledge of the witness Jack Lampley, and was therefore precluded from discovering what Lampley would say and was precluded from preparing a counter to Lampley's testimony regarding the prior knowledge of the scars, etc., Wilcox, when faced with an unknown oral statement, was equally prevented from properly preparing:

> In this case, had Petitioner known what the officer was going to say, he might have successfully excluded the testimony before trial. At the very least, advance knowledge would have given Petitioner time to gather rebuttal evidence. Page 1023.

This court went on to hold in Wilcox, as is absolutely pertinent to the instant case:

> On the other hand, close scrutiny might have revealed that the statement had no bearing on the Petitioner's defense.

> Without a Richardson inquiry, the trial court was in no position to make an accurate judgment as to these possibilities. Page 1023.

This court has recently revisited Richardson and Wilcox in Smith v. State, __So.2d.__; 12 F.L.W. 10 (Fla. 1/2/87). In Smith, this court again consistently reiterated the importance of a Richardson hearing, the efficiency of such a hearing, and dispositive of this case, the absolute need for such a hearing. This court found, in answer to a certified question, that "A trial court's failure to conduct a Richardson inquiry cannot be considered as harmless error, and is reversible error per se." In reaching such a conclusion, this court, noting the simplicity of the Richardson inquiry, stated that:

> The requirement that a trial court merely listen and evaluate any claim of prejudice accompanied by the minor delay which most hearings or inquiries will impose on a trial is more than justified by the assurance of compliance with our rules and requirements of due process. Page 10.

Again, it is the "claim of prejudice", the presentation by the Appellant of the facts which prejudiced him by hindering his preparation of the trial which was abolutely lacking in the instant case. Just as the lower court in

Smith misapprehended the very purpose of a Richardson hearing, so too did the trial court in the case at bar:

> One cannot determine whether the State's transgression of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the opportunity to speak to the question. We repeat that the court made clear in Wilcox that a reviewing court cannot determine whether the error is harmless without giving the defendant the opportunity to show prejudice or harm ... In Wilcox, the State sought to resist reversal by asserting that "no prejudice resulted because the trial court instructed the jury to disregard the [previously undisclosed] statement." Id. at 1022. In rejecting this argument, this court explained that the question of "prejudice" in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder, but rather upon its impact on the defendant's ability to prepare for trial. Pg. 10.

While the discovery violation in the instant case may have been minor and may well have been found to be harmless error, properly remedied by the allowance of depositions of the witnesses, the trial court precluded the Appellant's opportunity to speak to the question of prejudice, precluded

his opportunity to speak to the impact on his preparation for trial, and, in fact, the error committed is the preclusion of the very evidence necessary to make a judgment on the existence of prejudice or harm. Id., pg. 10.

When this court considers the prima facie violation of the discovery obligation through the late disclosure of the witnesses, as evidenced by the court's exclusion of oral statements of the Appellant disclosed during the same time frame - Jan.20 - (Tr. vol. !, pgs. 141-143), together with the refusal to allow the Appellant to explore the underlying reasons for this violation and to show how he was prejudiced in his trial preparation, reversal is mandated.

POINT II

APPELLANTS'S RIGHT TO A FAIR TRIAL WAS DESTROYED BY REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.

During the course of the instant trial including evidentiary presentation, out of court activities and closing argument, repeated instances of prosecutorial misconduct prevented the Appellant from receiving a fair trial.

During the cross examination of State witness Jack Lampley, Lampley testified that he knew the Appellant from before and that he knew the Appellant as a person who had alot of scars on his chest (Tr. vol. VI, pg. 810). In response to this testimony, the defense attorney asked the Appellant to stand and show the witness his chest (Tr. vol. VI, pg. 810). The prosecutor then interrupted with an improper jury speech/request to the court: "Your Honor, I'm going to ask, if it's appropriate with the court, that Mr. Smith take off all his clothes above his waist so the witness can observe." (Tr. vol. VI, pgs. 810-811). When the defense counsel so instructed the Appellant and tried to continue, the prosecutor again interrupted:

"Wait a minute, if we could take the whole shirt off ..." (Tr. vol. VI, pg. 811).

Only three more questions were accomplished by the defense attorney before the prosecutor interrupted again, this time ofering his unsolicited opinion and description of the

Appellant's scars and asking the court:

"Maybe if the court could ask the Defendant to walk in front of the jury .. " (Tr. vol. VI, pg. 811).

When the defense attorney disputed the description (apparently after the Appellant did display his torso to the jury), the prosecutor countered first by noting that the jury saw the display, then changing his position (Tr. vol. VI, pg 812).

The Appellant chose not to testify in his own behalf, instead relying upon his constitutional right to remain silent. However, in his closing argument, the prosecutor chose to directly comment upon the courtroom actions that the prosecutor coerced, but also upon the Appellant's failure to testify - including in his argument personal opinion as to what the Appellant's actions meant, vis a vis the Appellant's guilt or innocence in the matter. Further, the prosecutor directly and repeatedly comments on the Appellant's silence in the matter as it related to his activities:

> Mr. Washor (defense attorney) turned to the defendant and said, "Show your chest, Frank" ... What did Frank Lee Smith do - opens up his chest like this ... to show that part of the chest. Actions speak louder than words:

Ladies and gentlemen, I said Your Honor, would you ask the defendant to take off all his apparel above the waist, and what did he do, took off his tie, took off his coat, took off his shirt and pulled it down just off his shoulder and didn't take it off his arms, and actions speak louder than words.

Why did he do that? Did you see the scar on his arm? Did you see the scar on his shoulder? You got a better look at the arms and shoulders than I did from way back across the courtroom. If there were scars on his arms and shoulders, why did he do that? What was he hiding? Why did he go like this initially? He knows Jack Carson Lampley and he knows Jack Carson Lampley knows him. (Tr. vol. VII, pg. 1167).

Although there was no objection raised by Appellant's trial counsel, this direct comment on the Appellant's failure to testify constitutes fundamental reversible error and requires that a new trial be granted.

Very recently, this court reaffirmed the fact that comments on a defendant's demeanor off the witness stand are clearly improper. Pope v. State, __So.2d.__; 11 F.L.W. 533 (Fla. 10/24/86), pg. 534. In Pope, this court found that the prosecutor's comment that Pope was grinning ear-to-ear during the trial did not amount to fundamental error, primarily because the prosecutor's comments were in direct response to the defense attorney's argument that the State's star witness was grinning during her testimony. Consequently, this court found that the lack of objection in Pope waived appellate review. Id., pg. 534. The crucial difference between the case at bar and Pope is the nature of the comment in the instant case: direct comments on the Appellant's right to remain silent as well as prejudicial comments on the demeanor of the Appellant and the near total lack of evidence against the Appellant. Both of these factors, taken together, make it clear that the actions of the prosecutor constituted fundamental error, and are therefore reviewable on appeal and may properly act as a basis for a new trial.

In United States v. Pearson, 746 F.2d. 787 (U.S.C.A.

11th Circ. 1984) relied upon by this court in Pope, supra, pg. 535, note 3, the prosecutor, in closing argument, stated:

> You may say to yourself, why is somebody using a false name on an airline ticket? Does it sound to you like he was afraid? You saw him sitting there in the trial. Did you see his leg going up and down? He is nervous? ... You saw how nervous he was sitting there. Do you think he is afraid? Page 796.

