IN THE SUPREME COURT OF FLORIDA

WALTER GRANT KYSER,	:	
Appellant,	:	
v.	:	CASE NO. 69,736
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The Appellant, Walter Grant Kyser, will be referred to by name throughout this brief. References to the record on appeal will be designated with the prefix "R." Similar designations with the prefix "A" will be used for references to the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

1. Procedural Progress of the Case

On February 14, 1986, a Bay County grand jury returned an indictment charging Walter Grant Kyser with first degree murder for the shooting death of Deputy Floyd Milton Moore, Jr. (R 1233). Kyser proceeded to a jury trial on August 11, 1986 (R 1377). The Bay County jury found him guilty as charged (R 1409), and after hearing additional evidence, recommended a death sentence by a vote of eight to four (R 1420).

Circuit Judge W. Fred Turner adjudged Kyser guilty and sentenced him to death on November 4, 1986 (R 1047-1061, 1460-1469) (A 1-6). The court found three aggravating circumstances: (1) that Kyser committed the homicide during a burglary or while fleeing from the commission of a burglary; (2) that the homicide was committed to avoid arrest; and (3) that the homicide was committed to disrupt or hinder the lawful exercise of a governmental function (R 1467) (A 3-4). The court found no mitigating circumstances (R 1468) (A 4-5). Motions for new trial filed by counsel and by Kyser pro se were denied on November 26, 1986 (R 1431, 1444, 1450, 1475, 1484).

Kyser timely filed his notice of appeal to this Court (R 1474).

2. Facts-Guilt Phase

Floyd Moore, Jr. was a sergeant with the Bay County Sheriff's Department and also worked part time as a security guard at the Turtle Lake Apartments where he resided (R 721-723). He worked his security job on the night of January 27, 1986 (R 440-443). At 11 minutes after midnight on January 28, Deputy Jesse Clark heard a radio transmission from Moore to the Sheriff's Department requesting that a marked patrol car be dispatched to the apartment complex (R 440-443). Clark responded and arrived at the apartments seven minutes after the dispatch (R 442). He tried unsuccessfully to contact Moore via radio (R 443). Driving through the complex, Clark discovered Moore lying in the parking lot (R 443). He was unconscious and bleeding from a head wound (R 444). Moore wore a jacket with a sheriff's emblem and his cap with similar markings was nearby (R 443-444, 536-538). Moore's pistol was in his holster and his flashlight was in his back pocket (R 444). A sheriff's department walkie-talkie was on the ground still operating (R 443). Clark called for assistance and Moore was transported to Bay Memorial Medical Center (R 446, 535-536).

After surgery, Moore was pronounced dead (R 602). Dr. William Sybers performed an autopsy on January 29, 1986 (R 601). He concluded that Moore had suffered a gunshot wound through his head which instantly caused brain death (R 602-609). A .32 or .38 caliber bullet probably produced the wound (R 638-639). The projectile entered through the outer

portion of the left ear, traveled left to right at a slightly upward angle toward the front of the head and exited (R 605-609). There was soot present near the entrance wound, but no stippling, which lead Sybers to conclude that the shot was fired from a distance of one to six inches (R 611-613). According to Sybers, the wound was consistent with having been made by a wadcutter type bullet (R 613). Three small, C-shaped, metal fragments were recovered from the outside of the skull (R 606, 633). Sybers stated that as a soft lead bullet passes through bone, lead is sometimes sheared off (R 633). Tiny pieces of metal were also present along the bullet's path, but these were visible only in X-rays (R 635-637). Bleeding and swelling were present around the eyes which was the result of the internal force of the gunshot (R 603-604, 630). There was no external source for this injury (R 603-604). Finally, Sybers found a large bruise on Moore's right hip which was consistent with Moore having fallen onto the pavement (R 629).

