IN THE SUPREME COURT OF FLORIDA

WALTER LEE BROWN,

Appellant,

v.

CASE NO. 69,623

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

FLORIDA BAR NUMBER
308846

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PRELIMINARY STATEMENT

Appellant, WALTER BROWN, along with co-defendant Robert Roundtree, were the defendants in the trial court. Brown will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to herein as the state.

The record on appeal, consisting of five volumes of pleadings sequentially numbered at the bottom of each page, will be referred to as "R" followed by the appropriate page number in parenthesis. The transcript of proceedings below is contained in twenty-eight volumes, sequentially numbered at the top of each page, and will be referred to as "T" followed by the appropriate page number in parenthesis. The supplemental record on appeal will be referred to as "SR."

STATEMENT OF THE CASE

On November 1, 1985, an information was filed charging Walter Brown and co-defendant Robert Roundtree with the second degree murder of Francis Sheldon Bowden on October 10, 1985 (R 9). Subsequently, on November 8, 1985, the Grand Jurors of Duval County indicted appellant and Mr. Roundtree for first degree murder (R 28-30), and the state nol prossed the information (T 2).

Appellant was arraigned on the charge on November 12, 1985. He was also arraigned on that date on charges on first degree murder in Case No. 85-11306; armed robbery, armed kidnapping and use of a firearm during the commission of a felony in Case No. 85-11117; and armed robbery, aggravated assault and use of a firearm during the commission of a felony in Case No. 85-11118 (T 2-3).[1]

Prior to trial appellant filed motions to suppress physical evidence and statements to the police (R 97-98, 261-263). After a hearing on August 21, 1986, the motions were denied by written order (R 513, 514; T 136-173, 317). The court also heard Brown's and Roundtree's motions to sever, which were based on the conflicting statements of the two co-defendants. Brown's attorney noted that in Case No. 85-11118, the court deleted portions of Roundtree's confession which placed an increased amount of guilt on appellant. He argued that the statements with respect to the Bowden murder were fundamentally different in that Roundtree

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[1] Appellant was tried in Circuit Court Case No. 85-11118 prior to the trial of the instant cause and was convicted of armed robbery. That conviction is currently pending on appeal in the First District Court of Appeal, Case No. BO-301.

admitted shooting Mr. Davis but denied shooting Mr. Bowden, whereas Brown denied both killings. He argued that the confessions were not interlocking, regardless of any other similarities in the statements, and the differences were particularly significant in a capital case where intent to kill was an issue. As an alternative to severance, counsel suggested that those portions of Roundtree's statements which placed the blame on Mr. Brown be deleted. Counsel for Roundtree found that alternative totally unworkable and unfair and proposed that the offensive portions of Mr. Brown's statements be deleted. Roundtree's attorney argued that the statements were antagonistic and conflicting and that the inconsistencies were not minor. The state responded that the statements were interlocking on 35 salient facts and urged the court to deny the motions to sever and admit the statements without any deletions. After hearing the arguments of counsel, the court denied Brown's motion to sever. Roundtree's motion to sever was also denied (R 122-123, 124-126, 127-170, 172-209, 211-259, 512; T 230-260).

The state's Notice of Similar Fact and Collateral Crime Evidence (R 120-121) and appellant's motion in limine (R 275-278) were argued on August 22. The state sought to introduce evidence relating to (1) the robbery and kidnapping of Samuel Edwards on September 5, 1985; (2) the theft of a 1977 Dodge Aspen between September 22-23, 1985; (3) the murder of Robert Davis on the same dates; (4) the theft of Mr. Davis' 1984 Chevrolet Monte Carlo; (5) the burglary of Francis Bowden's apartment on October 11, 1985; (6) the aggravated assault and attempted kidnapping of Marvin Hazelton on October 10, 1985, and (7) the defendants' use of Mr. Bowden's credit card on October 10, 1985. After hearing arguments from the state and counsel for defendants Brown and Roundtree, the court

granted the motion in limine as to the incident involving Samuel Edwards and the use of Mr. Bowden's credit card, and denied the motion in all other respects (R 516; T 321-358).

Mr. Brown and Mr. Roundtree were tried jointly by jury on September 8- 12, 1986. At the conclusion of the trial, the jury found both defendants guilty of first degree murder as charged (R 741; T 2009). Appellant's motion for new trial, filed September 17, 1986, was heard and denied on September 24, 1986 (R 744-746, 748; T 2022-2027).

Prior to the advisory penalty hearing on September 25, 1986, appellant renewed his motion to sever and filed a motion to impanel a new penalty phase jury, which were denied (R 749-751, 752; T 2028-2042). Appellant also filed a notice of waiving reliance on the mitigating circumstance under Section 921.141 (6)(a) and motion in limine, which motion was granted (R 757, 758; T 2067-2072). The court granted in part and denied in part appellant's motion in limine regarding the aggravating circumstances under Sections 921.141 (5)(a, h, and i)(R 753-755, 756; T 2043-2067).

Appellant's motion for severance was again renewed and denied prior to the reception of evidence at the penalty phase (T 2211). Following the testimony, the jury recommended death sentences for both Walter Brown and Robert Roundtree (R 811; T 2523).

Following the denial of appellant's motion for a new sentencing hearing (R 812-814, 828; T 2533), the trial court sentenced appellant to death, finding six aggravating factors and no mitigating factors (R 829-854; T 2553-2562).

Notice of appeal was timely filed (R 860), and the Public Defender for the Second Judicial Circuit was designated to handle the appeal.

STATEMENT OF FACTS

A. Trial

Jury selection commenced on September 8, 1986. During the voir dire, the prosecutor exercised peremptory challenges to excuse ten black prospective jurors: Nathan Barnes (T 540)), Louise Grey (T 541), Theresa Baldwin (T 541), Terrie Boykins (T 546), Michael Campbell (T 548), Abram Williams (T 659), Timothy Williams (T 662), Keith Gallman (T 859), Ella Tillman (T 863), and Martha Robinson (T 966). Appellant's repeated objections and motions to strike the venire on the ground that the state's peremptory challenges were racially motivated were denied by the court after requiring the state to give reasons for its peremptory challenges (T 541-549, 659-660, 662, 859-862, 863-870, 966-968). The trial court also denied appellant's request for an additional challenge to backstrike a seated juror (T 973-974).

In his opening statement to the jury, counsel for Robert Roundtree told the jury that appellant "is an accomplished car thief" (T 1024). Appellant objected and moved for a mistrial on the grounds that it improperly placed appellant's character in issue and implied criminal conduct which was not admissible and not part of the state's submission of similar fact evidence. The court denied appellant's motion for mistrial but instructed the jury to disregard counsel's argument (T 1024-1029).

The first state witness was Henry Bowman, a deacon at the Mount Zion Missionary Baptist Church on San Diego Road in Jacksonville. Mr. Bowman discovered the body of Francis Sheldon Bowden behind the church on the afternoon of October 12, 1986 (T 1040-1042, 1045, 1411). The church was under construction and the

area around it was overgrown with weeds. The church sits about 75 to 100 feet from the road, and the body was found approximately 250 feet from the road. Douglas Anderson School is three blocks from the church, but it is not visible from the back of the church because of the woods (T 1044-1047).

An evidence technician arrived at the church at 2:50 p.m. on October 12. He secured the area and photographed the crime scene. Photographs and a diagram of the area were admitted into evidence (T 1049-1057, 1087-1094).

Lois McMahon, the victim's fiance, last saw Francis Bowden at 10:00 p.m. on October 9, 1985. They planned to meet the next morning at 8:00 a.m. to take a trip. At 6:45 a.m. on October 10, Mr. Bowden called Ms. McMahon to confirm their date. When Bowden failed to arrive at the appointed time and place, Ms. McMahon called his apartment and received no answer. She then contacted the apartment manager, Will King, to check Mr. Bowden's apartment. When King entered the apartment, the lights and TV were on and Mr. Bowden's wallet and credit cards were on the dresser, but Mr. Bowden was not there, and his car was not in the parking lot. King called the police at Ms. McMahon's request (T 1098-1103, 1178-1179).

Ms. McMahon went to her fiance's apartment. She found his clothes packed on the bed ready for the trip; his credit cards were strewn over the dresser. Nothing else was amiss in the apartment (T 1103-1104).

At 6:15 a.m. on October 10, 1985, James Coile left his apartment at the University Square Apartments and returned in his car 45 minutes later. Upon returning he saw a smaller gray or off-white late model car stop in the apartment driveway; the

passenger got out and rushed across the parking area. Coile went back to the parking space he had left at 6:15, but the spot was occupied by a maroon car. A young black male with a muscular build was trying to unlock the car. There were no other blacks in the area, and Coile thought it was unusual for someone to temporarily park a car in that spot so early in the morning. He noted the license number of the maroon car and then watched it leave the parking lot and go west on Cruz Street, followed by the smaller gray car. He later gave the license number to Will King and the police (T 1112-1121).

That night Mr. Coile looked out of his window and saw heads bob near the street. He was concerned that a burglary was taking place in Mr. Bowden's apartment across the way, so he sat watching the apartment entrance. He called Will King when he saw a man rush into the apartment. All the lights were on in Mr. Bowden's apartment. Coile later saw someone wearing a raincoat exit the apartment. It appeared that there was something in the raincoat. When the police arrived, Mr. Coile went outside and saw the maroon car bearing license number 775 BGL. He identified photographs of the car and license plate and the photos were admitted into evidence without objection (T 1121-1128).

Officer Reginald Richardson was dispatched to Mr. Bowden's apartment at 2:30 a.m. on October 11, 1985. The door was ajar and the apartment was in disarray. All the lights were on. No one was inside. There were two cars in the parking lot, a Toyota and a 1984 Monte Carlo, with a television set on the ground between them. Richardson called for an evidence technician and impounded the cars (T 1207-1213). The evidence technician, J. T. Royal, arrived at the apartment at 3:00 a.m. He photographed the apartment, the two

cars in the parking lot and the television. He seized a .22 rifle found on the coffee table in the apartment and nine rounds of ammunition. There were two empty gun cases in the hall and shotgun shells in the dresser and on the bed. One shotgun was found outside on the grass, and a shotgun, raincoat and belt were found in a pile of trash at the bottom of the stairs. Officer Royal testified that there were no signs of forced entry into the apartment (T 1141- 1154).

Leslie Kirkendall, Francis Bowden's daughter, went to her father's apartment at noon on October 10, 1985. His car was not there, but there were lights on in the apartment and Ms. Kirkendall heard the television through the door. She banged on the door and yelled for her father, but received no answer. She called Will King and returned to the apartment at 2:00 p.m. Inside she found clothes on the bed as if her father was packing; the TV and fan were on, and there were credit cards spread across the bedroom dresser. After the police were notified, everything was turned off and the apartment was locked (T 1160-1164). Ms. Kirkendall returned to her father's apartment the following morning and found a different condition from the day before; the stereo was disassembled on the floor, the dresser was in disarray and things were thrown on the bed,and there was a rifle on the table which she had never seen before. The witness identified her father's briefcase and a can of antifreeze in a photograph of the trunk of Mr. Bowden's car (T 1165-1170). On cross-examination, Ms. Kirkendall stated that she did not recognize a pair of gray shoes which were also in the trunk (T 1171).

Will King, the resident manager of University Square Apartments, testified that on the morning of October 10, 1985, at

approximately 6:30 or 6:45 a.m., he saw a red Monte Carlo with two black males park outside Mr. Bowden's apartment. King thought it unusual since no blacks lived in the apartment complex and it was so early in the morning. King testified that he was familiar with all the occupants and their vehicles, and he had never seen the Monte Carlo before (T 1174-1178). After Ms. McMahon's phone call, King went into the parking area; Mr. Bowden's car was missing. That night King made his rounds of the apartment complex at 11:00 p.m. He looked for Mr. Bowden's car, but he did not see it (T 1178-1182).