In its analysis, the Pearson court commented that the sole purpose of the closing argument is to assist the jury in analyzing, evaluating and applying the evidence and that "a prosecutor may not seek to obtain a conviction by going beyond the evidence before the jury, United States v. Vera, 701 F.2d. 1349 (U.S.C.A. 11th Circ. 1983), pg. 1361", pg. 796. The court also noted that "It is also clear that the defendant's behavior off the witness stand in this instance was not evidence subject to comment. United States v. Wright, 489 F.2d. 1191 (U.S.C.A. DC 1973)." Page 796.

Finally, in reversing the conviction because of the prosecutorial comments, the court in Pearson agreed that:

> The prosecutor's remarks constituted an indirect comment on his failure to testify at

> trial, introduced character evidence for the sole purpose of proving guilt, and violated his right not to be convicted except on the basis of the evidence at trial. Pg. 796.

Certainly, all of these factors and more are present in the instant case, and an even more aggravated situation in the case at bar, not only were the comments directed regarding the way the Appellant was taking off his shirt, but it was explicitly argued before the jury that the Appellant had something to hide, that the Appellant knew he would be identified and, most fatally, that the Appellant's actions should be considered evidence of guilt, as "actions speak louder than words." (Tr. vol. VII, pg. 1167).

In United States v. Wright, 489 F.2d. 1181 (U.S.C.A. DC 1973), also cited by this court in Pope, supra, pg. 535, note 3, a robbery conviction was reversed based upon the cumulative effect of errors including the prosecutor's closing argument, ending upon the demeanor of the defendant Wright who also did not testify at this trial. The prosecutor told the jury that Wright found a good part of the proceedings humorous and could not stand other parts of the proceedings, and that the jury should consider this in their deliberations. Id., pg. 1185. The record reflected in Wright that Wright was removed one time from the court for his behavior, shouted at the jury one time and asked to go back to his cell one time.

The court in Wright again reiterated that the defendant's character cannot be attacked unless put into issue, and that that basic principle cannot be circumvented by allowing the prosecutor to comment on the character of the accused as evidenced by his courtroom behavior. Page 1186. That the jury witnesses the courtroom behavior of the defendant does not make it proper for the prosecutor to tell them that they may consider such behavior as evidence of guilt. What the jury may infer, given no help from the court or the prosecutor, is one thing. What the jury may infer when the court allows the prosecutor to argue that courtroom behavior constitutes evidence against the defendant is something different altogether. Id., pg. 1186.

In a bizarrely similar fact pattern, a bank robbery conviction was reversed in United States v. Carroll, 678 F.2d. 1208 (U.S.C.A. 4th Circ. 1982), where identification was the main issue as in the case at bar. As in the instant case, there was considerable uncertainty regarding the identity of Carroll as the robber, as there were lots of different descriptions by the witnesses: one witness was able to identify Carroll out of court but not at the trial, one was able to identify in court after a wrong description, and one was able to identify Carroll only by his hairstyle (as Dorothy McGriff was only able to identify Appellant Smith by his shoulders -

Tr. vol. V, pgs. 656-659). During the trial, Carroll and his attorney examined some blowup photos of the bank robbery, with Carroll apparently gesturing and speaking to his attorney during the examination. During closing argument, the prosecutor argued to the jury that it was Carroll who was doing most of the pointing and most of the explaining to his lawyer, and that it was Carroll who knew more about the pictures than the lawyer did. Id., pg. 1209. Further, the prosecutor commented that:

> The reason he knew so much about these pictures is because he was in the bank there at the robbery. That's the only reasonable explanation. If there was an explanation, an innocent explanation as to why he knew more about the pictures that his lawyer did, I honestly don't know what it is. Page 1209.

Again, the prosecutor in the instant case went even farther than the prosecutor in Carroll, as he repeatedly told the jury that the Appellant Smith had something to hide and that Smith's actions spoke louder than words. See also United States v. Schuler, __F.2d.__; 40 Cr.L.Rptr. 2015 (U.S.C.A. 9th Circ. 9/12/86), where a conviction for threatening the life of the president of the United States was reversed because of the prosecutor's argument to the jury, pointing out that Schuler had laughed during the presentation of the evidence against him. Citing and relying upon United

States v. Pearson and United States v. Wright, the court in Schuler again held such a comment to be improper character attack and a violation of Schuler's Fifth Amendment right to remain silent and not testify - particularly in the sense that it would tend to force the defendant to take the witness stand in reaction to or in contemplation of such comments. See also Herring v. State, __So.2d.__; 12 F.L.W. 55 (Fla. 3d. DCA 1/2/87), where a second degree murder conviction was reversed after Herring's refusal to submit to a hand swab test for gunshot residue was brought before the jury and argued by the prosecutor in support of guilt. In its reversal, the court noted that this was not the type of activity that was probative of consciousness of guilt, particularly as there was no advisement of the right to refuse the test, and where it was not shown that the defendant had no substantial motivation not to behave as he did. Id., pg. 55.

Not only were the comments and actions of the prosecutor an improper attempt at a character attack on the Appellant and an attempt to go beyond the evidence in his argument to the jury, but such activities were also direct comments on the Appellant's failure to testify in his own behalf certainly fairly susceptible to an interpretation which would bring it within the prohibition against comments on silence. See State v. Thornton, 491 So.2d. 1143 (Fla. 1986). These actions by the prosecutor cannot be considered

harmless error in the instant case due to the extremely scarce evidence against the Appellant and the fundamental nature of the errors. Reversal is required.

The prosecutor also committed reversible error in staging a blatant character attack upon the non-testifying Appellant by eliciting evidence of or implications of unrelated criminal activities. During the direct examination of Gerald Davis, the prosecutor, through his questioning, elicited the totally irrevalent and prejudicial information about the suspect, asking Davis, "Do you get high? ... Do you do rock? ... Do you do coke? ... " Then he said, "Well, I like to get into something ... ". (Tr. vol. V, pg. 748). Immediately after this portion of the testimony, the prosecutor again elicited similar evidence regarding the suspect involved: "He said, are you sure you don't want to go back to my car and get high and move something?" (Tr. vol. V, pg. 749). Similarly, during the testimony of arresting officer McCann, the prosecutor elicited from McCann that the Appellant knew McCann by name although McCann never told him his name (Tr. vol. VI, pg. 854A). These instances of misconduct were clearly presented to show bad character and criminal propensity on the part of the Appellant.

Under Section 90.404(2)(a) of the Florida Statutes and Williams v. State, 110 So.2d. 654 (Fla.) cert denied

361 U.S. 847 (1959), similar act evidence is only admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, etc., but is inadmissible when the evidence is relevant solely to prove bad character or propensity. The defendant's predilection for drug use and his totally irrelevant knowledge of the police lieutenant who has worked in the black area of town for twenty-one years (Tr. vol. VI, pg. 855A), is surely a character attack upon the non-testifying Appellant. Such admission of this improper character attack and improper collateral evidence should be presumed harmful even without objection, because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of the crime charged. See Strait v. State, 397 So.2d. 903 (Fla. 1981). Also, the implication that necessarily must be drawn by the jury through the Appellant's knowing of the police officer's name is that there is some past contact with the police - implying the State had more evidence or knowledge that the jury did not know that made the prosecutor so comfortable in the prosecution. Glantz v. State, 343 So.2d. 88 (Fla. 3d. DCA 1977). Included in this catagory is the prosecutor eliciting the fact that the Appellant used a false name when first confronted by the police officers (Tr. vol. VI, pg. 897). This is just another example of a subtle character

attack and implication of prior misdeeds, as well as an implication of other knowledge not imparted to the jury.