Investigator Chuck Robinson examined the jacket Moore wore and discovered an Alabama driver's license inside (R 539-542). The license had been issued in the name "Edwin Allen Kyser" and bore a photograph of Appellant, Walter Grant Kyser (R 542-544, 548). Investigator Frank McKeithen learned from the local utilities company that electrical power was being provided to a Bay County residence under the name of Edwin Allen Kyser (R 548). McKeithen went to the Lynn Haven address and found a wooden duplex apartment with

a blue van parked near the door (R 548). There he met Tina Kyser and questioned her. Ultimately, she consented to the search of the residence and the van (R 550-555). From a gun rack in the bedroom, the investigators seized a .20 gauge shotgun and a .22 caliber rifle (R 557-558). They searched the apartment and van for a .38 caliber pistol but did not find one (R 558-559). In the bathroom, a wadded towel containing dark facial hair was found (R 559-560). Kyser had been wearing a beard (R 514). McKeithen obtained a description of Kyser and notified the Columbus, Georgia police department (R 550). Investigator W.E. Miller flew to Columbus and shortly after his arrival, that city's police department arrested Kyser (R 658-664).

Miller questioned Kyser at the Columbus Police Station (R 665). After giving a false name (R 662), Kyser admitted his real name (R 665). He said he had been using his brother's name and Alabama address (R 665). When asked about the shooting in Bay County, Kyser said he was scared (R 665). Miller asked him why he was scared and Kyser responded by asking, "|T]hat guy was a deputy sheriff, wasn't he?" Miller said, "Yes." (R 666) Kyser then stated that he had seen what happens to people in jail for such an offense (R 666). Miller asked what he meant (R 666). Kyser answered that he had spent time in prison in California for burglary charges and he did not think he could handle going back to prison.(R 666) Miller returned to Bay County the following day, January 29, 1986, with Kyser (R 667,714).

Miller introduced Kyser to Investigator McKeithen who continued to question Kyser about the shooting (R 714-730).

According to McKeithen, Kyser gave a statement admitting to the shooting (R 717-730). Kyser said that he had installed carpet at the Turtle Lake Apartments in the past and knew that sometimes storage rooms were left unlocked (R 717). He went to the apartments to steal items which he might find unsecured (R 717). As he walked along the breezeway in the U-building, Kyser said the officer approached him (R 717). Kyser recognized the man was a law enforcement officer because he wore an emblem on his cap or jacket (R 718). He also carried a walkie-talkie and said he had a gun (R 718). When asked, Kyser told the deputy that he had come to the apartments to visit someone in unit U-235 (R 718). The deputy asked for Kyser's driver's license and the two of them proceeded to apartment U-235 (R 718). No one answered the deputy's knock (R 718). At that time, the deputy called for a marked patrol car on his walkie-talkie, and the two of them began walking across the parking lot (R 718). Kyser said the deputy walked slightly in front of him and to his right (R 719). Kyser pulled the pistol he carried in his right front pants pocket and swung it toward the officer (R 719-720). He intended to strike the deputy in the neck and head area to stun him long enough to flee (R 719-720). However, the gun accidentally discharged, shooting the deputy (R 719-720). Kyser told McKeithen he had spent time in prison in California where someone tried to

kill him three different times (R 717). The fear of possibly returning to prison was on his mind when the deputy approached him that night at the apartments (R 717).

Richard Wyrick worked for Kyser as a carpet installer's helper in January 1986 (R 490-491). Wyrick testified that during that month he purchased guns for Kyser on two occasions (R 494). Kyser told him that he could not purchase the guns because he had an Alabama driver's license and a Florida license was necessary to buy a firearm (R 493). On January 10, 1986, Wyrick purchased a snubnose, double action, .38 caliber revolver and a .20 gauge shotgun for Kyser at the Miracle Strip Pawn Shop (R 493-497, 520-521). Kyser was present and selected the guns (R 494). The shop owner also gave Wyrick five rounds of reloaded, wadcutter type, .38 caliber ammunition in order to test fire the pistol (R 497, 521). On January 15, Wyrick made a second purchase for Kyser at the same shop of a .22 caliber rifle (R 498-499, 522-523). At the same time, Kyser sold a .357 magnum pistol, which he had pawned at the shop the previous day, to the shop owner (R 522). Wyrick remembered a conversation during which Kyser said the .357 was too large for his wife to handle and he was buying the .38 for her (R 505-506). Later, the pawn shop owner's entire remaining supply of reloaded .38 ammunition was sent to the FBI laboratory for analysis (R 523, 565-571). The analyst concluded that a portion of the wadcutter bullets in that supply of ammunition was of roughly the same chemical