At 2:30 a.m. King received a call from Mr. Coile, summoned the police, got a gun and went outside. He saw a young black male put a television down beside a red Monte Carlo. The youth fled when he saw King. A minute later King heard the sounds of persons going down the steps and running behind the apartments. King recognized the license number on the Monte Carlo that Coile had given him the previous morning. Mr. Bowden's Toyota was parked next to it (T 1183-1184, 1195-1196).

At 6:00 a.m. King was returning to his apartment after checking to see if the Bowden apartment was locked when he saw a young black male walk past his door. The manager thought he recognized the man from the previous morning as the passenger of the Monte Carlo and held him at gunpoint until Officer Richardson arrived and arrested him. Mr. King identified Walter Brown as the man he saw on October 10 and detained on the morning of October 11 (T 1197-1202, 1214-1215).

Over appellant's objection, Officer Richardson testified tha he advised appellant of his rights and Mr. Brown told him that he was at the apartment complex to pick up a car for a friend. Mr.

Brown was holding a foreign car key. The officer took the key and drove appellant to Abe's Wrecker where the Toyota was impounded, and established that the car key fit Mr. Bowden's automobile (T 1215-1219).

The next state witness was homicide detective Anthony Hickson (T 123-1234). Prior to his testimony, the court overruled defense counsels' objections to the admission of collateral crime evidence and appellant's renewed motion to sever and instructed the jury on the limited purpose of the collateral crime evidence (T 1235-1239).

Detective Hickson testified that on the morning of September 23, 1985, a 1977 green Dodge Aspen was discovered in a grassy area off North Liberty Street adjacent to a cemetery. The keys were in the ignition and the radio was playing loudly. A body was in the trunk. The victim had sustained one gunshot wound to the left side of the face (T 1239-1244).

On October 2, 1985, Hickson interviewed Walter Brown at the Sheriff's office. Over appellant's objections (T 1247-1249), Hickson testified that appellant denied any knowledge of the theft of the Dodge Aspen or murder of Robert Davis (T 1250).

Robert Roundtree was arrested on October 14, 1985 (T 1227-1230). Detective Hickson interviewed Roundtree that day (T 1266). The court denied Roundtree's motion to suppress his statements and appellant's renewed motion to sever but agreed to give appellant's requested instruction at the conclusion of the statements (T 1269-1271). Hickson then testified that he advised Roundtree of his rights and Roundtree admitted that he and Walter Brown, whom he called Wayne, stole the Dodge Aspen on the morning of September 22. The following day they picked up a man on Pearl Street, robbed him, put him in the trunk, drove to Liberty Street and killed him.

Appellant was driving the car and told Robert to go to the trunk and shoot the man. Roundtree said he did not want to shoot the man, but he opened the trunk and fired one shot while standing approximately five feet from the body (T **1272-1276).**

Roundtree further confessed that they stole the man's Monte Carlo and spray painted black spots on it to alter the car's appearance. They drove the vehicle for two or three weeks when they started looking for another automobile. Sometime in early October, they attempted to rob and kidnap a man in the Albertson's Shopping Center, but a police car came by and the man ran. They immediately drove into an apartment complex behind the Albertson's and saw an older white male cleaning out his car. Another individual came out of an apartment and Brown and Roundtree pretended to work on their car until the individual left. They then approached the older man with a gun and made him get in the car. The man said he had money upstairs in his apartment. One of them took the man's keys and went to the apartment with the man at gunpoint. The man was then put in the trunk of the Monte Carlo. They were leaving the apartment complex when Brown said he lost the wallet or dropped his identification and they returned to the complex, but did not find it. When they left the second time, they took the man behind a church on San Diego Road. According to Roundtree's statement, Roundtree was driving the man's Toyota and Brown drove the Monte Carlo with the victim in the trunk. Brown told Roundtree to park down the street away from the church, while he drove behind the church. Roundtree heard shots and then Brown returned to the car. They left in the Toyota but later retrieved the Monte Carlo from behind the church and continued driving both cars. That night they agreed to go back to the man's apartment

with a young black male, Amp, who was their look-out. They panicked when they thought someone had seen them and ran. They dropped weapons as they fled the apartment T **1277-1278, 1281-1286).**

On cross-examination, Hickson recalled Roundtree's statement that he [Roundtree] was in the Monte Carlo and Brown was outside when they approached the man in the Albertson's parking lot. Brown had a pistol and Roundtree had a **.22** automatic rifle, the same weapon used to shoot Mr. Bowden (T **1294).** With regard to the Davis shooting, Mr. Roundtree never indicated that Walter Brown forced him or ordered him to do it, nor did he ever indicate that he was afraid of Mr. Brown (T **1296-1297).**

On redirect examination, Hickson stated that Roundtree told him that after they put the man in the trunk of the Monte Carlo, he was driving the other vehicle and Brown told him to go back because the man might still have his identification and tell the police who they were. The man was still alive in the trunk of the car (T **1305-1307).**

Following this testimony, the court instructed the jury that the statements of Robert Roundtree could be considered as evidence against Mr. Roundtree but could not be considered in determining the guilt of Walter Brown (T **1309-1310).**

Roundtree agreed to give Detective Hickson a recorded statement (T 1288-1293), and the transcribed statement was read to the jury (T **1328-1373).** In that statement Roundtree said it was appellant's idea to steal the Dodge Aspen and Brown gave Roundtree the **.22** automatic rifle and told him what to do (R **131-132);** Brown didn't like that car and they went to the Pearl Plaza looking for another vehicle (R 134-135); Brown pulled a gun

on Robert Davis and put him in the trunk of the Aspen and drove the victim's Monte Carlo to the cemetery with Roundtree following in the Aspen: Brown told Robert to shot the man in the trunk, which Roundtree did, although he said he did not try to kill Davis (R 137-1421). Roundtree knew the police were looking for him and they decided to steal another car. At the Albertson's parking lot, Roundtree was sitting in the Monte Carlo with the .22 rifle, but he dropped it and the bullets fell out: Walter approached the intended victim with a gun, but the man ran and a police officer saw them (R 147-151). At Mr. Bowden's apartment, Roundtree got in the Toyota and started it, but Brown told him to wait while he took Bowden's keys and went upstairs to the apartment: Roundtree wanted to leave the man in the trunk of the Monte Carlo and depart in the Toyota, but Brown told him to go back because the victim might get out and tell the police about the car (R 147-153). Roundtree maintained that Brown drove the Monte Carlo, and when they stopped, Brown took the .22 rifle out of Roundtree's car, told Roundtree to park and wait for him and come back in five minutes: Roundtree drove back, stopped the car and heard shots. When Brown came back to the car, he told Roundtree that he shot the man in the back, the man fell and Brown shot him in the stomach and the neck, then grabbed his neck and shot him in the head. Roundtree did not witness the murder (R 153-158). According to Roundtree, someone drove Brown back to the church to get the Monte Carlo later that day (R 162).

The court again denied appellant's motion for severance at the conclusion of the recorded statement, but reinstructed the jury on limiting the use of the recorded and oral statements as to defendant Roundtree (T 1374-1375).

Over appellant's objections (T 1313-1315), Mrs. Berenice Davis identified her car and house keys and a photograph of the 1984 Monte Carlo and testified that she last saw the car and the keys on September 23 in the possession of her son, Robert Davis (T 1316-1317).

Appellant's oral and written statements were introduced through Detective David Cobb. At a hearing outside the presence of the jury, the court agreed to delete portions of appellant's statement of October 14, but overruled appellant's motion to delete other portions of the statement (T 1383-1384, 1395-1407). In the presence of the jury, Detective Cobb testified that he interviewed Walter Brown on October 14, 1985. The officer advised appellant of his rights and told him that they had found a body. Appellant said he and Roundtree attempted to rob someone at the Albertson's parking lot on Beach and University. Roundtree had a rifle on the man and told him to get in the car, but a police car came up and the man ran from them. They were afraid of being caught in the Monte Carlo, so they drove across the street to the University Square Apartments, where they saw two men in separate cars in the parking lot. They decided to take the Toyota when the other car left. Mr. Bowden was working on his car when they came up behind him. Bowden said he had money upstairs and gave his keys to Brown. Mr. Brown went upstairs and took $250 in cash, but left the billfold. He locked the apartment, then locked Mr. Bowden in the trunk of the Toyota and he and Roundtree departed in the Monte Carlo. They drove a few minutes, but returned to get the car because they were afraid the victim could identify them. Roundtree drove the Toyota and Brown took the Monte Carlo. At the church, Roundtree told Walter to wait down the street. Appellant drove to

the school on San Diego Road and Roundtree turned off in the church parking lot. A few minutes later Roundtree came back and then both men went behind the church where Brown saw the body. Appellant told Detective Cobb that he knew Mr. Bowden would be killed when they went back to the apartment to get him (T 1416-1419).

Brown and Roundtree returned to Brown's aunt's house where they divided the money. They met again that night to discuss burglarizing the apartment. At 2:00 a.m. they went to the apartment. Brown was carrying the .22 rifle, which he left in the apartment. He turned on the lights. They left when they thought they had been seen, dropping items as they were leaving. At 6:30 a.m. Brown went back to get the car, but was stopped by the apartment manager. Brown said the murder weapon was a sawed-off .22 rifle. He said the weapon did not use shotgun shells (T 1420-1421).

Appellant further stated that he stole the 1977 Aspen which he found parked in the yard with the keys in the trunk. He and Roundtree drove to Pearl Plaza. Robert Davis was in a phone booth. They tried to rob him, but he had no money. They put him in the trunk of the Aspen: Brown drove the Aspen and Roundtree drove the Monte Carlo to a cemetery. Brown opened the trunk and Roundtree shot Davis in the head. They left in the Monte Carlo, and later painted the hood and changed the tag (T 1423-1424).

Detective Cobb testified that he took a recorded statement from appellant the same day. Appellant was readvised of his rights and gave the same story (T 1424). The officer stated that the distance from the University Square Apartments to the Mount Zion Church was 3.2 miles (T 1425).

Cobb testified on cross-examination that appellant was 20 years old, did not complete high school and had a reading problem. Appellant's oral and recorded statements were consistent (T 1434-1437).

Officer Steven Shinholser was present when appellant was advised of his rights and questioned, and he repeated the substance of appellant's oral statement (T 1443-1457). Appellant's recorded statement was then read to the jury (T 1471-1520).

Crime lab analyst Allen Miller processed the 1984 Monte Carlo and 1985 Toyota Cressida for fingerprints on October 11 (T 1522). Fingerprint expert Ernest Hamm compared the latent prints lifted from the two cars with the inked prints from the defendants (T 1559-1562, 1566-1567). Lifts from the windshield wiper control arm and rearview mirror of the Monte Carlo were identified as Robert Roundtree's left thumb and right thumb, respectively. Walter Brown's left palm print was identified on the top of the trunk of the Monte Carlo (T 1532-1535, 1573-1584). Roundtree's left palm print, left thumb, right thumb and left index finger were identified on the trunk of the Toyota. Two fingerprints, both identified as Roundtree's right thumb were lifted from the rearview mirror of the Toyota. One latent lift from the trunk of the Toyota was identified as Walter Brown's left palm print (T 1536-1539, 1584, 1595-1597).

Miller testified that he seized one live .22 caliber cartridge on the ground after the body was removed. The cartridge was underneath the body. He received bullets from the medical examiner during the forensic examination (T 1541-1545).