This misconduct on the part of the prosecutor requires reversal in the instant case.

During the prosecutor's final argument, he referred to the Appellant as a weirdo (Tr. vol VII, pg. 1157), running afoul of Bullard v. State, 436 So.2d. 962 (Fla. 3d DCA 1983), where it was again reiterated that it is improper for a prosecutor to apply offensive epithets to a defendant or engage in vituperative characterizations of them (calling the defendant a creature and a thing). Also in the same closing argument, the prosecutor improperly emphasized the breakdown of the victim's mother on the witness stand, resulting in her wailing and crying before the jury (Tr. vol V, pgs. 645-646) by reminding the jury that "she became an emotional wreck when she saw this photograph ... she started wailing and screaming ... that is the one who did my baby." (Tr. vol. VII, pg. 1174). It was error for the trial court to deny Appellant's Motion for Mistrial at the time of such emotional outburst, and this error was magnified by the prosecutor's improper emphasis of such emotional outburst during his closing argument. A short time later, the prosecutor again appealed to the emotions of the jury in his asking for a fair verdict for the victim Shandra Whitehead (Tr. vol. VII, pg. 1179).

These are exactly the types of improper methods calculated to produce a wrongful conviction that were denounced in Burger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935), pg. 633. In Edwards v. State, 428 So.2d. 357 (Fla. 3d. DCA 1983), a first degree murder conviction was reversed based in part upon the prosecutor's closing argument, "All I'm going to ask you for is justice ... I'm going to ask you for justice on behalf of myself and the people of the State of Florida and also on behalf of (the victim's) wife and children." Pg. 359. The court found that the prosecutor's argument was an improper appeal to the jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused. Page 359. The court went on to find that these types of appeals to prejudice or sympathy are calculated to unduly influence a trial jury. See also Vaczek v. State, 477 So.2d. 1034 (Fla. 5th DCA 1985), where a first degree murder conviction was reversed based upon the prosecutor's eliciting of the victim's pregnancy. This improper sympathy ploy in the argument of the prosecutor, cumulatively considered with the other aspects of misconduct, raised to the level of fundamental error, requires reversal.

Finally, the most blatant instance of misconduct, and certainly another factor in the analysis of cumulative effect, was the prosecutor's coaching of the witnesses,

particularly Gerald Davis, in the hallway, regarding identification of the Appellant and specifically who to pick out. (Tr. vol. VII, pgs. 1240-1245). Not only was this misconduct improper, but also constituted a discovery violation in that the prosecutor failed to disclose to the Appellant the fact that the witness could not, in fact, make an identification - certainly evidence which was important to support the Appellant's identification defense.

Therefore, based upon the cumulative effect of all of the instances of misconduct cataloged above, a new trial is required. See Groebner v. State, 342 So.2d. 94 (Fla. 3d. DCA 1977).

POINT III

THE TRIAL COURT ERRED BY CALLING GERALD DAVIS AS A COURT WITNESS AND BY ALLOWING THE PROSECUTOR TO CROSS EXAMINE AND IMPEACH DAVIS.

Immediately preceeding the testimony of Gerald Davis on behalf of the State, the prosecutor involved approached the bench and requested the trial court to declare Gerald Davis a court witness, relying on the rationale that there was a change in the testimony of Davis from prior statements: Davis now saying that before viewing the live lineup he was shown a photo lineup again, which the police adamantly denied (Tr. vol. V, pg. 742). Appellant's trial counsel raised an objection and properly noticed that inadequate predicate had been shown by the State for such action, noting that there were simply inconsistencies and not a radical change in the testimony. (Tr. vol. V, pg. 742). The trial court overruled the objection, noting the prosecutor's statement that the prosecutor could not vouch for the credibility of the witness, but set forth guidelines including the fact that the prosecutor was not to ask questions unless first bringing them to the attention of the court outside the presence of the jury. (Tr. vol. V, pg. 743).

The prosecutor then commenced his questioning of Gerald Davis, and it soon became apparent that there were

no changes, surprises or adverse instances of testimony given by Davis which would possibly justify the trial court's action in calling Davis as a court witness. The issue of the lineup sequence, as given as a predicate by the prosecutor for his request as a court witness, was broached directly by the prosecutor and did not become an issue with the witness, even during cross examination (Tr. vol. V, pgs. 752-755). It also became clear, during the direct examination by the prosecutor, that the court witness status was sought as an improper vehicle for the State's admission, under the guise of impeachment, of prior inconsistent statements by Davis regarding scars on the suspect (Tr. vol. V, pgs. 758-760), and regarding a jacket worn by the suspect (Tr. vol. V, pg. 762).

The State went even further than improperly impeaching Davis with prior inconsistent statements in that the prosecutor brought in similar inconsistent statements of Davis through Detectives Amabile and Scheff regarding identification procedures (Tr. vol. VI, pgs. 907, 991), and regarding the mentioning of the scar on the suspect (Tr. vol. VII, pg. 1014). Even further, Scheff was allowed to testify regarding the State's theory of the case regarding the jacket: that the Appellant had the jacket in question on when Davis saw him, but he took it off, put it in the pickup truck, where it was later found by the police (Tr. vol. VII, pg. 1020).

This court has very recently revisited the issue of calling a witness as a court witness to enable both sides to cross examine and impeach said witness, in Jackson v. State __So.2d.__; 11 F.L.W. 609 (Fla. 12/5/86). While the factual pattern in Jackson was rather far-fetched (Jackson's mother being called as a court witness to testify that Jackson had not admitted the robbery and killing, to enable the State to call an impeaching witness, a police officer, to testify that the mother told him that Jackson had confessed), the law of the case is equally applicable to the instant matter, and equally fatal to the conviction. In Jackson, this court cited Brumbley v. State, 453 So.2d. 381 (Fla. 1984) to support the modern and clarified proposition that a party may not impeach a court's witness with prior inconsistent statements unless that witness's in-court testimony proves adverse, that is, actually harmful to the impeaching party. Jackson, pg. 609. Although the instant case does not have the rank heresay found in Jackson, the basic concept set forth in Jackson, that acted as a basis for the reversal, is identical to that in the instant case: the initial error in permitting the witness to be called as a court witness.

> Permitting a court to abandon its position of neutrality by calling a witness as its own was intended to prevent the

> manifest injustice which might occur if the testimony of an eyewitness to a crime was not placed before the jury because of the inability of either party to vouch for that witness. Id., pg. 610.

In the case at bar, the neutrality of the court was certainly violated by the court specifically announcing to the jury that the court called Gerald Davis as a court witness (Tr. vol. V, pg. 743). Further, there was simply no basis for such an action, as the prosecutor's stated inability to vouch for the credibility of Gerald Davis was a sham. It is a rare witness in any case that has not made an inconsistent statement to some degree and that is not open to some cross examination and impeachment by an adverse party. For the trial court to allow the prosecutor to basely manipulate the system through a perfunctory proffer of an inconsistency, tied together with his assertion of inability to vouch for Davis, is not proper. A perusal of the entire testimony of Davis simply shows that the prosecutor was able to bring out points of testimony regarding the mention of a scar on the suspect and regarding the description of a jacket worn by the suspect to buttress the theory of his case and to deflate the impact of the Appellant's cross examination. This is further aggravated by the fact that this impeachment, particularly regarding the jacket, was used as substantive evidence, as is evidend by Scheff's testimony of the State's

theory of the case (Tr. vol. VII, pg. 1020).