composition as the three, C-shaped, metal fragments the medical examiner removed from Moore's head (R 677-706). He could not eliminate the wadcutter bullets as a possible source of the fragments (R 698).

3. Motion To Suppress Statements

Kyser moved to suppress the statements he allegedly made to Investigators Miller and McKeithen (R 1345-1346). The circumstances surrounding the taking of the statements were developed at a pretrial evidentiary hearing (R 1097-1222). Testimony at the hearing established the following:

At approximately 6:45 p.m. on January 28, 1986, Officer Bill Mixon of the Columbus, Georgia Police Department, arrested Kyser in the parking lot of the Crystal Restaurant (R 1097-1100). Mixon handcuffed Kyser, placed him in the backseat of his patrol car and read him his Miranda rights (R 1099-1101). Mixon asked Kyser his identity and Kyser said his name was James Roberts from Tampa (R 1101). Kyser told Mixon that he had arrived in Columbus the previous night (R 1102). Detective R.T. Boren of the Columbus police department went to the scene of the arrest with Investigator Miller from the Bay County Sheriff's Department who had just arrived in Columbus (R 1113-1128). Boren spoke to Kyser briefly in the backseat of the patrol car (R 1114-1117). He told Kyser that he had a fugitive warrant for him and advised him of his rights (R 1114-1116). Kyser's only response was to state that his name was James

Roberts, not Kyser (R 1116). A few minutes later, Miller also spoke to Kyser in the car and again advised him of his rights (R 1125-1126). Boren and Miller testified that Kyser did not ask for counsel during either of those conversations (R 1122-1123, 1127-1128). Kyser was then transported to the Columbus Police Station (R 1129).

Detective Boren was concerned with ascertaining Kyser's true identity (R 1132). He questioned Kyser on that subject inside a small interview room (R 1130-1135). After Kyser again asserted that his name was James Roberts, Boren confronted him with a photograph obtained from his residence and a similar one found when his vehicle was searched in Georgia (R 1131-1132). Kyser ultimately admitted that his real name was Walter Grant Kyser (R 1132-1135). At that time, Kyser expressed his fear that the Bay County officers would try to kill him (R 1133-1135). Boren left Kyser alone in the interview room and told Miller that Kyser had admitted to his true identity (R 1161-1164, 1166). Boren proceeded to another part of the station to complete the booking report and other paperwork (R 1163-1164). He was gone about 15 to 20 minutes.(R 1149, 1154).

During Boren's absence, Miller entered the interview room and questioned Kyser (R 1166). Miller reminded Kyser of his rights and asked if he wanted to talk about the shooting in Panama City (R 1167). Kyser said he was scared and asked if the victim was a deputy (R 1167). Miller answered that he was (R 1167). Kyser metioned that he had

been in trouble before and did not want to go back to jail (R 1168). They had some further conversation about the Bay County Jail (R 1168). Miller again asked Kyser if he wanted to talk about the shooting (R 1168). Kyser said, "Can we talk about something else, I think I want to talk to a lawyer before I talk about that and I hope you understand that." (R 1168) They had some discussion about Kyser's inability to eat or sleep because his conscience was bothering him and his fear of flying (R 1168). Kyser also stated that he would be willing to waive extradition (R 1168). Miller then left the interview room (R 1169).