David Warniment was qualified as an expert firearms examiner and testified that he examined the .22 caliber rifle and nine

cartridges. Four cartridges were tested for comparison with the projectiles recovered by the medical examiner. Warniment stated that the bullets were consistent with having been fired from that weapon, but could not be identified as such. He further noted that the tested cartridges were the Remington brand, as was the cartridge found under the body. Warniment could not determine how many rounds the .22 rifle held (T 1606-1619).

Marvin Hazelton testified that he went to Albertson's at 6:30 a.m. on October 10, 1985, to purchase coffee. As he came out of the store and went to his locked car, a man approached him from behind and said, "Don't run or yell or I'll blow your head off" (T 1624-1626). The man was holding a gun in his right hand and told Hazelton to get in a car, which Hazelton described as a two-door Chevrolet. The driver opened the passenger door and pushed the seat forward. Hazelton paused and thought the gunman was putting the gun in his pocket, so he ran. Hazelton could not identify the perpetrators, but he recognized the photograph of the Monte Carlo (T 1627-1632).

On cross-examination Hazelton said that the gunman was putting the gun in his back pocket. No shots were fired (T 1632-1633).

The final state witness was medical examiner Bonifacio Floro. Dr. Floro testified that when he responded to San Diego Road on October 12, 1985, the body was already decomposing, indicating death between 36 to 48 hours before. The autopsy revealed several injuries on the body, including a black eye, a laceration on the lower lip, and four gunshot wounds (T 1643-1651). The trial court sustained appellant's objections to two autopsy photographs: four photographs were admitted into evidence over the objections of both defendants (T 1652-1661).

Dr. Floro described the gunshot wounds. One wound to the back of the head behind the right earlobe showed fouling or gunpowder residue on the skin and hair, suggesting that the gun was fired at close range. The second head wound did not have any black residue and was probably sustained at a distance. Dr. Floro determined from the angle of the wounds that the victim was on the ground with the left side of his head toward the ground when he was shot. He testified that the victim would have lost consciousness immediately from either wound and either shot would have been fatal. In contrast, the two wounds in the back and abdomen would not have been immediately incapacitating. Both of these wounds were angled acutely upward slightly above the waistline. There were no bullet holes in the victim's shirt, indicating that the victim's hands were raised lifting his shirt. The medical examiner expressed his opinion that the victim was still conscious after the abdominal wounds were inflicted. He further opined that the shots to the back and abdomen were inflicted first and the wounds to the head were inflicted while the victim was on the ground. The cause of death, according to the doctor, was multiple gunshot wounds to the head and thorax (T **1662-1670**).

On cross-examination, Dr. Floro stated that there was no way to determine what caused the laceration on the lip (T **1671**). The black eye could have been caused by the trauma of the bullet wound to the back of the head and was not necessarily caused by an external blow (T **1673**).

Following this testimony, the state rested (T **1677**). Appellant's motion for judgment of acquittal and renewed motions to sever and for mistrial were denied (T **1679-1683**). The defense then rested (T **1686**).

During the charge conference, the trial court denied appellant's requested instructions on independent act (T 1696-1712) and second degree felony murder (T 1723-1734), and special verdict for felony and premeditated murder (T 1781-1784).

Before the state's final arguments, both counsel for appellant and Mr. Roundtree renewed their motions to sever and motions for mistrial, which were again denied (T 1860-1861). At the conclusion of the arguments and instructions on the law (T 1974-1984, 1995-2003), the jury retired to deliberate (T 2003) and returned with its verdicts as noted above (T 2006-2007, 2009).

B. Penalty Phase

The penalty proceeding was commenced on September 25, 1986. The state introduced a certified copy of the judgment and sentence for armed robbery against appellant in Case No. 85-11118 and a similar judgment and sentence against Robert Roundtree and rested (T 2214-2216).

Eight witnesses testified on behalf of Mr. Roundtree. Appellant objected to the testimony of Dr. Harry Krop regarding the co-defendant's relationship with Mr. Brown. On proffer the psychologist testified that at the time of the murder Roundtree was acting under the substantial domination of Mr. Brown. The witness based his opinion on Roundtree's feelings of inferiority, fear of rejection and strong need for approval, and the fact that Roundtree exhibited no violent behavior until the time he met appellant. The court allowed the witness to testify as to Roundtree's susceptibility to domination but excluded any reference to criminal activity with appellant (T 2323-2333).

On direct examination by Roundtree's attorney, Dr. Krop testified that based upon Roundtree's personality profile, he was

under substantial domination of another at the time of the death of Mr. Bowden. The witness stated that Roundtree was living with Mr. Brown and his family in October, 1985, and had been living with the family for a few months prior to that date. In Dr. Krop's opinion, the most striking characteristic of Roundtree's personality profile was his need for approval and acceptance, by a father figure, a friend, an authority figure or any individual who would let Roundtree feel accepted (T 2334-2336).

On cross-examination by the state, Dr. Krop explained that Roundtree would not rob, kidnap and murder just to please somebody, but he would not engage in that behavior by himself (T 2354).

Appellant presented the testimony of Dr. Louie Legum, a clinical psychologist, who testified that appellant functions at a borderline intelligence range (T 2367-2375).

On cross-examination by the state, Dr. Legum stated that appellant could not read adequately for his chronological age and did not know the number of weeks in a year. A 1977 school report classified appellant in the borderline range which was consistent with the expert's findings. Appellant quit school in the eleventh grade (T 2378-2381, 2387-2388).

Jeanette McCray, appellant's older sister, testified that there were four children in the family: appellant was the second oldest and only male. Their parents were not married and appellant and his sisters were raised by their mother in a housing project. The family was supported on welfare. Ms. McCray stated that Walter was a kind and loving brother (T 2389-2392).

Appellant's mother, Mae Pearl McCray, testified that she was 16 years old when appellant was born. They were poor and lived in a violent neighborhood. Appellant never had a father. Walter was

a slow learner and in special classes in school. He dropped out of school because he was older than the others in his class and was depressed. Ms. McCray considered her son a follower. She said Walter was a loving, kind and considerate son, and she would be supportive of him if he was given a life sentence. She said Walter expressed sorrow over Mr. Bowden's death (T **2392-2399**).

On proffer Ms. McCray testified that she knew Robert Roundtree and he had a bad reputation for violence in the neighborhood. In her opinion Roundtree was the dominant person in the relationship with her son. The court sustained Roundtree's objection to the proffer (T **2399-2401**).

By stipulation the defendants introduced the sentencing orders in the robbery convictions reflecting the date of the crime and fact that Brown and Roundtree were co-defendants (T **2402-2412**).

Following closing arguments (T **2412-2460, 2460-2482, 2483-2512**) and charge to the jury (T **2512-2522**), a majority of the jury recommended that the court impose a sentence of death (T **2523**). The court sentenced appellant accordingly.

lV SUMMARY OF ARGUMENT

During the jury selection appellant made a prima facie showing that ten blacks were challenged by the state solely because of their race. The trial court made a finding that there was a substantial likelihood that the state's pre-emptory challenges were exercised solely on the basis race, but denied appellant's motion for mistrial because the state gave race-neutral reasons for its challenges. A critical evaluation of the state's proffered explanations for excluding a disproportionate number of black jurors indicates that the state's reasons were not sufficient to overcome a presumption of racial discrimination. Those reasons, ranging from the jurors being single to wearing New York pointy shoes, from inaccurate portrayals of the jurors' views on the death penalty to wanting more males on the panel, were not based on the particular case, the parties or witnesses or characteristics other than race. Appellant is entitled to a new trial.

In Issue 11, appellant contends that he was prejudiced when the co-defendant's counsel argued to the jury that Brown was an accomplished car thief. Counsel's argument was an attack on appellant's character and its sole relevance was to establish appellant's propensity to commit crime. The trial court should have granted appellant's motion for mistrial.

Appellant and Robert Roundtree were jointly tried for the murder of Francis Bowden. Both defendants gave statements to the police describing their respective roles in the murder. These statements interlocked in many details, but diverged on the most significant fact in issue, i.e., who shot Mr. Bowden. Both statements were introduced into evidence, although neither defendant testified at trial. Appellant contends in Issue III that

the introduction of the co-defendant's confession at trial violated his Sixth Amendment right of confrontation under the Bruton rule. That rule is fully applicable here, whether or not the confessions are deemed interlocked. The trial court reversibly erred in denying appellant's motion to sever.

In Issue IV, appellant claims that the trial court reversibly erred in denying his requested instruction on independent act. Whether or not Brown was actually or constructively present and participated in the kidnapping and murder of Mr. Bowden or whether the murder was an independent act of Roundtree were factual issues to be determined by the jury with proper instructions by the court. The court's refusal to give the instruction denied appellant his right to have the jury deliberate on his theory of defense.

The fairness of the penalty proceeding was compromised in several respects by the court's denial of appellant's motion to sever. First, as argued in Issue V, the spillover effect of the introduction of the co-defendant's statement in the guilt phase implicated appellant's right of confrontation in the penalty phase as well. In addition to considering the co-defendant's inadmissible statement implicating appellant as the triggerman, the jury also heard expert testimony that Roundtree was under the substantial domination of appellant at the time of the murder. Appellant argues in Issue VI that this evidence constituted non-statutory aggravation and tainted the jury's death recommendation. This Court should reverse appellant's death sentence and remand for a new penalty proceeding.

Issues VII and VIII pertain to the court's sentencing order. Appellant argues that the court's findings that the murder was heinous, atrocious and cruel and committed in a cold, calculated

and premeditated manner were predicated on the co-defendant's confession, thus violating appellant's right of confrontation. The aggravating circumstances were not proved beyond a reasonable doubt and appellant's death sentence cannot stand. Finally, appellant contends that the reversal of his conviction in Case No. 85-11118, which is pending review by the First District Court of Appeal, would invalidate the aggravating factor under Section 921.141(5)(b), Florida Statutes.

V ARGUMENT

ISSUE I

APPELLANT WAS DENIED HIS RIGHTS TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY.

The equal protection clause of the Sixth and Fourteenth Amendments to the United States Constitution forbids a prosecutor to peremptorily challenge potential jurors solely on the basis of race. Batson v. Kentucky, ___ U.S. ___, 90 L.Ed.2d 69 (1986). Purposeful racial discrimination in the selection or exclusion of prospective jurors was condemned by this Court In State v. Neil, 457 So.2d 481 (Fla. 1984), which recognized that the discriminatory use of peremptory challenges deprives a defendant of his right to an impartial jury under Article I, Section 16, Florida Constitution.

In Neil, this Court held that when the trial court perceives a systematic exclusion of blacks from the jury pool, the prosecutor must justify his or her peremptory challenges and show that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race. In abandoning the time-honored test established in

Swain v. Alabama, 380 U.S. 202 (1965) for determining whether purposeful racial discrimination occurred in the jury selection, this Court adopted the following standard:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

457 So.2d at 486-487 (footnote omitted).

Applying the first step of this test to the instant case, the record reveals that defense counsel made a timely objection after the third black juror was excused by the state (T 540-541). Noting that the state exercised its first three peremptory challenges to excuse blacks, the trial court made the requisite finding of a substantial likelihood that the challenges were exercised solely on the basis of race and required the state to give reasons for its peremptory challenges (T 541-542). Appellant renewed his objection

and moved for a mistrial when the state exercised its fourth, fifth and sixth peremptory challenges to remove black jurors (T 546-547, 548, 659-660), and four subsequent peremptory challenges (T 662, 859-862, 863-864, 966). In fact, the record reveals that the state peremptorily challenged ten black jurors and only three white jurors, leaving a jury of eleven whites and one black. Although somewhat chagrined by the state's explanations for removing a disproportionate number of black jurors, the lower court nonetheless denied appellant's repeated motions for mistrial. As will be demonstrated below, the reasons given by the prosecutor were so specious that they did not adequately justify the removal of ten black jurors, and appellant is thus entitled to a new trial.