Finally, the error is apparent and requires reversal, as Davis was not an eyewitness to the crime. In the best light of the State, Davis saw a person, possibly a suspect, in the area of the crime scene at a similar time. (Tr. vol. V, pg. 746). The person involved approached Davis from a vacant lot across the street from Shandra Whitehead's home, solicited Davis for sex, and was seen by Davis walking away in the direction of the victim's home. (Tr. vol.V, pgs. 746, 747, 750). Davis was not an eyewitness to the crime, and at best, was a link in an incomplete circumstantial evidence chain. This court in Jackson finally clarified the question as to whether or not a witness had to be an eyewitness to the crime before being called a court's witness when it was clearly stated that, "We believe that court witnesses should be limited to those situations where there is an eyewitness to the crime whose veracity and integrity is reasonably doubted." Page 610. Gerald Davis simply did not fit into this catagory, and was improperly called as a court witness.

In Parnell v. State, __So.2d.__; 11 F.L.W. 2273 (Fla. 4th DCA 11/7/86), another murder conviction was reversed on the improper calling of a court's witness in a case factually very similar to the case at bar. In Parnell, Parnell's girlfriend and stepfather were allowed to be called as court witnesses and allowed to be impeached with prior

inconsistent statements, as it was "clear that the statements that would be made by them during trial would be inconsistent with their prior statements". Page 2274. Parenthetically it should be noted that no such clarity existed in the instant case, there being only the two issues of impeachment done by the State (the scar and the jacket). In Parnell, the witnesses were allowed to be impeached with prior inconsistent statements to the police officers, the contents of which were damaging to Parnell. These impeaching statements showed that Parnell was aware of and involved in the planning of the murders. Even though Parnell was decided before the clarification regarding eyewitness status in Jackson, supra, the Parnell court did recognize the treshold question being whether or not Nelson, the stepfather, should have been called as a court's witness. The court went on to hold that:

> An examination of the record compels the conclusion that the only purpose the State had to request the court to call Nelson as a court's witness was to set the stage for presentation of Nelson's previous statements to the police inculpating the Appellant; statements which, but for this method, would have been inadmissible and which by everyone's agreement were not admissible as substantive evidence. We conclude that under the

> circumstances, the prejudicial nature of the non-substantive evidence was sufficient to warrant a new trial for the Appellant. Page 2274.

Just as it was equally improper for the trial court to call Gerald Davis as a court witness and to allow the State to impeach Davis with prior inconsistent statements as substantive evidence, it should also be noted that the trial judge in Parnell correctly instructed the jury that the impeachment testimony in the case of Nelson was to be considered by the jury for the sole purpose of judging the credibility of the witness and was not to be considered as evidence or proof of the truth of any such statement. Page 2274. In the instant case, no such jury instruction was given to cure the prejudicial effect of this error. (Tr. vol. VIII, pgs. 1197-1223, see pg. 1214).

Finally, further aggravating the error in calling Davis as a court witness, was the admission of prior inconsistent statements as substantive evidence to be considered by the jury. As noted earlier, there was no limiting instruction given to the jury. While it is true that under Section 90.801(2)(a) Florida Statutes (1983), prior inconsistent statements of a witness taken under oath are admissible as substantive evidence, see also Moore v. State, 452 So.2d. 559 (Fla. 1984), Section 90.608(2) Florida

Statutes (1983), which provides that a party may not impeach its own witness unless that witness's testimony proves adverse to the calling party. A witness must give testimony prejudicial to the cause of the calling party; the fact that a witness cannot recall making prior inculpatory statements is insufficient. Austin v. State, 461 So.2d. 1380 (Fla. 1st DCA 1984), pg. 1383; Parnell, supra, pg. 2274. Just as Parnell's girlfriend's testimony that she could not recall whether Parnell had confessed the crime to her did not meet the "well recognized criteria for adverseness", Austin, supra, Parnell, pg. 2274, Davis also failed to give a predicate denial of prior statements. Regarding the question of the scars, Davis initially states that he doesn't remember whether the suspect had any scars, but then admits that in an earlier conversation he stated that the suspect did have a scar (Tr. vol. V, pg. 758). Not being satisfied with this effective (and improper) impeachment, the prosecutor continues and refreshes the recollection with a prior and consistent statement regarding when the conversation about the scars first took place (Tr. vol. V, pgs. 759-760). Again, regarding the testimony of the jacket, Davis gives a detailed description of the jacket worn by the suspect, but could not recall what type of material was on the inside of the jacket (Tr. vol. V, pg. 762). The prosecutor was again allowed to use a prior statement to not only get the lining of the jacket

before the jury, but the fact that the outside was a windbreaker-type jacket - critical to the State's theory of the case, as a windbreaker was found in a truck nearby (Tr. vol. V, pgs. 762-763). As was stated in Parnell, it is improper to use such statements as substantive evidence on a premise of lack of recollection as opposed to a denial.

As it was groundless and improper for the trial court to call Gerald Davis as a court witness, as Davis was not an eyewitness and as there was no foundation for the prosecutor's stated inability to vouch for Davis' credibility, and as the error was compounded by allowing the prosecutor to cross examine and impeach Davis, using such impeaching testimony as substantive evidence in support of the State's theory of the case, a new trial is warranted.

POINT IV

THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE.

The case against the Appellant was strictly a circumstantial evidence case tied together with alleged statements of an incuplatory nature made by the Appellant at the police station. As a circumstantial evidence case, this court must review the sufficiency of the evidence under the special standard set forth in Heiney v. State, 447 So.2d. 210 (Fla. 1984):

> When a case is based on circumstantial evidence, a special standard of sufficiency of the evidence applies. Jaramillo v. State, 417 So.2d. 257 (Fla. 1982). This standard is:
>
> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d. 972 (Fla. 1977).

While this court concerns itself with the circumstantial nature of the evidence against the Appellant and the exclusion of all reasonable hypothesis of innocence, this court is reminded also of the continued vitality in the State of Florida of a reversal in the interest of justice under Tibbs v. State, 397 So.2d. 1120 (Fla. 1981):

> By eliminating evidentiary weight as a ground for appellate reversal, we do not mean to imply that an appellate court cannot reverse a judgment or conviction "in the interest of justice." The latter has long been, and still remains, a viable and independent ground for appellate reversal. Rule 9.140(f) Florida Rules of Appellate Procedure provides the relevant standard:
>
> > In the interest of justice, the court may grant any relief to which any party is entitled.
>
> This rule, or one of its predecessors, has often been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings which occurred at the trial. Pg. 1126. See also Burr v. State, 466 So.2d. 1207 (Fla. 1985).

Although a suspect was seen by the victim's mother, Dorothy McGriff, reaching into the home in question at approximately 11:30 PM (Tr. vol. V, pg. 635), Mrs. McGriff was unable to give a facial description and was not sure what the man lppked like, as she did not get up close. (Tr. vol. V, pgs. 650-651). McGriff stated that she was not paying attention to the person involved and did not get a good look at his face (Tr. vol. V, pgs. 654-655), and in fact, when pressed on cross examination, admitted that she could not identify the face and simply could identify the shoulders, but she did not see the face and could not recognize the face (Tr. vol. V, pgs. 657-658). McGriff gave a description to the police of a medium build, heavy in the chest, lower haircut, black man, dark skin with jeans, pair of brown suede shoes, orange T-shirt with writing. (Tr. vol. V, pg. 650). Another description given was muscular, big, heavy-set like a football player, no big stomach, five-foot-eight to five-foot-nine. (Tr. vol V., pg. 653). Although McGriff picked a photo from the photo lineup, she first saw the composite sketch and then picked someone out of the lineup of torsos, looking at the shoulders primarily (Tr. vol. V, pg. 657). McGriff also testified that when she was shown the photographs, the police told her that one of the photographs was the suspect, to let her know that they had caught him, although she had told them she could not recognize the face (Tr. vol. V, pg. 659).