When Boren returned, Miller was talking on the telephone (R 1150). Boren did not talk to him and did not know that Miller had talked to Kyser during his absence (R 1149-1150). Boren did not know that Kyser had requested a lawyer (R 1149-1150). He proceeded to question Kyser about the shooting (R 1136-1137). According to Boren, Kyser was reluctant to talk about Florida at all (R 1145). However, Boren continued to talk to him for several hours and built a rapport with Kyser until he slowly started to talk about the incident (R 1145). Kyser first stated that another individual was involved, and he wanted to talk to his wife, Tina Kyser, before giving further information (R 1137). Boren made a telephone call, and after about 45 minutes, Tina Kyser returned a call (R 1138). After talking to his wife, Kyser handed the telephone to Boren and said his wife would tell him the name of the second individual (R 1138). She

gave Boren the name Ricky Wyrick (R 1139). When told his wife's response, Kyser then related a version of the shooting which included Wyrick as the one pulling the trigger (R 1139-1142). Kyser later repeated the story in Miller's presence but no tape recording was made (R 1152-1153).

Miller transported Kyser to Bay County the next day (R 667). Upon their arrival, Miller introduced Kyser to Detective McKeithen, stating that the two of them were working together on the case and that McKeithen wanted to talk to him (R667-668, 716). Miller did not tell McKeithen that Kyser had asked for a lawyer (R 727). McKeithen advised Kyser of his rights and then asked Kyser exactly what happened during the shooting incident (R 717, 1171-1172). Kyser talked, ultimately giving the statement to which McKeithen testified at trial (R 717-720, 1173-1177). When asked to repeat the statement on tape, Kyser refused and again asked for a lawyer (R 729-730, 1173). McKeithen terminated the interview at that time (R 1173).

Kyser testified during the suppression hearing (R 1181). He stated that he asked for a lawyer from the first time Detective Boren talked to him at the police station in Columbus (R 1182-1183). When Miller entered the interview room, Kyser repeated his request for counsel (R 1183). Moreover, Kyser again asked for a lawyer when McKeithen first asked to talk to him in Bay County (R 1183-1185). Additionally, McKeithen threatened to arrest Kyser's wife and have his baby placed in foster care (R 1208-1214).

Kyser said he finally decided to relate the story blaming the shooting on Wyrick because of the telephone conversation with his wife while in Georgia (R 1219-1220). He said that he did not initiate any of the conversations with the detectives about the shooting incident (R 1221-1222).

The trial court denied the pretrial motion to suppress statements (R 1366) and overruled Kyser's continuing objections to the admission of the statements at trial (R 654-656). The court also denied Kyser's motion to prohibit the use of that portion of his statement where he mentioned his prior prison incarceration in California (R 640-656).

4. Jury Instructions--Guilt Phase

During the jury instruction charge conference, the State asked for a first degree felony murder instruction with burglary and escape as the underlying felonies (R 752-754). Kyser objected, arguing that there was insufficient evidence of a burglary or escape to justify the instruction (R 754-757, 806-824). The court disagreed and granted the State's request (R 806-824). Furthermore, the court denied Kyser's request that the standard jury instructions be used to advise the jury of the elements of the underlying felonies (R 806-824). The court chose to merely read the statutes on burglary and escape (R 806-824, 886-887). Finally, the court refused to instruct the jury on the elements of an attempt, even though the jury was told

that an attempted escape or an attempted burglary could provide the necessary underlying felony (R 807-824,886).

5. Seating The Alternate Juror

The jury was sequestered at the beginning of the trial (R 377). On August 14, 1986, the jury returned a verdict of first degree murder (R 902-903). Court was adjourned until the afternoon of the following day when the penalty phase was to commence (R 903). After Judge Turner was home for the evening, the bailiff in charge of the jury telephoned him stating that Juror Robert Schlief needed to be released because his daughter had shot herself and was hospitalized (R 923). Schlief was the foreman of the jury (R 1409). Judge Turner telephoned the prosecutor and defense counsel and advised them of the situation (R 924). The court said the trial would continue because the alternate juror was available and still sequestered (R 924). Kyser objected to the seating of the alternate juror because she did not have the benefit of having deliberated on the verdict as did the remaining eleven (R 905-906). He moved for a mistrial which the court denied (R 905-908). Alternatively, Kyser asked the court to impanel a totally new jury to hear the penalty phase (R 905-908). After hearing arguments, the court denied the request (R 908-924). Alternate Juror Tanya Thurman was seated as a primary juror, and the court continued with the penalty phase of the case.