The following ten jurors were challenged by the state.

Nathan Barnes

Mr. Barnes was single, a bank teller and had lived in Jacksonville for 23 years. He did not have any children or belong to a church or any civic organizations. He had worked in the bank for two years, was a high school graduate and had completed one year of junior college (T 391-392, 421, 427, 467-468). The prosecutor gave several reasons for challenging Mr. Barnes:

> [H]e is a single, young male in this community. He indicated when asked to find presumption of innocence and burden that he was going to hold the State to a higher standard than what is called for by the law.
>
> He came back very late from his lunch break, indicating to me that he's not taking this case very seriously already. And quite frankly he's dressed in a manner that I did not want a juror dressed in. That bothers me.

(T 542). Defense counsel noted that Mr. Barnes was wearing gray dress slacks, a white shirt with a knit tie, his collar and cuffs

were buttoned, and he was only a few minutes late after the break. Counsel further noted that the prospective juror had a responsible job in a bank and was taking management courses. The state attorney then added that the juror "is wearing maroon socks and these pointy New York shoes and he's carrying a purse," to which defense counsel indicated that the purse was actually a bank bag (T 542-544).

Louise Grey

Ms. Grey was single, employed as a merchandise handler at Sears and had lived in Jacksonville her entire life. She had two children, aged 21 and 26, and is a Baptist. She held strong convictions against the death penalty but said she could convict if she believed the defendants were guilty beyond a reasonable doubt (T 393-394, 421, 427, 438-439). The state excused her because of her convictions against the death penalty (T 543-544).

Theresa Baldwin

Ms. Baldwin was the mother of two sons, ages two and five. Her husband was an electronic technician and she was employed outside the home as a computer operator. She lived in Jacksonville for 14 years and was a member of Great Holy Temple. She did not express any reservations about recommending death (T 395-397, 422, 427-428, 440-441). After the state's challenge for cause was denied (T 535-536), the prosecutor peremptorily struck Ms. Baldwin over concerns about her feelings toward the death penalty (T 544-545).

Terrie Boykins

She was single, unemployed and had no children. She expressed no reservations about the death penalty (T 399, 423, 441). The

state struck Ms. Boykins because she was single, did not have a job, was at least 30 years old and had never been employed (T 547).

Michael Campbell

Mr. Campbell had lived in Jacksonville for 26 years. He was employed as a set director for Mystery Man Movies. He had two children, ages five and ten, and was a Baptist. His wife did not work. He had been working for the movie company for two months, having been previously laid off from work (T 402, 424, 428, 484-485). The state's reasons for excusing him: he was a young male, working for a movie company, was a plaintiff in a workmen's compensation case and was inappropriately dressed. The prosecutor noted that Mr. Campbell was the only person on the jury not in a tie or suit (T 549).

Abram Williams

Mr. Williams was single, had lived in Jacksonville for 22 years and worked at the Jacksonville Warehouse. He was previously employed for seven or eight months as a custodian at NAS, for six months as a salesman at the Sears Surplus Store, and before that did construction work for one and a half years. He did not have any negative feelings about the death penalty (T 552-553, 565-566, 590, 627). The reason for the state's challenge: "Mr. Williams is single, he's young. He has a local arrest record and he has got a horrible employment history." (T 660).

Timothy Williams

Mr. Williams was 18 years old, single and a recent high school graduate. He worked for temporary services since his graduation. He did not have any problem applying the death penalty and said he could listen to the evidence and instructions in recommending life or death (T 559, 575-576, 594, 616). The state challenged him

because of his youth, his inexperience and because he is "just not an appropriate juror for this type of case" (T 662).

Keith Gallman

Mr. Gallman had worked for five years as an apprentice to a mechanical contractor. He was married and had two young children. His wife was employed at University Hospital. He had lived in Jacksonville for 15 years and did not belong to a church. He stated he could recommend the death penalty (T 786, 809-810). The state's reasons for striking him: he had a failure to appear in court, which indicated to the prosecutor a lack of respect for lawyers and the court system, and he had strong reservations about the death penalty (T859-860). Counsel for appellant disputed these reasons, noting that the prospective juror said nothing about reservations about the death penalty but in fact said he could recommend it, and further that there was no indication that Mr. Gallman had a conviction for failure to appear and such occurrences were common in the jurisdiction and not sufficient reason for exclusion from jury service (T 860-861).

Ella Tillman

She was retired, having previously been a cook for the school board. Her husband was a coil operator for Simmons bedding and they had no children. She had lived in Jacksonville her entire life and had been on disability since 1979. The state claimed Ms. Tillman was not a desirable juror because she was on welfare. The prosecutor expressed that another reason, among others, for excluding this black female was that the state preferred male jurors. The state declined the court's invitation to state its other reasons for the record (T 863-864).

Martha Robinson

Ms. Robinson was a tax examiner for the IRS, divorced and had three children. She had an accounting degree from the University of North Florida (T902, 909, 948-949). The state challenged Ms. Robinson because of her felony arrest record. The court inquired of Ms. Robinson and verified that the prospective juror had been arrested for although never convicted of two felonies (T 966-968).

In addition, the state challenged three white jurors, Gertrude Faulk, who had reservations about the death penalty (T 593-594, 601, 615, 661); Mark Peavy (T 777), and James Rohman, who was acquainted socially with an assistant public defender and expressed his personal criteria for recommending the death penalty (T 798-799, 830-832, 870).

The state attempted to justify its removal of the ten blacks by claiming that one black male, George Murray, was still seated on the jury and another black juror, Curtis Jenkins, who was a "desirable" state juror, was removed by the defense (T 863-864). It is noteworthy that Mr. Murray was strongly in favor of the death penalty ["I don't want to see nobody kill nobody and nobody get killed, but when they kill somebody, get rid of them. You kill them." (T 622-623)], and was accepted as a juror only after the state had peremptorily challenged seven other black jurors and the court had found a prima facie showing of racial discrimination under Neil. Curtis Jenkins, on the other hand, said he could not consider mitigating circumstances and would automatically recommend death for premeditated or any other type of murder, and was properly excused for cause without objection by the state (T 735-736, 769-770, 864-865). While he may have been a "desirable" juror for the prosecution, he was not qua ified to serve in this capital case.

In Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), the Third District Court of Appeal interpreted Neil to place an affirmative duty on the trial court to critically evaluate the proffered explanations by the state and to reject any race-neutral explanation which is not bona fide. The court provided standards to determine the legitimacy of any race-neutral explanation:

> The following will weigh heavily against the legitimacy of any race-neutral explanation: 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror; 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason given for the challenge is unrelated to the facts of the case: and 5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.

503 So.2d at 355.

With these standards in mind, it is clear that the prosecutor's explanations, with two possible exceptions, were not legitimate, bona fide reasons sufficient to overcome the presumption of racial discrimination. One exception was Ms. Robinson, who admitted being arrested, although never convicted of two felonies. The other exception was Ms. Grey who expressed reservations about the death penalty.2 However, the state excused two other jurors, Ms. Baldwin and Mr. Gallman, for their purported views on the death penalty, although neither of these individuals

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2With regard to Ms. Grey, the trial court noted that it would have granted a challenge for cause had a challenge for cause been made (T 544).

indicated any problems with recommending a death sentence. Ms. Baldwin responded in the negative when asked whether she would have any problems convicting the defendants based on her feelings about the death penalty and said that the death penalty "depends on the circumstances or the evidence" (T 440-441). The prosecutor did not pursue any questioning based on this response. Mr. Gallman was questioned at length by the state about his views on the death penalty and affirmatively stated he could follow the law and recommend death (T 809-810). The prosecutor's explanation for challenging Mr. Gallman because "[h]e also has strong reservations about the death penalty which is something that concerns me" (T 860) was patently bogus.

The prosecutor excused two black males because they were inappropriately dressed; one was wearing maroon socks and New York pointy shoes and carrying a bank bag, and the other was not wearing a tie. However, the state accepted a white male juror, Mr. Shriver, who was wearing an open-collared shirt and had a leather jacket on the back of his chair (T 777). The state also claimed Mr. Barnes would hold the state to a higher burden than required by law, although no where in the record does it indicate that Mr. Barnes made such a statement, nor was he specifically asked anything regarding the state's burden of proof. See Slappy v. State, supra, where the court rejected an explanation for the challenge of one juror which similarly was not the subject of any voir dire examination.

One black female, Ms. Boykins, was excused because she was unemployed (T 547), yet an unemployed white female, Darla Chance, sat on the jury (T 390). Four blacks were ostensibly challenged because they were single: Mr. Barnes (T 392, 542); Ms. Boykins (T

399, 547); Abram Williams (T 552, 660); and Timothy Williams (T 559, 662). However, that same factor did not disqualify five whites from service in the prosecutor's view: Sarah Foucalt (T 404); Susan Anderson (T 556); Kenneth Rozier (T 673); Ben Strozier (T 904); and Karla Halberstadt (T 905). In short, these reasons were simply too vague and ambiguous to overcome a suggestion of racial bias. Slappy v. State, supra (explanations based on assumed employment group bias, which was not shown to apply to the facts of the particular case, and fact that unchallenged juror had same employment, strongly inferred racial bias).

After excusing Ms. Tillman, the ninth black challenged by the state, the prosecutor told the court:

> Quite frankly, in this case, we want more male jurors. We are going to attempt to do that by striking Mrs. Tillman to get some more males.

(T 864). The state could have achieved that goal in part by accepting the five black males it struck just prior to Ms. Tillman. Interestingly, although the prosecutor said she wanted a predominantly male jury, the state accepted 13 white females: Aimee Gilbert (T 539); Darla Chance (T 539); Catherine Winter (T 546); Dorothy Reynolds (T 548); Sarah Foucalt (T 550); Susan Henderson (T 660-661); Lynette Matthews (T 663); Patricia Cooper (T 775-776); Karen Chmielewski (T 862); Adelle Howard (T 963); Mary Myers (T 974); Karla Halberstadt (T 975); and Joye McFeeters (T 975). In fact, six white females sat on the jury that tried the case, although the state had seven peremptory challenges remaining. The two alternate jurors were also female.

This is the kind of disparate treatment condemned by the court in People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), where the prosecutor excused one black juror who had

children the same age as the defendant, although several unchallenged white jurors also had children the defendant's age. The court noted that such disparate treatment was strongly suggestive of bias and could in itself have warranted the conclusion that the peremptory challenge was being exercised for impermissible reasons.

This case can also be likened to People v. Turner, 42 Cal.3d 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986), where the prosecutor challenged one black juror because "something in her work . . . would not be good for the People's case." 726 P.2d at 110. The California court regarded this reason as "so lacking in content as to amount to virtually no explanation." Id. Another black prospective juror in Turner was challenged because he was a truck driver and ostensibly would have difficulty with the circumstantial evidence and instructions. The court found no evidence to support this claim and rejected the reason as simply a more subtle form of invidious discrimination.

Here, as in Slappy v. State, supra, the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value. The court in Slappy noted that the trial judge first required the prosecutor to explain his reasons for peremptorily challenging four prospective black jurors and "[w]ith a hint of frustration--as if legally obligated to accept the State's explanation," denied the defendant's motion to strike the panel, finding that the prosecutor's reasons were "reasonable." 503 So.2d at 352. The court below expressed similar frustration when it inquired:

> Let me ask the State, I have heard various reasons ranging from he had on an open shirt to that they're on disability as

> explanations of jury selection in this case.
>
> Is it the State's position that any reason other than race is sufficient? Is that the State's position?