Although a television set was moved within the house to a window and the supposed murder weapon was found (a rock), and although the entire house was minutely examined, dusted for fingerprints and any other physical evidence, there were absolutely no fingerprints which matched the Appellant's or in any way linked him to the crime (Tr. vol. VI, pg. 851), including fingerprints lifted from the television set and from the automobile of Chiquita Lowe. (Tr. vol. IV, pgs. 511, 535, 556-557; vol. V, pg. 735). Also, a great deal of blood was taken and analyzed, as well as hair samples and vaginal smears (Tr. vol. IV, pg. 556). While it was found that the victim was blood type O, non-secreter, and the Appellant was blood type B, secreter (Tr. vol. VI, pgs. 835-837), there was absolutely no evidence linking the Appellant to the crime - no hair samples, no blood grouping, no way to connect the Appellant by blood or hair to the crime (Tr. vol VI, pg. 839). In fact, Detective Scheff capsulized the State's lack of evidence, admitting that the blood, hair and fiber samples all came back negative, without a connection to the Appellant (Tr. vol. VII, pg. 1045), and in fact, admitting that not only were there no witnesses who could put the Appellant in the house, there was absolutely no physical evidence, fingerprints, blood, semen, hair, fiber, etc. which could put the Appellent inside the house in question (Tr. vol. VII, pg. 1052).

The State then turned to its circumstantial evidence in the form of the testimony of Chiquita Lowe. Lowe could testify to nothing more than being in the area of the victim's house on the night in question at the approximate hour of the crime and being flagged down by a man near the house (Tr. vol. V, pg. 688). Lowe refused the delirious looking stranger's request for fifty cents, and later saw Gerald Davis on the same street speaking to him for a while (Tr. vol. V, pgs. 669, 672, 687). Other than looking delirious, Lowe described the person as having pores, a beard or hair underneath, straggly hair sticking out, about five-eleven to six feet tall, a hundred ninety to ninety-five pounds (Tr. vol. V, pgs. 671-672). Lowe also gave a description of muscular big arms, big chest and straggly hair around his face, although she was not looking at him (Tr. vol. V, pg. 688, 690). Lowe also told the police that the suspect had no scars on his face and there was nothing unusual about his face, just oily skin (Tr. vol. V, pg. 691), with no mention of a droopy eye (Tr. vol. V, pg. 694), but that the suspect had a large stirling ring (Tr. vol. V, pg. 698). In court, Lowe identified the Appellant (Tr. vol. V, pg. 680), although she also identified a scar on the Appellant's face in court and admitted that she never saw a scar on the face of the person that she spoke to (Tr. vol. V, pgs. 706-

707). Also, Lowe did not see a live lineup, but only a photographic lineup (Tr. vol. V, pgs. 703, 682). Again, it is critical to recall that Lowe did not see the Appellant or the suspect in or near the house in question, but simply walking on the street in the area. It is also important to note that all of the identification procedures, including the composite photograph which Lowe assisted in comprising, occurred after Lowe saw what she felt was the same suspect again at the home of her uncle, Jack Lampley. (Tr. vol. V, pgs. 676-677).

Finally, the only other witness presented (other than the supposed statements made to the officers) was Gerald Davis, a man who was walking on the street near the house of the victim and who as sexually solicited by a stranger from a vacant lot (Tr. vol. V, pg. 746). Davis gave a description of a heavy-set person, six foot to six foot-one, one hundred forty to one hundred forty-five pounds, later one hundred sixty to one hundred seventy pounds, muscular, chubby stomach, tacky beard, kinky hair, jacket, shirt, dark pants, old work boots (Tr. vol. V, pg. 766). Davis also told the police that the susspect had light brown skin and no scars (Tr. vol. V, pgs. 769-770). Davis saw two photo lineups with no identification in the first one (Tr. vol. V, pg. 754). Davis also stated that he did make an identification in the live lineup, but on cross

examination stated that he had reservations regarding the height, regarding the clothes and the beard, with such reservations being salved when the police told him that all of the persons in the lineup were six foot to six foot one (Tr. vol. V, pg. 757). Davis also testified that he told the police that he was not sure that the person he picked out was the same person that he spoke to (Tr. vol. V, pgs. 790-791), and in fact kept telling the police that he was not sure at the lineup, but the person that he identified just looked like the person - in fact, although he didn't remember the person, he felt compelled to pick someone out and kept telling the police that he didn't know if that was the person (Tr. vol. V, pgs. 793, 794). Davis went so far as to testify that it was very apparent to him that the police wanted him to make an identification, but he still could not say that the person he picked out in the lineup or in court was the same person that he spoke to on the night in question (Tr. vol. V, pgs. 794-795).

The only other evidence presented, supposedly linking the Appellant to the crime, was the testimony of Detectives Scheff and Amabile to the effect that when the police told the Appellant that the victim's younger brother had seen him, the Appellant stated that it was too dark in the house and the lights were out (Tr. vol. VI, pgs. 900, 984). Also, the officers brought before the jury the

Appellant's statement that he had not been in the area of the crime for months, and the Appellant's general denial of responsibility for the crime (Tr. vol. VI, pgs. 899, 979). The Appellant did not testify at trial.

It is the total lack of physical evidence and eyewitness testimony, coupled with the very questionable nature of the identification testimony, which shows the court that the evidence involved was insufficient to sustain the conviction, and that the interests of justice require that a new trial be granted.

Certainly, the primary evil to be avoided in the introduction of out-of-court identification is a very substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972); Grant v. State, 390 So.2d. 341 (Fla. 1980), pg. 343. Initially, this court should consider, despite the lack of objection or limiting motion, the absolutely prejudicial nature of the identification procedures involved, and the clear likelihood of misidentification which necessarily resulted. Notwithstanding the rather bizzare range of descriptions given (including the basis for the B.O.L.O. given at the time: medium height, medium-heavy build, bluejeans, suede shoes, short black Afro and beard (Tr. vol. IV, pg. 507), the actual participants in the lineup have a great bearing on the misidentification. Not only were some of the participants shorter, five foot nine and five foot ten (Tr. vol. VII, pg. 1049) (particularly important

based upon Davis' reservation regarding height as mentioned earlier), but one of the participants in the lineup was fourteen years younger than the Appellant, one seventeen years younger, one four years younger, one five years younger, and one thirteen years younger (Tr. vol. VII, pg. 1050). These characteristics certainly would satisfy the first prong in Neil v. Biggers and Grant v. State, supra, regarding the unnecessarily suggestive procedure in obtaining the out-of-court identification and fatally tainting the in-court.

Moving to the second prong of the test, that being the question as to whether or not such suggestive procedures would give rise to substantial likelihood of misidentification, Neil v. Biggers and Grant v. State set forth factors to be considered: the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation. Grant, pg. 343.

With the varying descriptions on both clothes, facial features and build, coupled with the professed uncertainty of McGriff (denial of any facial memory) and Davis (in-court protestations of uncertainty regarding the

person chosen being the person spoken to), it is clear that the identification procedures involved should have been suppressed as being fundamental error, and certainly cast grave doubt as to the reliaiblity of the identification of the Appellant as the perpetrator of the crime.