While the court and counsel discussed the alternate juror problem, the bailiff revealed that the remaining

jurors were aware of the fact that Juror Schlief's daughter had shot herself in the head and was in critical condition (R 905, 924-926). He said one of the jurors, who was a nurse, called the hospital and obtained a report on the daughter's condition (R 925). Kyser moved for a mistrial on the ground that the jurors had violated sequestration (R 924-927). The court denied the motion (R 926-927).

6. Penalty Phase and Sentencing

The State presented no additional testimony at the penalty phase of the trial. However, the court did allow the prosecutor to introduce judgments for Kyser's prior convictions for burglary and grand theft (R 927-934). Kyser testified in his own behalf and introduced the testimony of a friend and a psychologist (R 937, 944, 997).

Kyser told the jury that his wife, Tina Kyser, actually shot Deputy Moore. He said that on the night of the homicide, he and his wife left their home looking for something to steal (R 946-949). His past practice as a thief was to drive or walk around at night looking for something unsecured to steal (R 947). Since his prior conviction for burglary, he did not burglarize anything; he merely picked up items he might find (R 947). His wife would remain in the van while Kyser looked for items (R 948-949). They began their search after 10:00 p.m. on January 27, 1986 (R 948). After looking through the Heritage Apartments, they decided to try at the Turtle Lake Apartments before returning home (R 950). Kyser looked

through the back area of the complex and decided to make a quick look through the front (R 951). He parked his van across the street from the U-building (R 951). There were storage buildings in that part of the complex, and Kyser thought he might find one left open (R 952). As Kyser walked through the breezeway and downstairs, Deputy Moore approached him and asked him why he was there (R 952). Kyser told him he was there to visit someone, but the person was not home (R 952-953). Moore asked for identification and Kyser gave him a driver's license (R 953). After checking the apartment where Kyser claimed to have been, Moore called for a marked patrol car on his walkie-talkie (R 954). Moore also asked to search Kyser and his van (R 954). Kyser agreed, since he did not carry a firearm on his person (R 954, 996). However, he did have a pistol in the glove compartment of his van (R 941). Moore frisked Kyser, and the two men began walking across the parking lot to the van (R 954-955). As they walked away from the parked cars, Kyser heard a gunshot (R 955). He turned around and saw his wife standing slightly to the left of Moore (R 955). She held the .38 pistol in her hand (R 955, 981). She appeared frozen (R 955). Kyser put her in the van and they fled (R 955).

During his testimony, Kyser admitted that he had given two or more false stories to law enforcement (R 956). One version implicated Richard Wyrick and another his wife's stepbrother, Lee Dunbac (R 957-965). These stories were

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developed with his wife's assistance (R 958-963). Kyser said he told these versions of the incident because he loved his wife and wanted to protect her from prosecution (R 965).

Kyser's friend and employee in the carpet installation business, Dorine Vann, testified in mitigation (R 937). She said that Kyser was a kind and patient boss (R 939-940). He would never cause trouble, and she never saw him violent (R 940-941). If a confrontation arose, Kyser's response was to withdraw from the situation (R 940). She was aware that he carried a pistol in the glove compartment of his van (R 941).

Dr. Clell Warriner, a psychologist, examined Kyser prior to trial and testified for the defense in mitigation (R 997-1000). He concluded that Kyser was not psychotic or severely mentally ill (R 1007-1008). However, Warriner did find that Kyser suffered from an unusual personality problem (R 1008-1017). The disorder is called "color shock" because a symptom is an inability to see past the color of certain pictures and figures in the Ink Block Test for measuring personality traits (R 1004, 1008). The predominant behavioral symptom is abnormal difficulty dealing with emotional stress or pressures (R 1008). When confronted with such a situation, the person suffering color shock would withdraw from it (R 1008-1010). In Warriner's opinion, Kyser had suffered from this problem from around the age of six (R 1009).