(T 866). What was apparent to the trial judge, and should be apparent to this Court, is that none of the reasons given by the state were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged jurors other than race, as mandated by State v. Neil and Batson v. Kentucky. Of course, the prosecutor would not be inclined to say that she challenged a particular juror because of race, and there is no litmus test for determining the truth and sincerity of the state's proffered explanations. But the inquiry should not end simply because a reason is stated: the reasons must be critically evaluated in the context of the case to determine whether any of the state's challenges were indeed racially motivated. Otherwise, State v. Neil provides a right without a remedy.

The fact that one black juror sits on the jury trying the case is not sufficient grounds for dispelling a prima facie showing of racial discrimination. In McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), for example, the court was unpersuaded by the state's argument that one black venireperson was eventually seated as an alternate juror, and held:

> Questions of possible tokenism aside, . . ., we note that the selection of that alternate did not occur until after McCray had challenged the prosecutor's use of eight of the state's eleven peremptories to rid the jury of all the blacks and Hispanics called to that point.

750 F.2d at 1133.

Similarly, in Roman v. Abrams, 608 F. Supp. 629 (S.D.N.Y. 1985), where the defendant was white but the chief state witness

was black, the prosecutor used 10 out of 11 peremptory challenges against whites. The court reversed for a new trial, even though three whites did serve on the jury. In Commonwealth v. Gagnon, 449 N.E.2d 686 (Mass.App. 1983), a new trial was ordered where the prosecutor excluded 19 French-surnamed jurors, even though the prosecutor did not challenge four other French-surnamed jurors. The court noted:

> As the number of members of a particular group who are challenged grows larger, the presumption of proper use of the peremptory challenge grows weaker.

449 N.E.2d at 692.

Here, the prosecutor exercised ten of its 13 peremptory challenges to exclude black venire members, leaving only one black male on the jury. Appellant contends that the peremptory excusal of two or even one prospective juror solely on account of race is, as a matter of law, reversible error. See Davis v. Georgia, 429 U.S. 122 (1976) (improper exclusion of a single prospective juror with only a general objection to the death penalty tainted death sentence and constituted reversible error). If any of the state's reasons is illegitimate and a juror is excused solely on the basis of race, reversal is required.

This Court must grant appellant a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN ROUNDTREE'S COUNSEL ARGUED THAT APPELLANT WAS AN ACCOMPLISHED CAR THIEF, WHERE THE COLLATERAL OFFENSES WERE NOT RELEVANT TO THE CRIME CHARGED AND NOT ADMISSIBLE AT TRIAL.

Florida courts have consistently held evidence tending to show an accused was arrested, suspected, charged or convicted of crimes

for which the accused was not on trial to be inadmissible on the theory that jurors would be unfairly prejudiced due to their knowledge of the unrelated crime. See, e.g., Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983); Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). The prejudicial effect in a criminal trial of evidence of a collateral crime committed by the defendant has long been recognized by this Court in decisions narrowly defining the circumstances in which such evidence may properly be allowed. State v. Harris, 356 So.2d 315 (Fla. 1978); Williams v. State, 110 So.2d 654 (Fla. 1959).

The general rule set forth in Williams v. State, supra, as codified in Section 90.404(2), Florida Statutes (1985), is that similar fact evidence of other crimes is admissible if relevant to a material fact in issue, such as proof of motive, intent, identity or absence of mistake or accident, but it is inadmissible if its sole relevancy is to establish bad character or propensity to commit crime. This rule was violated when Roundtree's counsel, in his opening statement to the jury, referred to appellant as an accomplished car thief, alluding to admissions in Brown's confession (T 1024). Appellant objected to this argument and moved for a mistrial. The state conceded that evidence of appellant's prior thefts would not be relevant (T 1026) and, in fact, agreed to delete that portion of appellant's October 14 statement where he acknowledged three or four grand thefts of automobiles (T 1401-1402). The trial court nonetheless denied appellant's motion for mistrial, but implicitly sustained the objection and instructed the jury to disregard counsel's statement that appellant is an

accomplished car thief (T 1025-1029). Appellant contends that the trial court erred in denying his motion for mistrial.

There can be no doubt that counsel's argument was impermissible and prejudicial. See Jackson v. State, 451 So.2d 458 (Fla. 1984)(testimony that defendant committed an assault on witness and bragged of being a "thoroughbred killer" irrelevant and prejudicial error). This was clearly an attack on appellant's character and no curative instructive could remove the prejudicial impact on the jury. Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983)(curative instruction insufficient to cure prejudicial impact of witness' testimony that defendant had a "prior felony past").

The error here cannot be condoned because it was made by the codefendant's counsel rather than the prosecutor. In Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1979), both the prosecutor and counsel for the codefendant told the jury in closing arguments that Sublette had not testified in his own behalf. Reversing Sublette's conviction, the District Court of Appeal held that the codefendant's reference to Sublette's failure to take the stand constitutionally infringed upon Sublette's right to remain silent. The court held that the error stemmed from the fact of the comment rather than the source of the comment, quoting DeLuna v. United States, 308 F.2d 140, 152 (5th Cir. 1962):

> If comment on an accused's silence is improper for judge and prosecutor, it is because of the effect on the jury, not just because the comment comes from representatives of the State. Indeed, the effect on the jury of comment by a co-defendant's attorney might be more harmful than if it comes from judge or prosecutor.

365 So.2d at 777 (emphasis in original).

The admission of irrelevant evidence showing bad character or propensity to crime is presumed harmful error, because of the

inherent danger that a jury will take it as evidence of guilt of the crime charged. Straight v. State, 397 So.2d 903, 907 (Fla. 1981). The error here compromised appellant's right to a fair trial on the issue of guilt or innocence as well as prejudicing him on the question of life or death. See, Issue V, infra. Appellant is therefore entitled to a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE, AND THE SUBSEQUENT INTRODUCTION OF THE CO-DEFENDANT'S CONFESSION WITHOUT OPPORTUNITY FOR CROSS-EXAMINATION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court held that a defendant's Sixth Amendment right to confront his accusers is violated when a co-defendant's confession, which incriminates the defendant, is admitted in evidence and the co-defendant chooses not to testify.

Subsequently, in Parker v. Randolph, 442 U.S. 62 (1979), the Supreme Court split 4-4 on the question of whether the Bruton rule is applicable when the moving defendant himself has confessed. Justices Rehnquist (who wrote the plurality opinion), Burger, Stewart and White expressed the view that admission of "interlocking confessions" of non-testifying co-defendants, accompanied by proper limiting instructions, does not violate the Sixth Amendment, while Justice Blackmun (concurring) and Justices Stevens (who wrote the dissenting opinion), Brennan and Marshall expressed the view that the Bruton rule remains applicable in the "interlocking confessions" situation, but, depending on the circumstances of the particular case, the error may or may not be harmless. Justice Blackmun believed that the "harmless error"

doctrine was applicable to the facts of Parker v. Randolph, so he concurred in the judgment.

The conflicting case law generated by the three opinions in Parker v. Randolph[3] was authoritatively resolved by the United States Supreme Court in its April 21, 1987, opinion in Cruz v. New York, 481 U.S. ____, 41 CrL 3036 (1987). In Cruz the high Court held that where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant and even if the defendant's own confession is admitted against him. The Court rejected the Parker plurality's view that where a defendant has himself confessed, introduction of the codefendant's confession will seldom, if ever, be of the devastating character required by Bruton to prove a confrontation clause violation, and stated:

> It is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' codefendant confessions that 'interlock' with the defendant's own confession. `[T]he infinite variability of inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes [the assumption that an

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[3] See, e.g., Puiatti v. State, 495 So.2d 128 (Fla. 1986), adopting the reasoning of the plurality opinion in Parker that Bruton did not require the co-defendant's confession to be excluded because the defendant had himself confessed and his confession "interlocked" with the co-defendant's; Earhart v. State, 429 A.2d 557 (Md.App.1981), State v. Rodriguez, 601 P.2d 686 (Kans.1979), and State v. Bleyl, 435 A2d 1349 (Maine 1981), adopting the Blackmun-Stevens approach of continuing to regard Bruton as fully applicable in interlocking confession cases but subject to the harmless error doctrine; and United States v. Parker, 622 F.2d 298 (8th Cir.1980), adhering to Justice Blackmun's approach. The decision in Puiatti v. State was recently vacated by the United States Supreme Court. Puiatti v. Florida, 41 CrL 4033 (1987).

> interlocking confession will preclude devastation3 untenable.' Parker, **442** U.S., at **84** (Stevens, J., dissenting). . . .
>
> In fact, it seems to us that `interlocking' bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were standing by his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to avoid his confession--on the ground that it was not accurately reported, or that it was not really true when made. . . . [A] codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, whereas one that is positively incompatible gives credence to the defendant's assertion that his own alleged confession was nonexistent or false. Quite obviously, what the `interlocking' nature of the codefendant's confession pertains to is not its harmfulness but rather its reliability: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the defendant, see Lee v. Illinois, **476** U.S. ____ **(1986),** but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential. The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted. Having decided Bruton, we must face the honest consequences of what it holds.

41 CrL at **3037-3038** [Emphasis in original]. In adopting the view espoused by Justice Blackmun in Parker v. Randolph, the Cruz Court went on to hold that while a codefendant's interlocking confession incriminating the defendant may not be admitted at trial, the

defendant's own confession may be considered on appeal in assessing whether any Confrontation Clause violation was harmless.

Several observations made by Justice Blackmun in Parker apply with particular force to the instant case. Justice Blackman wrote:

> The fact that confessions may interlock to some degree does not ensure, as a per se matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.

Parker v. Randolph, supra, 442 U.S. at 79 (Blackmun, J., concurring).

In the instant case, Brown and Roundtree gave confessions to the police, which confessions described their respective roles in the robbery and murder. While the statements correspond in many details, they depart on the most significant fact in issue, i.e., who shot Francis Bowden. Brown admitted robbing Mr. Bowden. He claimed Roundtree had the shotgun when they first approached Mr. Bowden in the parking lot. Roundtree told Walter to go up to the victim's apartment and get money, which Brown did. Roundtree then ordered the victim into the trunk of the car. The two left the apartment complex with Brown driving the Monte Carlo, but Roundtree told him to go back to get the man. Roundtree then got in the Toyota with the victim in the trunk and drove to San Diego Road with Brown following in the other car. At San Diego Road, Roundtree told appellant to go past and wait for him by the bridge.

Roundtree met him there in the Toyota. Brown denied shooting Mr. Bowden. He said he never heard any shots fired and did not see the victim being shot. He said they never discussed killing Bowden and did not think they were going to hurt him (R 215-223, 226, 243-244).

Roundtree admitted having the shotgun at the Albertson's parking lot and driving the Monte Carlo in to the University Square Apartments. He said Brown told the victim to get in the car, which Roundtree started, and told Roundtree to wait while he went upstairs to get the man's money. According to Roundtree, Brown told Mr. Bowden to get in the trunk of the Monte Carlo and was going to leave him in the trunk with a note on top of the car. They drove off but turned back because the man still had identification. Brown got into the Monte Carlo and drove in front. At the school Brown took the shotgun out of the car and told Roundtree to drive down the street and park. He turned off the car and heard four shots. Walter came running, got in the car and told Roundtree that he shot the victim in the back, stomach, neck and head. Roundtree said he did not see it happen and maintained that Brown fired the shots (R 149-158, 169). He further maintained that while he shot Robert Davis, he did so only at Brown's direction (R 141).

Counsel for both Brown and Roundtree argued at the hearing on their respective motions to sever that the confessions were not interlocking. The differences in the statements were crucial with respect to the defendants' respective culpability and appellant's theory of defense that he did not kill, intend to kill or witness

the killing of Francis Bowden. 41n a capital case where intent is a crucial element of the offense charged, codefendants' statements which implicate each other as the sole murderer are clearly antagonistic and cannot be deemed interlocking. See Lee v. Illinois, ___ U.S. ___, 90 L.Ed.2d 514 (1986).