Similarly, there was nothing in the evidence or the circumstances presented which would show the Appellant's denials to be false. It has been held by this court that the version of the Appellant must be believed unless shown positively to be false. Mayo v. State, 71 So.2d. 899 (Fla. 1954). As the testimony involved was not of such a nature to be convincing, and in fact bears blatant earmarks of uncertainty, reversal is required. Council v. State, 140 So. 13 (Fla. 1933). It is clear that the verdict in this case was not in accord with the manifest justice of the case, and that the character and integrity of the witnesses should go into the formula for determining the interest of justice on review. Williams v. State, 130 So. 457 (Fla. 1930). As a human life is involved, it is only just and right that another jury should pass upon the issues in this matter. Platt v. State, 61 So. 502 (Fla. 1913).

POINT V

THE CUMULATIVE EFFECT OF VARIOUS COURT RULINGS REQUIRE A NEW TRIAL TO BE GRANTED.

Throughout the course of the trial, various rulings resulted in prejudice to the Appellant, the cumulative effect of which requires a new trial in the instant case.

The trial court erred in refusing to suppress the results of the illegal stop and arrest of the Appellant, as such stop was without warrant and was premised entirely upon identification by a civilian in the police car (Mobley) who pointed out "Frank L" (Tr. vol. I, pgs. 33, 35). Although arresting officer McCann testified that he saw the outline of a hidden knife as he drove past the Appellant and that he would have definitely stopped and arrested the Appellant for carrying that concealed weapon (Tr. vol. I, pgs. 31, 38), it is clear that this was a pretext action based upon inadequate descriptions and investigation at that point. Unlike United States v. Hensley, __U.S.__; 105 S.Ct. 75 (1985) [which expanded stop and frisk encounters under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) to include completed felonies], the instant stop was not based upon a police flyer or warrant but was based upon evidence which was insufficient for an arrest, as was admitted by the detectives (Tr. vol. I, pg. 45). The extremely general

description which the police were working with (see Point IV regarding sufficiency) was too vague and generalized to support even a Terry stop. See Ross v. State, 419 So.2d. 1170 (Fla. 2d. DCA 1982) (black male with short cropped hair wearing a white T-shirt and bluejeans insufficient); Strong v. State, __So.2d.__; 11 F.L.W. 1800 (Fla. 2d DCA 8/29/86), (black male wearing dark clothing with a handgun at a particular convenience store insufficient); Williams v. State, 454 So.2d. 737 (Fla. 2d. DCA 1984) (tall black male selling marijuana in front of a particular bar insufficient). Therefore, the stop of the Appellant was unreasonable and unconstitutional as would be the returning of the Appellant to the police station for conversation as related by Detective Scheff (Tr. vol. I, pg. 45). See Hayes v. Florida, __U.S.__; 105 S.Ct. 1643 (1985).

Therefore, the Motion to Suppress should have been granted and the evidence tainted by such actions should have been excluded. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

The trial court erred in denying the Motion to Suppress Statements by the Appellant. Notwithstanding the initial taint of the unconstitutional stop and arrest of the Appellant, the supposed oral statements of the Appellant should have been suppressed as the record was insufficient to support a finding that the statements involved were freely

and voluntarily made (see DeConnigh v. State, 433 So.2d. 501 (Fla. 1983), and the record was insufficient to support a finding that the Appellant waived his right to remain silent and right to an attorney (rights which the trial court implicitly found were exercised by the Appellant when the court suppressed the second statement (Tr. vol. I, pgs. 87-88). The Appellant made it unmistakably clear that he did not wish to speak to the officers - as clear as a lay person in his situation could make it: he gave a false name on the rights waiver form, told the police that he was not going to cooperate, inquired about the interrogation room being bugged and was hostile to the police (police admitting there was no rapport) and, in fact, did not allow a tape recorded statement to be taken nor a written statement nor did the Appellant sign any type of statement (Tr. vol. I, pg. 65). Certainly the State has the burden of establishing a valid waiver of the right to counsel and to remain silent and all doubts must be resolved in favor of protecting a claim of Sixth Amendment right to counsel. Michigan v. Jackson, __U.S.__ 106 S.Ct. 1404 (1986). As this was not done, reversal is mandated.

The trial court erred by admitting overly grusome and imflammatory photographs of the victim over the Appellant's objection, with said photographs being admitted only

for the purpose of inflaming the passion of the jury. (Tr. vol. IV, pgs. 561, 566). The photographs in question were certainly so inflammatory as to create an undue prejudice in the minds of the jury and detract from a fair and unimpassioned consideration of the evidence in the case. Young v. State, 234 So.2d. 341 (Fla. 1970), pg. 348.

The trial court erred in restricting cross examination of Shirley McGriff, the aunt of the victim and sister of Dorothy McGriff regarding Dorothy's relationship with a person named Marvin - a possible second suspect in the incident (Tr. vol. IV, pg. 612). It is fundamental that cross examination is the principal means by which a witness's perceptions and memory are tested to show bias, prejudice or interest and is a vital aspect of the defendant's right to confront witnesses. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974); Cox v. State, 441 So.2d. 1169 (Fla. 4th DCA 1983). It has also long been the law in the state of Florida that one accused of a crime may show his innocence by proof of guilt of another. Lindsay v. State, 68 So. 922 (Fla. 1915). Where evidence tends in any way even indirectly to prove a defendant's innocence, it is error to deny its admission. Chandler v. State, 366 So.2d. 64 (Fla. 3d. DCA 1978). Although evidence regarding other suspects was elicited through the cross examination of detectives later in the trial

(Tr. vol. VI, pgs. 945-946; vol. VII, pgs. 1021-1027), eliciting such information through an impartial witness has a much greater impact on a jury, and it was error to deny such cross examination - particularly as among all the names checked as suspects, Marvin never arose except in the restricted questioning of Shirley McGriff.

The trial court erred in failing to grant Appellant's request for an independent chemist to attempt separate and more detailed semen and blood tests with an eye toward excluding the Appellant (Tr. vol.X, pgs. 1536, 1543). Although all of the physical tests regarding blood and semen were negative and did not connect Appellant to the crime, it was the Appellant's intention, stated in his motion and arguments, to require the independent testing and to thereby exclude himself as a suspect. By denying this request, the Appellant was denied his constitutionally guaranteed access fo evidence, which is meant to deliver exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous convictions and ensuring the integrity of our criminal justice system. Melendez v. State, __So.2d. __; 11 F.L.W. (Fla. 12/19/86), pg. 639. While the Appellant recognizes that there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case, the State does have a duty to present evidence that might be

expected to play a significant role in the suspect's defense. Id., pg. 639. It was error to exclude the possibility of such witnesses.

The trial court erred in denying the Motion to Disqualify the Trial Court filed by the Appellant. (Tr. vol. X, pgs. 1487, 1493). At the hearing on the Motion to Disqualify, it was alleged that the trial court made prejudicial remarks, including that the chances looked fifty-fifty for the Appellant and that the court would see a trial (Tr. vol. I, pg. 96). The trial court, in denying the Motion, found the Motion to be legally insufficient regarding fact and law, but the trial court went further and commented on and passed upon the truth of the allegations, noting that "I didn't say it". (Tr. vol. I, pg. 97). It has been repeatedly held that while it is appropriate for the court to determine the sufficiency of the defendant's motion for the judge's disqualification, the court shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. Bundy v. Rudd, 366 So.2d. 440 (Fla. 1978), pg. 442. "When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry, and on that basis alone establish grounds for his disqualification." Bundy, pg. 442.