After hearing arguments of counsel and the standard penalty phase jury instructions, the jury recommended a death sentence by a vote of 8 to 4 (R 1044, 1420). The court ordered a presentence investigation (R 1045), and on November 4, 1986, sentenced Kyser to death in accordance with the recommendation (R 1047-1061, 1465-1469) (A 1-5).

SUMMARY OF THE ARGUMENT

1. Shortly after his arrest, Kyser requested a lawyer and asked that he not be questioned about the circumstances of the alleged crime. Investigator Miller, to whom the request was made, failed to inform the other investigators working on the case of Kyser's request. Subsequent to the request, two of these investigators, on separate occasions, initiated custodial interrogation and obtained incriminating statements. Miller was present during a portion of the first interrogation and introduced the investigator who conducted the second to Kyser, knowing that the investigator intended to question Kyser about the crime. The statements obtained after Kyser's request for counsel were inadmissible since they were secured in violation of the Fifth Amendment. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 278 (1981).

2. The evidence at trial was insufficient to prove first degree murder. At best, the State proved second degree murder, since there was no evidence of premeditation or proof of one of the requisite underlying felonies. Kyser's statement to Investigator McKeithen was the only evidence of the circumstances surrounding the shooting. It revealed that the victim stopped Kyser to investigate his presence at the apartment complex. During the stop, Kyser used his pistol to strike the victim. Unfortunately, the gun accidentally discharged, killing the victim. The physical evidence was consistent with Kyser's statement.

3. Over defense objections, the trial court instructed the jury on escape, attempted escape, burglary and attempted burglary as underlying felonies for the felony murder theory of the prosecution. These instructions were improper because there was no evidence of the commission of these felonies produced at trial. Furthermore, even if appropriate, the instructions were erroneous because the elements of an attempted burglary and an attempted escape were not included.

4. The trial court should have granted a mistrial and impaneled a new jury for penalty phase when the foreman of the of the jury had to be excused from further service after guilt phase. Instead, the court seated an alternate juror and proceeded with the penalty phase of the trial. This procedure deprived Kyser of his right to have his trial jury, or a specially impaneled jury, make the sentencing recommendation. Additionally, the process denied Kyser of his right to have a sentencing jury in which all the jurors have participated equally in the deliberative process. The jurors also had knowledge of the fact that the foreman was excused because his daughter had attempted suicide by shooting herself in the head. The jurors' knowledge of this fact violated the sequestration rule and tainted the jurors ability to continue to serve objectively.

5. Kyser's death sentence should be reversed because the trial court's sentencing weighing process was flawed. First,the court improperly found that the homicide was committed during a burglary and for the purpose of avoiding arrest or

disrupting the enforcement of the laws. Second, the court failed to find as a mitigating circumstance that the homicide was committed by another and that Kyser's participation was minor. Third, the court did not consider as nonstatutory mitigating circumstances several of Kyser's character traits, including his reputation for nonviolence. Fourth, the court gave improper weight to the jury's death recommendation and did not make an independent judgment regarding the imposition of death.

6. Kyser's death sentence is disproportional to the crime and his personal culpability. The State's proof at trial established nothing more than a second degree murder. However, even a crime fitting the theory of the prosecution-- a premeditated murder committed during a burglary for the purpose of avoiding arrest-- does not warrant the imposition of death, when compared to similar cases in which this Court has said death is not justified. The additional defense evidence at penalty phase proved that it was actually Kyser's wife who shot the victim to Kyser's complete surprise. He had not participated in a plan to use lethal force, much less kill, attempt to kill or intend that a killing take place.