Several courts have analyzed the interlocking nature of codefendants'confessions in the context of homicide prosecutions and have rejected the interlocking confessions exception to the Bruton rule unless the statements are identical as to motive, plot and execution of the crime. See, e.g., State v. Bleyl, 435 A.2d 1349, 1364 (Me.1981) ("[T]he confessions, to 'interlock,' should be substantially similar and consistent on the major elements of the crime, in particular, the motive, plotting and execution of the crime"). See also, United States ex rel. Ortiz v. Fritz, 476 F.2d 37, 39 (2d Cir. 1973) (interlocking confessions must be the same "[a]s to motive, plot and execution of the crime''). Accord, Holland v. Scully, 797 F.2d 57 (2d Cir. 1986).

In State v. Bleyl, supra, Bleyl and two codefendants, Chamberlain and Coyne, were convicted of manslaughter, burglary and robbery. Chamberlain's and Coyne's confessions implicated both of them and Bleyl in all three offenses. Bleyl's confession, however, implicated him only in conduct constituting burglary. In refusing to sever Bleyl's case, the trial judge found, as a matter of state law, that Bleyl's confession showed that manslaughter and robbery

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4 See Enmund v. Florida, 458 U.S. 782 (1982), where the United States Supreme Court held that the Eighth Amendment bars the death penalty for those who aid and abet felonies resulting in murder, but who themselves do not kill, attempt to kill or intend that killing result.

were foreseeable consequences of the burglary and thus interlocked with the other two confessions. The appellate court reversed Bleyl's convictions for manslaughter and robbery, finding that his confession interlocked with the other two only as to the burglary, but did not interlock at all as to the crimes of manslaughter and robbery. In so holding, the court rejected any notion that the jury could confine its consideration of Bleyl's guilt of manslaughter and robbery to the evidence properly admissible against him.

In Holland v. Scully, supra, four codefendants were indicted on murder and robbery charges. Three of the codefendants were tried together after their motions for severance were denied and the fourth codefendant entered a guilty plea and agreed to testify at trial. All four defendants made statements implicating themselves as well as their codefendants. None of the three defendants testified at trial, although their statements were introduced in evidence. In granting Holland's petition for habeas corpus, the federal court ruled that Holland's trial was infected by a serious Bruton violation by virtue of the admission of the statements of his non-testifying codefendants, which violated his sixth amendment right of confrontation. The court noted that although Holland's confession was similar to that of his two codefendants in detailing many of the facts surrounding the robbery, he never admitted that he induced his codefendants to commit the crime or participated in the planning of the crime. In contrast, the two codefendants statements indicated that Holland was the mastermind and solicited them to commit the robbery. As characterized by the court,

> Their damning testimony played a primary and essential role in making the case for aiding and abetting against Holland.

797 F.2d at 66.

Similarly, here, the statements of Brown and Roundtree were similar in the details surrounding the thefts of the Dodge Aspen and Monte Carlo and the murder of Francis Bowden, but they differed as to their respective roles in the planning and commission of the offenses. Roundtree claimed that appellant initiated the thefts of the Dodge Aspen and Monte Carlo, gave him the gun and told him to shoot Robert Davis, kidnapped Mr. Bowden in the Toyota and murdered the victim. Brown, on the other hand, said it was Roundtree's idea to steal the Aspen; Roundtree gave him the pistol to rob Mr. Davis at the Pearl Plaza and threatened Davis if he did not get in the trunk, and Roundtree shot the victim of his own accord in the cemetery. Brown insisted that Roundtree drove the Toyota to the Mt. Zion Baptist Church and told Brown to wait while he [Roundtree] committed the murder. Clearly, when two statements "diverge on matters as central as the defendants' various roles in the planning of the crime,'' Holland v. Scully, 797 F.2d at 66, the confessions cannot interlock. See also, People v. Fort, 147 Ill.App.3d 14, 100 Ill.Dec. 438, 497 N.E.2d 416 (1986) (statements not interlocking when each defendant accuses the other of wielding the fatal knife).

The court in Holland v. Scully rejected the state's harmless error argument, finding that the case against Holland for aiding and abetting was far from overwhelming, despite an in-court identification of Holland as one of the robbers and despite the testimony of the accomplice who pled guilty, which testimony implicated Holland in the planning of the robbery and directly contradicted Holland's statements. The court reasoned that Holland's confessions admitted only the elements of the lesser crimes of criminal facilitation or hindering prosecution, but he

consistently denied any intent to solicit or participate in the crime, which was a prerequisite to a conviction for aiding and abetting under New York law.

> It is the purest speculation whether the jury would have inferred, from Holland's admitted marginal involvement in the robbery, his intent to be a participant.

Id., at 67.

The cornerstone of the Second Circuit's decision in Holland v. Scully, was the opinion of the United States Supreme Court in Lee v. Illinois, ___ U.S. ___, 90 L.Ed.2d 514 (1986). In that case, Lee and her codefendant Thomas were charged with the double murder of Lee's aunt and the aunt's friend, Odessa. Both were taken into custody and made statements. Lee's account was that she did not participate in the murder of one of the victims and that she acted in self-defense or under intense and sudden passion in killing the aunt. Thomas's statement, however, revealed that he and Lee had previously discussed killing one of the victims. This statement suggested a premeditated plan to kill. During their joint bench trial, the prosecutor repeatedly used Thomas's statement as evidence against Lee. Thomas did not testify. In reversing the conviction, the Supreme Court stated that, whereas the defendant's confession alone would have rendered her liable for voluntary manslaughter, the admission of her codefendant's statement added the element of premeditation and thus made out a case for murder. In rejecting the state's argument that the confessions were interlocking and thus reliable, the high Court responded:

> Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains `interlock' with the facts in the

> defendant's statement. See Parker v. Randolph, 442 US 62, 79, 60 L Ed 2d 713, 99 S Ct 2132 (1979) (Blackmun, J., concurring in part and concurring in the judgment). The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

90 L.Ed.2d at 529. The high Court found that while Lee's and Thomas's confessions overlapped to a great extent in their factual recitation, they diverged with respect to Lee's participation in the planning of her aunt's death, her facilitation of the murder of the second victim, Odessa, and certain factual circumstances relevant to the codefendants' premeditation. The Court concluded:

> The subjects upon which these two confessions do not 'interlock' cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie.

Id. The statements in issue here are similarly divergent on the critical issues in dispute at trial. While the confessions of Brown and Roundtree corresponded in many of the details of the crime, they were not interlocking.

Even when, as here, the jury is instructed to consider the confession only against the declarant, the danger of misuse of the confession by the jury is too great to be constitutionally admissible. The course of the trial below clearly disclosed the misuses of the codefendants' statements. The prejudice began in the opening statements to the jury when the prosecutor argued that defendants Brown and Roundtree locked Mr. Bowden in the trunk of the Monte Carlo and left the apartment complex in the victim's Toyota Cressida, then returned to the apartment parking lot, where Mr. Brown exited the Toyota and drove off in the Monte Carlo with the victim still in the trunk (T **1014**). These facts were derived from the confession of the codefendant and contradicted Brown's statement. Of course, this was the same version of facts advanced by Roundtree's counsel in his opening statement (T **1033-1034**). Regardless of the pretrial appearance of the situation, at this point it became patently apparent that appellant had to defend himself against the codefendant as well as the state. See People v. Fort, supra at **421** ("[D]efendants were forced to defend themselves from each other as well as the State."), and People v. Bean, 109 Ill.2d **80, 92** Ill.Dec. **538, 485** N.E.2d **349, 355 (1985)** (Defendant placed "in the position of having to defend against two accusers, the State and his codefendant.'').

The prejudice persisted throughout the trial when the statements were actually introduced and permeated the penalty phase, most notably when Roundtree introduced evidence that he was under the substantial domination of Walter Brown at the time of the murder. See Issue VI, infra. As in People v. Bean, supra, **485** N.E.2d at **356**, the trial "produced a spectacle where the [state]

frequently stood by and witnessed a combat in which the defendants attempted to destroy each other.''

Under no circumstances could the jury apply the law without being unduly confused or prejudiced by the commingling of evidence admitted as to each respective defendant. As recognized by the Supreme Court in Bruton v. United States, 391 U.S. at 135-136:

> ¢T!here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extra-judicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Accord, Cruz v. New York, 41 CrL at 3037. The trial court's limiting instructions were futile under the circumstances of this case.

The only evidence before the jury that appellant was present at the scene of the murder and fired the fatal shots was Roundtree's statement and that statement was devastating to appellant's defense that his codefendant killed both Robert Davis and Francis Bowden. Roundtree's statement at trial, even with a limiting instruction, cannot by any stretch of the imagination be deemed harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). Roundtree was not available for cross-examination and Brown was thus denied his right of confrontation. The error in denying appellant's motion for severance requires reversal and a new trial.

ISSUE IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION ON INDEPENDENT ACT, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW

At trial, both in writing and orally, appellant requested that the jury be instructed on the defense theory of independent act (R 687; T 1697-1712, 1739-1749). Appellant theorized that the robbery of Mr. Bowden was completed when Brown and Roundtree left the apartment complex initially and that the subsequent kidnapping and murder of the victim was an independent act of the co-defendant. Appellant's counsel argued that Brown's statement which was admitted into evidence supported an independent act instruction in that Brown said it was Roundtree's idea to return to the apartment to get Mr. Bowden; they departed in separate cars, and Brown did nothing further to effectuate the death of Mr. Bowden. The court denied appellant's requested instruction, finding "no evidence before the jury by which an independent act could possibly be considered" (T 1712), but allowed counsel to "argue it if you can find facts from which you can argue it" (T 1713). The court's refusal to give appellant's requested instruction was clearly erroneous.

The courts of this state have repeatedly recognized that the failure to give a requested instruction on theory of defense, where there is *any* evidence to support it, is reversible error. Smith v. State, 424 So.2d 726 (Fla.), cert. denied, ___ U.S. ___, 103 S.Ct. 3129 (1983); Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882 (1981); Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945); Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982); Mellins v. State, 392 So.2d 1207 (Fla. 4th

DCA 1981); Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976); Koontz v. State, 204 So.2d 224 (Fla. 2d DCA 1967). In the case sub judice, the trial court's failure to instruct the jury on independent act, as requested by appellant, effectively denied appellant his right to have the jury deliberate on his theory of defense.

Appellant's requested instruction was based on this Court's holding in Bryant v. State, 412 So.2d 347 (Fla. 1982). In Bryant this Court reversed a conviction for first degree murder finding that the trial court committed reversible error in not giving Bryant's requested instruction on independent act. The evidence at trial revealed that Bryant was asked by Jackson to assist him in burglarizing an apartment, which Jackson said was vacant. Upon entering the apartment, Bryant found the victim naked on the floor with his hands and feet tied with a cord. Bryant retied the victim and put him on the bed. He then left the apartment and met Jackson two days later to split the proceeds from the burglary. The victim's nude body was found in a kneeling position against the bed, his hands tied with the cord and a necktie tightly bound around his neck. The victim died of asphyxia by strangulation caused by the necktie, and he had been violently sexually assaulted.