Consequently, with the trial court's refuting of the allegations, it became clear that the Motion to Disqualify must be granted, and it was error to deny that Motion.

The trial court erred in denying Appellant's Motion for Change of Venue (Tr. vol. X, pgs. 1486, 1494). The allegations of exhaustive newspaper and radio coverage regarding this crime (Tr. vol. I, pg. 97) was verified with at least one juror's admission of reading a newspaper article about the case (Tr. vol. II, pg. 186). It was error to force the Appellant toi be tried in the community which had been permeated with pre-trial publicity, to the detriment of the Appellant.

The trial court erred in refusing Appellant's request to interview the Grand Jurors who returned the Indictment in the instant matter, although some of the Grand Jurors knew the parties involved (Tr. vol. X, pgs. 1540-1541). Certainly the Appellant is entitled to a fair and impartial Grand Jury to review the evidence presented and to make a determination as to whether or not to indict on that evidence and not outside influence. As a prima facie showing was made of prejudicial outside influence, it was error to prevent the Appellant from at least inquiring of the Grand Juror's regarding this influence.

It was error by the trial court to admit the composite artists' sketches before the jury, as such sketches

were necessarily based upon heresay - the out-of-court statements of Chiquita Lowe and Gerald Davis, in that the artists were both employees of the Sheriff's Office, their testimony and the result of their work also had artificial weight before the jury because of their official position. It was error to admit such sketches.

It was error for the trial court to read back the testimony of Chiquita Lowe at the jury's request over the objection of the Appellant (Tr. vol. VIII, pgs. 1233-1234) and to deny the resulting Motion for Mistrial (Tr. vol. VIII, pg. 1235), as just as the Appellant's trial counsel argued, this gave artificial weight to this critical testimony by isolating such testimony before the jury. This isolation of testimony to the exclusion of the evidence favorable to the Appellant's position was prejudicial error.

Wherefore, for the cumulative effect of all of the aforementioned, a new trial is required.

POINT VI

THE TRIAL COURT ERRED IN IMPOSING A DEPARTURE SENTENCE REGARDING COUNT III OF THE INDICTMENT.

In response to a Motion filed by the State, the trial court entered an Order aggravating the sentence in Count III, Burglary with an Assault (Tr. vol. X, pg. 1545), sentencing the Appellant to a life term (Tr. vol. X, pg. 1551) instead of the three-and-a-half to four-and-a-half year range anticipated by the sentencing guidelines (Tr. vol. X, pg. 1548). In entering such an aggravated sentence, the court found, as its first justification, that the departure sentence should be imposed because the defendant is an habitual offender. (Tr. vol. X, pg. 1545). This court has recently held that the habitual offender status is an improper reason for departure from the recommended sentencing guidelines, as the objectives and considerations of the habitual offender status are fully accomodated by the sentencing guidelines. Whitehead v. State, __So.2d.__, 11 F.L.W. 553 (Fla. 10/31/86). See also Strong v. State, __So. 2d.__; 11 F.L.W. 2601 (Fla. 1st DCA 12/19/86). As this reason for departure is clearly improper, resentencing under the guidelines is required, as a reviewing court cannot discern from the record that there is no reasonable possibility that the absence of this invalid reason would have affected the

sentencing, thus the improper reason must be considered harmful. Albritton v. State, 476 So.2d. 158 (Fla. 1985); Casteel v. State, __So.2d. __; 11 F.L.W. 631 (Fla., 12/12/86), pg. 632.

POINT VII

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON APPELLANT.

The review of the death sentence by this court has two discreet facets: to determine that the jury and judge acted with procedural rectitude and to ensure relative proportionality among death sentences which have been approved statewide. Adams v. State, 412 So.2d. 815 (Fla. 1982). In the instant case, not only are the procedural errors fatal to the sentence of death, but the sentence imposed is not proportional in a statewide comparison of death sentences approved, particularly in light of the improper consideration of certain aggravating circumstances, and the failure of the trial court to consider mitigating circumstances shown by the Appellant.

In imposing the death sentence, the trial court found that five (5) aggravating circumstances exist: that the Appellant was under sentence of imprisonment at the time, that being on parole; that the Appellant has been previously convicted of another capital felony or a felony involving use or threat of violence; that the killing was committed during the commission sexual battery and burglary; that the killing was especially heinous, atrocious or cruel; and that the killing was committed in a cold, calculated and premeditated manner. (Tr. vol. X, pgs. 1552-1556). In making these

findings, it is clear that the aggravating circumstances of heinous, atrocious and cruel and cold and calculated were improperly considered when imposing the death sentence.

Considering first the finding that the killing was done in a cold and calculated manner, the theories and speculation regarding the prior planning to use a rock as a weapon (Tr. vol. X, pg. 1556) are not supported in the record and do not support his aggravating circumstance, recalling that this circumstance ordinarily applies to those murders that are characterized as executions or contract murders. McCray v. State, 416 So.2d. 804 (Fla. 1982). Similarly, the court's finding of an attempt to commit sexual battery does not support an intent to commit first degree murder (see Jackson v. State, __so.2d.__; 11 F.L.W. 609 (Fla. 12/5/86), conviction reversed, intent to commit armed robbery does not translate into intent to commit first degree murder). The facts of this case show a spontaneous frenzied reaction as opposed to the well planned execution-style murder such as Vaught v. State, 410 So.2d. 147 (Fla. 1982). See the following, reversing of finding of cold and calculated: Peede v. State, 474 So.2d. 808 (Fla. 1985); Brown v. State, 473 So.2d. 1260 (Fla. 1985); Wright v. State, 473 So.2d. 1277 (Fla. 1985); and Griffin v. State, 474 So.2d. 777 (Fla. 1985).

Turning to the finding of heinous, atrocious and cruel and the concurrent statewise review of the proportionality of the death sentence, the court improperly relies on a

fallacious time frame to support such a finding: sexual battery then striking with the deliberate intention to inflict pain and suffering (Tr. vol. X, pgs. 1555-1556). However, no evidence in the record supports this theory and time frame. Quite the contrary, the fact that the victim was unconscious and comatose when taken to the hospital, lingering days before dying, (Tr. vol. V, pg. 714; vol. IV, pgs. 569-570) negates any assumption regarding the timing and regarding the consciousness of pain. The vaginal bleeding would be just as consistent with consciousness or unconsciousness during the sexual battery, and the court can only speculate. The fact that the younger brother was not awakened during the attack is more consistent with the theory that the victim was struck initially and then attacked. This case is directly contrary to Atkins v. State, __So.2d.__; 11 F.L.W. 567 (Fla. 11/7/86), where the six year old victim of a sexual battery was found conscious and choking on her own blood, leading this court to find that there was no evidence that the victim was unconscious to save her from pain and torture. The attention of this court is directed to the following cases where the death sentence was found to be inappropriate in situations more heinous than those presented in the instant case: Irizarry v. State, __So.2d.__; 11 F.L.W. 568 (Fla. 11/7/86); Huddleston v. State, 475 So.2d. 204 (Fla. 1985); Drake v.