Bryant unsuccessfully requested an instruction on independent act on the theory that the death was caused by an act totally independent of the robbery and the tying of the victim with the cord which was part of the robbery. On appeal to this Court, Bryant argued that had the instruction been given, the jury could have decided that the death occurred not pursuant to the robbery but rather pursuant to a subsequent sexual assault

which was committed independently by Jackson or some other person and which was outside of or foreign to the common design of Jackson and Bryant to rob the victim. This Court agreed, finding evidence from which the jury could have concluded that Bryant withdrew from the criminal enterprise prior to the sexual battery and death of the victim. The Court reasoned:

> The record demonstrates beyond a reasonable doubt that Bryant was present during and participated in the robbery. If the jury finds that the tying of the victim by Bryant during the course of the robbery or any other acts committed by Bryant or his accomplice during the perpetration of the robbery either caused or materially contributed to the victim's death, then it may properly find Bryant guilty of first-degree murder. . . . This is so because the felony murder rule and the law of principles combine to make a felon liable for the acts of his co-felons. . . . But this liability is circumscribed by the limitation that the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish. . . . Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first-degree murder, . . ., there must be some causal connection between the homicide and the felony. In the present case, if the jury finds that the death was not caused or materially contributed to by any acts committed during the perpetration of the robbery but rather was caused solely by acts committed during the perpetration of the sexual battery, if the jury finds that Bryant was not actually or constructively present during and did not participate in the perpetration of the sexual battery, and if the jury finds that the sexual battery was an independent act of another and not a part of Jackson and Bryant's common scheme or design, then it may not find Bryant guilty of first-degree felony murder. This is a factual issue to be determined by the jury pursuant to proper court instructions consistent with this opinion.

Id., at 350 [citations omitted].

Similarly, here, Brown was present during and participated in the robbery of Francis Bowden. However, the jury could have decided, with proper instructions, that the death occurred not pursuant to the robbery but rather pursuant to the subsequent kidnapping which was committed independently by Roundtree and which was outside the common scheme of Brown and Roundtree to rob the victim. Appellant's statement to Detective Cobb amply supported this theory of defense. Brown told the officer that he went up to the apartment, took money out the wallet on the dresser and left the apartment. Roundtree told the victim to get in the trunk of his car and they left. Roundtree then told Brown to turn back and Robert got in the Toyota and drove off. Brown followed Roundtree in the Monte Carlo and at San Diego Road, Roundtree told Brown to go on past him. Brown drove by the school, parked by a bridge and waited (R **319-322**). He said they never discussed killing the victim and when asked whether he thought something was going to happen to the victim when they went back to get the car, appellant responded:

> Well, not really, because there was, you know, no need to kill him, because he [Roundtree] said -- he told the guy, he said, you know, We ain't going to hurt you or nothing like that, because --

(R **322**). Appellant insisted that Roundtree "just told me to follow him" (R **324**) and denied shooting Mr. Bowden or being present when he was shot (R **346**, 350).

For purposes of determining whether a theory of defense instruction is warranted by the evidence, the evidence must be viewed in the light most favorable to establish the defense upon which the instruction is sought. Bryant v. State, supra. Even if the evidence as to the theory of defense was unconvincing to the

court, it was for the jury, and the jury alone, to pass upon the validity of the defense after proper instructions from the court. Edwards v. State, 428 So.2d 357 (Fla. 3rd DCA 1983); Koontz v. State, 204 So.2d 224 (Fla. 2d DCA 1967).

Defense counsel's entire summation to the jury was premised on the independent act theory, that the kidnapping was Roundtree's idea and the murder was committed by Roundtree in the course of the kidnapping, after the robbery was completed (T 1834-1836, 1955-1956). This argument was a futile effort since the court refused to give the appropriate instructions on the law which were relevant to the defense's theory of the case. Clearly, "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978). As noted in Bryant v. State, supra, at 350:

> Although during argument to the jury, defense counsel made clear his position as to the theory of independent act, the jury was not apprised of any legal basis upon which it could consider this position since the court refused to give an instruction on independent act.

Likewise, in Mellins v. State, 395 So.2d 1207, 1209 (Fla. 4th DCA 1981), petition for review denied, 402 So.2d 613 (Fla. 1981), the court reasoned:

> It is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction. The jury is admonished to take the law from the court's instructions, not from argument of counsel. It must be assumed that this admonition is generally followed.

Since the jury here was never properly instructed on Brown's theory of defense, the jury had no legal basis from which it could consider his defense.

The failure to give a theory of defense instruction is error of constitutional dimension since it deprives the defendant of his rights to trial by jury and due process of law. United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (D.S.D. 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). The jury did not have to believe appellant's defense, but it should have been given the opportunity. The fact that the jury was not properly instructed on the theory of the case as requested vitiates the result of this trial. Appellant's conviction must be reversed and a new trial ordered.

ISSUE V

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE AT THE PENALTY PHASE, THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHTS OF CONFRONTATION AND DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

After Brown and Roundtree had been found guilty, appellant moved to impanel a new jury or sever the penalty phase on the grounds that the guilt phase jury already heard Roundtree's statements and evidence of the Davis murder, which could be used by the jury as impermissible rebuttal to the mitigating circumstance under Section 921.141 (6)(d), Florida Statutes.5 Counsel argued

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5 *See* Elleae v. State, 346 So.2d 998 (Fla. 1977), where this Court held that the admission of a collateral offense which had not resulted in a conviction at the time of trial constituted a non-statutory aggravating factor.

that the use of Roundtree's statement in the penalty phase would violate his confrontation rights under the constitution. **(T 2030-2042).**

It is well settled that the fundamental principles of due process apply at all three phases of a capital trial: the guilt-innocence phase, the penalty phase before the jury, and the sentencing before the judge. Presnell v. Georgia, **439** U.S. **14 (1978);** Gardner v. Florida, **430** U.S. **349 (1977);** Engle v. State, **438** So.2d **803** (Fla. **1983).** Even though a defendant has no substantive right to a particular sentence, sentencing is a critical stage of the criminal proceeding, Mempa v. Rhay, **389** U.S. **128 (1967),** and the defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. Inasmuch as the penalty of death is so qualitatively different from any other sentence, there is a greater need for reliability when the death sentence is imposed. Lockett v. Ohio, **438** U.S. **586, 604 (1978).** Accord, Woodson v. North Carolina, **428** U.S. **280, 303-305 (1976);** Gardner v. Florida, **430** U.S. **349 (1977).** Appellant submits his death sentence was imposed under circumstances incompatible with these constitutional guarantees by virtue of the trial court's denial of appellant's motion for severance at the penalty phase.

In Bruton v. United States, **391** U.S. **123 (1968),** it was held that a statement or confession of a co-defendant is not admissible against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such a statement is unquestioned error. The right of confrontation is equally applicable to the trial and sentencing phases of a capital case.

Walton v. State, 481 So.2d 1197 (Fla. 1985); Gardner v. State, 480 So.2d 91 (Fla. 1985); Engle v. State, supra.

At the trial below the jury heard extensive testimony and argument pertaining to Roundtree's statements implicating appellant in the Davis and Bowden murders. Roundtree did not testify at either the guilt or penalty phases. While the state did not introduce his statements at the penalty proceeding, relying instead on the testimony introduced at trial, the spillover effect between the guilt and penalty phases nonetheless violated the principles of Bruton and the due process and confrontation clauses of the Sixth Amendment. Just as the limiting instructions were ineffectual in the guilt phase, see Issue 111, supra, no cautionary instruction could erase the powerful impact of the co-defendant's incriminating statements on the jury in considering the question of life or death.

In Engle v. State, this Court held that the trial court reversibly erred by considering in sentencing a confession admitted at the co-defendant's trial. In Gardner v. State, supra, the trial court allowed a police officer to testify about an accomplice's statements incriminating Gardner as the one who stabbed the victim. This Court reversed, finding that the statements were neither cumulative evidence nor harmless error. Similarly, in Walton v. State, this Court held that Walton's right of confrontation was denied when the state presented the confessions of two co-defendants who were not available for cross-examination. These cases apply with equal force here, where the jury undoubtedly considered similar inadmissible and prejudicial evidence before recommending the death penalty.

The closing arguments at the penalty phase demonstrate the confusion and improper influence of the joint trial. Unable to resolve the conflicts in the statements, the prosecutor argued that both defendants kidnapped Mr. Bowden, took him to an isolated area and shot him (T 2426). In urging the jury to find the aggravating circumstance under Section 921.141 (5)(h), the state recalled that Mr. Bowden was put in the trunk of an automobile, transported 3.2 miles, marched 32 feet to an isolated area behind the church, shot with his hands up, and still conscious, shot again (T 2433-2436). The state could never prove which defendant murdered Mr. Bowden and commingled the defendants' statements in such a way that no jury instruction could intelligently guide the jury in considering the admissible evidence as to each.

In an analogous situation in Majors v. State, 247 So.2d 446 (Fla. 1st DCA 1971), the state presented four witnesses who testified that the co-defendant shot the victim and four other equally competent witnesses who testified that Majors shot the victim. In finding that the evidence created a reasonable doubt as to the defendant's guilt, the court reasoned:

> Each defendant was forced into the position of trying to prove that the other defendant was the guilty party, while the prosecutor could sit back and watch the two defendants 'fight it out' before the jury as to who was guilty. This, we think, was an unfair burden to place on the defendant under our system of justice. Under that system there is no authority for the procedure used in this case, which we believe denied due process of law to the appellant, so the judgment appealed from must be reversed.

247 So.2d at 448. As in Majors, there was no dispute below that only one defendant shot and killed Mr. Bowden. There was a real dispute, however, as to which one of the defendants did it. The state's tactic in letting the defendants "fight it out'' was an

unfair burden, especially in a proceeding which calls for a greater degree of reliability.

In McCray v. State, 416 So.2d 804, 806 (Fla. 1982), this Court noted that:

> If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. As in this case, the defendants are confronting each other and are subject to cross-examination upon testifying, thus affording the jury access to all relevant facts.

Here, unlike in McCray, the defendants were not subject to cross-examination and the jury did not have access to all relevant facts. Consequently the jury was unable to resolve the conflicts, as evidenced by the death recommendations for both Brown and Roundtree.

To uphold appellant's sentence under these circumstances would make a mockery of the requirement that the sentence of death be imposed only upon reliable evidence. Appellant's sentence must be reversed and the cause remanded for a new penalty proceeding.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE CO-DEFENDANT TO INTRODUCE EVIDENCE THAT HE WAS UNDER THE SUBSTANTIAL INFLUENCE OF APPELLANT, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL.

Robert Roundtree's defense in the penalty phase focused in large measure on his upbringing and personality which made him susceptible to Brown's evil influences. Roundtree's counsel advised the court prior to the penalty phase that "the theory of defense, so to speak, in the present phase is that Mr. Roundtree was basically a very good kid up until he became involved with Mr. Brown.'' (T 2203). Anticipating the problems inherent in joining the defendants in the penalty phase, Brown moved for severance and

moved to preclude the co-defendant from introducing any evidence of nonstatutory aggravating factors against him (T 2029-2042, 2069-2072, 2127-2131). Although Roundtree was limited in his presentation of evidence regarding appellant's criminal record, this restriction was not enough to protect appellant's right to a fair determination on the sentence under the Eighth and Fourteenth Amendments.

Roundtree presented evidence through the testimony of his brother, two psychologists, a social worker and a foster parent that he was very shy, quiet, and a follower (T 224, 2312); that up until September 1985 when he began living with appellant, he was never involved in any violent or criminal activity (T 2244-2245, 2262, 2290); he suffered from feelings of rejection and abandonment (T 2256-2259); he was not aggressive (T 2259, 2262, 2290), and he was highly susceptible to influence (T 2262-2263, 2267). This testimony culminated with that of Dr. Krop, who affirmatively pointed to Walter Brown as a dominating influence over Mr. Roundtree. Dr Krop testified that Roundtree "was staying out of trouble until he got involved and began living with the codefendant [Brown]" (T 2316). Over defense counsel's objections and after a proffer (T 2322-2334), Dr. Krop advised the jury that Robert was living with Mr. Brown and appellant's family in October 1985 and was under the substantial domination of Walter Brown on the date of the murder (T 2334-2335). On cross-examination by the state, Dr. Krop expressed his opinion that Mr. Roundtree would not rob, kidnap and murder if he were by himself: "[H]e probably would not engage in a behavior if somebody else [obviously appellant] did not influence him to do that" (T 2354).

While this evidence was admittedly relevant as to the statutory mitigating factor under Section 921.141 (6)(e) as it applied to Roundtree, it constituted nonstatutory aggravation as applied to Walter Brown. See, e.g., Miller v. State, 373 So.2d 882 (Fla. 1979)(existence of mental mitigation improperly used by trial court as non-statutory aggravation). In Miller, supra at 885, this Court held that "[t]he aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose.'' This Court has consistently held that evidence offered by the state for the purpose of aggravating the crime is inadmissible unless it tends to establish one of the statutorily enumerated aggravating circumstances. See, e.g., Odom v. State, 403 So.2d 936 (Fla. 1981); Perry v. State, 395 So.2d 170 (Fla. 1981). Clearly, if the state cannot directly present evidence of a defendant's bad character, which is not relevant to establish a statutory aggravating factor, the co-defendant should not be permitted to do so either.

The devastating impact of this testimony on appellant's defense at the penalty phase cannot be denied. Appellant maintained throughout the trial and penalty phase that he did not kill Mr. Bowden, that it was Robert Roundtree who wanted to go back and get the victim and Robert Roundtree who pulled the trigger four times. The injection of testimony that Walter Brown was the dominating force behind Roundtree destroyed appellant's defense in a way which the state alone could not have done and violated this Court's caution in Ellege v. State, 346 So.2d 998, 1003 (Fla. 1977), that

> We must guard against any unauthorized factor going into the equation which might tip the scales of the weighing process in favor of death.

Appellant was denied any opportunity to rebut this devastating evidence when the trial court excluded his mother's proffered testimony that Roundtree had a reputation for violence in the community and was the dominant figure in his relationship with appellant (T 2399-2401). See Perry v. State, 395 So.2d 170 (Fla. 1981)(error to exclude mother's proffered testimony concerning Perry's age, background and upbringing).

The impermissible evidence against appellant and the exclusion of the proffered testimony of Ms. McCray are further illustrations of the mischief resulting from the court's denial of appellant's motion to sever. Under these circumstances, it cannot be said beyond a reasonable doubt that the denial of the motion for severance did not influence the jury's advisory recommendation of death. Chapman v. California, 386 U.S. 18 (1967).

In Dougan v. State, 470 So.2d 697 (Fla. 1985), the trial court at the sentencing hearing allowed the state to read an indictment for an unrelated murder and allowed a co-indictee to testify that he and two other men committed the murder at Dougan's direction. This Court reversed Dougan's death sentence and remanded for another sentencing hearing before a new jury, noting that "[w]e cannot tell how this improper evidence and argument may have affected the jury.'' Id., at 701. See also, Maggard v. State, 399 So.2d 973, 977 (Fla. 1981). (Error in allowing state to introduce evidence of defendant's prior criminal record to rebut mitigating factor of no significant prior criminal activity, after defendant expressly waived reliance on that factor, was held to be "of such magnitude as to require a new sentencing hearing before the jury and the court."), and Perry v. State, supra, at 174-175 (Death sentence reversed and case remanded for new penalty proceeding

before a new jury because the state presented evidence of non-statutory aggravating factors). The errors here totally infected the penalty phase and mandate a new penalty hearing before a newly impaneled jury.

ISSUE VII

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL, AND COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WHICH FINDINGS WERE IMPROPERLY BASED UPON THE CODEFENDANT'S CONFESSION.

The admission of the codefendant's statements was prejudicial to appellant whose sole defense was that he was not the triggerman and therefore less culpable than Mr. Roundtree. This prejudicial evidence not only permeated the guilt and penalty proceedings, but extended to the actual sentencing as well, as evidenced by the trial court's findings in support of the death sentence.

As previously noted, this Court has recognized that the right of confrontation extends to the final sentencing process by the judge. Engle v. State, 438 So.2d 803 (Fla. 1983). In Engle, the Court held that consideration of a codefendant's statement in sentencing the appellant unconstitutionally denied him his right of confrontation. Here, as in Engle, the court was not only aware of the inadmissible evidence, but he did, in fact, consider it.

A. The Trial Court's Finding That The Murder Was Especially Heinous, Atrocious And Cruel Was Not Proved Beyond A Reasonable Doubt.

The aggravating circumstance under Section 921.141(5)(h), Florida Statutes, pertains to the nature of the killing itself, while Section 921.141(5)(i) relates to the killer's state of mind, intent and motivation. Mason v. State, 438 So.2d 374 (Fla. 1983). Each of these aggravating factors can apply only to the actual perpetrator of the murder under the facts of this case.

With regard to the aggravating circumstance under Section 921.141(5)(h), the trial judge stated:

> H. THE CAPITAL FELONY WAS ESPECIALLY EVIL, WICKED, ATROCIOUS OR CRUEL.
>
> FACT:
>
> Francis Sheldon Bowden was robbed and then locked in the trunk of a car, having been advised he would not be harmed. After being left in the trunk for a period of time, the vehicle started moving and for some three miles, Francis Sheldon Bowden had to endure his captivity and wonder about his fate. When the vehicle stopped, Francis Sheldon Bowden was in a relatively isolated place.
>
> Francis Sheldon Bowden was then marched with his hands above his head at least thirty-one feet further into isolation. He had to be certain of his fate by then.
>
> Francis Sheldon Bowden was shot in the stomach and then again in the back. His liver and a kidney were hit. He did not die but was certainly in pain. He must have known his death was imminent.
>
> Two more shots were fired. These were both fired directly into Francis Sheldon Bowden's head. One shot left powder burns on the skin. Either would have been fatal.
>
> CONCLUSION:
>
> There is an aggravating circumstance under this paragraph.

(R 850-851).

It is well settled that aggravating circumstances must be proved beyond a reasonable doubt before being considered in sentencing. State v. Dixon, 283 So.2d 1 (Fla. 1973). In State v. Dixon, supra at 9, this Court held that the aggravating factor under Section 921.141(5)(h) applies only to those murders

> where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

[Emphasis added].

Although the facts as stated by the trial court may support a finding that the murder was heinous, atrocious and cruel, the aggravating circumstance pertains to the nature of the killing itself and cannot be applied to one who did not physically participate in the killing. See Craig v. State, 12 FLW 269 (Fla. May 28, 1987) (murder not heinous, atrocious and cruel where codefendant was the actual killer). Notably, the trial court made the identical findings of fact in sentencing Robert Roundtree to death (SR 24-25), even though it was undisputed that only one of the defendants actually committed the murder. The trial court's sentencing findings in appellant's case vis-a-vis Roundtree's are factually inconsistent. Either appellant or Roundtree was the triggerman. Absent consideration of the codefendant's confession, there was no evidence that appellant marched Francis Bowden 31 feet with his hands above his head, and shot him in the back and stomach and twice in the head. As there was no competent evidence that appellant was the triggerman or was even present at the time of the killing, the proof was not sufficiently clear to establish this aggravating factor beyond a reasonable doubt.

B. The Trial Court's Finding That The Murder Was Committed In A Cold, Calculated And Premeditated Manner Was Not Proved Beyond A Reasonable Doubt.

The aggravating factor under Section 921.141(5)(i) applies only to crimes which exhibit a heightened premeditation, greater than that required to establish premeditated murder. As with each statutory aggravation, this heightened premeditation must be proved beyond a reasonable doubt. Gorham v. State, 454 So.2d 556 (Fla. 1984). Although there may be evidence that the underlying felony, robbery, was premeditated in a cold and calculated manner, that

premeditation cannot automatically be transferred to the murder itself. Gorham v. State, supra; Maxwell v. State, 443 So.2d 967 (Fla. 1983).

With respect to this aggravating circumstance, the trial judge wrote:

> I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> FACT:
>
> The time between the decision to murder Francis Sheldon Bowden and his actual murder included enough time for Walter Lee Brown and Robert Wright Roundtree to drive back to where Francis Sheldon Bowden had been left, a distance of three miles; to recover Francis Sheldon Bowden and a vehicle; to drive another 3.2 miles to the scene of the murder; to get Francis Sheldon Bowden out of the trunk of the automobile: to walk him some thirty feet into a wooded area; and to shoot him four times. There was ample time for Walter Lee Brown to reflect on his actions.

(R 851-852).

The critical factual predicate supporting these findings came from Robert Roundtree's confession. The court, again, made identical findings of fact in sentencing Roundtree to death (SR 25-26). While admitting his participation in the robbery, Brown maintained that it was not his idea to go back to recover Mr.Bowden, that he followed Roundtree the 3.2 miles to the church and waited several blocks away for Roundtree to join him. The trial court apparently rejected Brown's statements in applying this aggravating circumstance, but he could do so only upon the consideration of Roundtree's.

In Cannady v. State, 427 So.2d 723 (Fla. 1983), the only direct evidence of the manner in which the murder was committed was

the appellant's own statements, in which he repeatedly denied that he meant to kill the victim. The trial court rejected these statements in finding that the murder was committed in a cold, calculated and premeditated manner. This Court reversed Cannady's death sentence, noting:

> The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

427 So.2d at 730.

Similarly, here, the only direct evidence of the manner in which the murder was committed was the statements by Brown and Roundtree. The trial court rejected appellant's statements, relying instead on Roundtree's version of the crime. As the codefendant's statements were inadmissible as to Brown, this aggravating factor was not proved beyond a reasonable doubt.

In Lee v. Illinois, U.S. ___, 90 L.Ed.2d 514 (1986), the Supreme Court noted that use of the interlocking confessions exception to the Bruton rule is particularly suspect where there is a strong likelihood that the factfinder considered a defendant's statement against his codefendant. That is precisely what occurred here. Under these unique circumstances, appellant's death sentence cannot be sustained. At a minimum appellant submits that the trial judge is obliged to reevaluate the sentence imposed upon him in light of the permissible evidence against him and without consideration of the codefendant's confession.

ISSUE VIII

THE REVERSAL OF APPELLANT'S CONVICTION IN CASE NO. 85-11118 WOULD INVALIDATE THE AGGRAVATING CIRCUMSTANCE UNDER SECTION 921.141(5)(b), FLORIDA STATUTES.

The trial court found as an aggravating factor that appellant was previously convicted of a felony involving the use or threat of violence to the person, based upon his conviction for armed robbery in Circuit Court Case No. 85-11118. That conviction is currently pending review by the First District Court of Appeal in Case No. BO-301. Brown and Roundtree were jointly tried in that case, and one issue on appeal involves the introduction at trial of the codefendants' interlocking confessions. See Appendix.

The reversal of appellant's conviction in Case No. 85-11118 would render the aggravating circumstance under Section 921.141(5)(b) invalid. Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, appellant requests in Issues I, 11, III and IV, that this Court reverse his conviction and sentence and remand the cause for a new trial. In Issues V and VI, appellant requests this Court reverse his sentence of death and remand for a new penalty proceeding before a new jury. In Issues VII and VIII, appellant requests that his death sentence be reversed and the cause remanded for resentencing in light of the admissible evidence against him.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ P. Douglas Brinkmeyer

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
FLA. BAR #308846
POST OFFICE BOX 671
TALLAHASSEE, FL 32302
(904)488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing has been furnished by hand delivery to Bradford L. Thomas, Assistant Attorney General, The Captiol, Tallahassee, FL, 32301 and by U.S. Mail to Walter Lee Brown, #285825, Post Office Box 747, Starke, FL, 32091, this 1st day of July, 1987.

/s/ P. Douglas Brinkmeyer

Paula S. Saunders
Assistant Public Defender