State, 441 So.2d. 1079 (Fla. 1983); Herzog v. State, 439 So.2d. 1372 (Fla. 1983). For further comparison to show cases where the death sentence has been approved, see Hooper v. State, 440 So.2d. 525 (Fla. 1985); Roman v. State, 472 So.2d. 886 (Fla. 1985); Waterhouse v. State, 429 So.2d. 301 (Fla. 1983). When a legitimate statewide comparison of death sentence cases is made, this court must agree that the death sentence would be disproportionate in the instant case, and the case should be remanded for a life term.

The death sentence in the instant case is also flawed due to the fact that the trial court failed to consider important mitigating circumstances, particularly the circumstances dealing with the Appellant being under the influence of extreme mental or emotional disturbance and the Appellant's diminished capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. By rejecting these mitigating circumstances specifically (Tr. vol. X, pgs. 1558-1559), the court improperly ignored mental mitigation, examples of which were found throughout the record. When the court initially granted the Appellant's Motion to Appoint Psychiatrist regarding competency to stand trial (Tr. vol. I, pg. 22), the court was again advised of irrational behavior during the course of the trial (Tr. vol. III, pgs. 365-366), and during the advisory portion of the trial, Appellant presented evidence of Dr. Krieger, a clinical

psychologist, regarding the Appellant's breakdown in thinking, delusional manner, and marginally mentally ill status, diagnosing the Appellant as having a schizophrenic disorder with paranoid features (Tr. vol. VIII, pgs. 1303-1304, 1307). Appellant also produced Dr. Zager, a psychiatrist, who testified regarding Appellant's paranoid disorder (Tr. vol. VIII, pg. 1311). Finally, the court granted a Motion to Continue the original sentencing date for more psychiatric examination and appointed three psychiatrists at the Appellant's request for the purpose of sentencing (Tr. vol. VIII, pgs. 1376, 1379). With the record replete with evidence of emotional disturbances and dimished capacity, the trial court erred by failing to consider these mitigating circumstances and in imposing the death sentence. These problems must be considered in the sentencing equation even though they fall short of a defense of insanity or diminished capacity. Eddings v. Oklahoma, __U.S.__; 102 S.Ct. 869 (1982); Jones v. State, 332 So.2d. 615 (Fla. 1976). See Atkins v. State, __So.2d. __; 11 F.L.W. 567 (Fla. 11/7/86), where much less and less substantial evidence supported these mitigating circumstances. Parenthetically, the trial court improperly failed to consider the Appellant's background and childhood, particularly dealing with the Appellant's mother being raped and killed and his father dying while he was a child (Tr. vol. VIII, pg. 1315). See Scott v. State, __So.2d.__; 11 F.L.W. 505 (Fla. 10/3/86).

Another distinct flaw in the death sentence was the court's consideration of a twenty-six year old juvenile manslaughter conviction when the Appellant was thirteen years old (Tr. vol. X, pg. 1557). This error began with the trial court's allowing of the prosecutor to elicit such testimony from the Appellant's aunt Della Irving, who in her advisory sentence testimony simply stated that the Appellant would not hurt anyone (Tr. vol. VIII, pg. 1324). The prosecutor took this opportunity to bring up the twenty-six year old conviction, contrary to the prosecutor's earlier position that he would not use such a juvenile conviction unless the door was opened, prompting the trial court to grant a related Motion in Limine (Tr. vol. VIII, pgs. 1275-1276). The subterfuge of the situation is readily apparent in that the prosecutor did not question Della Irving regarding her knowledge of the Appellant's first degree murder conviction as an adult which had already come before the jury, but instead chose to mount an improper character attack with the juvenile conviction which had no probative value as being too remote in time to be properly considered by the jury or the sentencing court. See United States v. Cathey, 521 F.2d. 268 (U.S.C.A. 5th Circ. 1979); Ward v. State, 343 So.2d. 77 (Fla. 2d. DCA 1977).

Finally regarding imposition of the death sentence, permeating the entire procedure was the improper argument of

the prosecutor and equally improper and inadequate instruction by the trial court minimizing the jury's role in the sentencing procedure and limiting their consideration of non-statutory mitigating circumstances, thus making the entire sentencing procedure unconstitutionally defective.

At the very outset of the trial in the initial comments to the jury, the court begins to minimize the jury's role in the death sentence procedure, telling the jury that they render an advisory sentence and the court sentences the defendant, with the court not being required to follow the advice of the jury. "Thus, the jury does not impose punishment ... the imposition of punishment is the function of the court rather than the function of the jury ... " (Tr. vol. II, pg. 187). The effect of this minimization is immediately shown when a prospective juror states in open court and in the presence of the panel that her understanding of the court's instructions was, vis a vis the jury's role in sentencing:

> You said that if you could make an impartial decision but your faith does not believe in killing people, you're not making that decision yourself. In other words, if you say you should not feel that way, you should not feel responsible for what happens,

> even though you can make an impartial decision. I don't believe in taking a life, but I'm not making that decision, but I will give an impartial decision ... (Tr. vol. II, pg. 189).

The trial court does not clarify the position taken by and expressed by the juror, but in fact then questions her regarding her ability to find guilt or not. The juror then repeats her minimized role: "The way you had said it, I thought since we would not be responsible" (Tr. vol. II, pg. 190), again leading to no clarification by the court. These comments by the prospective jurors which remained unchallenged by the trial court present an intolerable danger that the role in making an advisory recommendation, which is a position which is entirely incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. Caldwell v. Mississippi, __U.S.__; 105 S.Ct. 2633 (1985), pgs. 2641-2642); Darden v. Wainwright, __U.S.__; 106 S.Ct. 2464 (1986), pg. 2473. This minimization without clarification by the trial court and without correction by the jury instruction is further exacerbated by the trial court's failure to give the proposed special jury instruction regarding the jury's right and privilege to consider any aspect

of a defendant's character or background as a mitigating circumstance (Tr. vol. X, pg. 1513) and the ability to consider human mercy in imposing a life sentence (Tr. vol. X, pg. 1519). See Floyd v. State, __U.S.__; 11 F.L.W. 594 (Fla. 11/21/86).

Wherefore, for reasons of procedure and proportionality, as well as improper instruction and minimization of the jury's advisory rule, the sentencing procedure was fatally flawed, and the death sentence must be reversed.

CONCLUSION

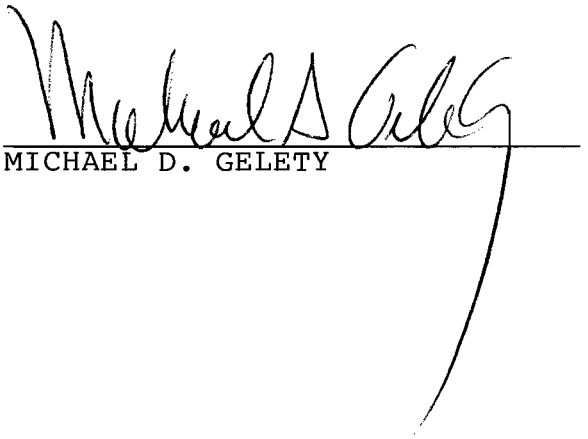
Based on the foregoing points, including the failure to grant the Motion to Suppress the statements of the Appellant, the lack of sufficient evidence to support the conviction, the failure of the court to hold a Richardson hearing and the cumulative effects of the other points raised, a new trial is required.

Similarly, the death sentence is inappropriate in the case based upon the facts and based upon the statewide comparison of other death sentence cases.

A new trial is required in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant FRANK LEE SMITH was furnished by U.S. Mail to the Attorney General's Office, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401 this 15th day of January, 1987.



MICHAEL D. GELETY