7. Kyser presented evidence that he did not kill, attempt to kill, intend that a killing take place or that lethal force be used, and that he did not act with indifference to human life. The jury should have been instructed that a death sentence is unconstitutional under these circumstances pursuant

to Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

8. During penalty phase, the State was allowed to introduce evidence of Kyser's prior convictions for burglary and larceny. Kyser did not assert the applicability of the mitigating circumstance of no significant history of prior criminal activity, even though the court chose to instruct the jury on all the enumerated aggravating and mitigating circumstances, including this factor. Consequently, the convictions were nonstatutory aggravating circumstances, not rebuttal. The evidence should not have been presented to the jury, and the prosecutor should not have argued these convictions as nonstatutory aggravating circumstances.

9. The trial court should not have read the standard penalty phase jury instructions to the jury. These instructions unconstitutionally diminish the importance of the jury's sentencing recommendation.

ARGUMENT

I

THE TRIAL COURT ERRED IN ADMITTING KYSER'S INCRIMINATING STATEMENTS IN EVIDENCE BECAUSE THE STATEMENTS WERE OBTAINED DURING CONTINUED CUSTODIAL INTERROGATION AFTER KYSER HAD ASSERTED HIS RIGHT TO REMAIN SILENT AND REQUESTED COUNSEL.

This Court has, on many occasions, acknowledged, applied and emphasized the bright-line rules governing custodial interrogation once the suspect has asserted his right to counsel. E.g., Kight v. State, No. 65,749 (Fla. July 9, 1987); Smith v. State, 492 So.2d 1063 (Fla. 1986); Drake v. State, 441 So.2d 1079 (Fla. 1983). The Fifth Amendment to the United States Constitution mandates that all questioning cease immediately when a suspect makes such an assertion. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 278 (1981); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As noted in Smith v.Illinois,

> In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching" --explicit or subtle, deliberate or unintentional--might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. [citations omitted]

469 U.S. at 98. Police officer's may clarify the request for counsel if it is equivocal, but no further communication about the charges or a waiver of rights is permitted. Smith v. Illinois; Valle v. State, 474 So.2d 796, 799 (Fla. 1985); Thompson v.

Wainwright, 601 F.2d 768 (5th Cir. 1979) The officer may not ask the suspect why he is exercising his rights or make any gratuitous remarks even remotely related to the charges under investigation. Smith v. State, 492 So.2d at 1066-1067. Only if the suspect himself initiates further discussions about the charges is the officer permitted to resume questioning and seek a waiver of the suspect's rights. Edwards v. Arizona; Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). The trial court failed to follow these standards and erred in denying Kyser's motion to suppress.

There was no dispute that Kyser requested a lawyer during his interrogation. Kyser testified that he made such a request of Detectives Boren, Miller and McKeithen when they began questioning about the shooting incident. (R 1181-1185) While Boren and McKeithen denied hearing such a request prior to Kyser's making incriminating statements, Miller acknowledged that Kyser asked for a lawyer during his first contact with him at the police station in Columbus.(R 1168-1169) This request was well before Kyser made statements to Boren and McKeithen. When Miller asked about the shooting, Kyser said,

> Can we talk about something else, I think I want to talk to a lawyer before I talk about that and I hope you understand that.

(R 1168) Miller did understand that request, and the subject of their conversation changed to other unrelated matters.(R 1168-1169) However, Miller, who was present during at least part of Boren's and McKeithen's interrogation of Kyser, did not tell those two detectives about Kyser's assertion of his right to a

lawyer. (R 727, 1149-1150) Whether Miller's omission was intentional or inadvertent, the effect was the same--Boren and McKeithen failed to honor Kyser's request and proceeded to interrogate.(R 717, 1136-1137, 1171-1172) Even though Boren and McKeithen did not have actual knowledge of the request, they are bound by it just as much as Miller. See, Michigan v. Jackson, 475 U.S. __, 106 S.Ct. __, 89 L.Ed.2d 631 (1986); Anderson v. State, 487 So.2d 85 (Fla. 2d DCA 1986); Williams v. State, 466 So.2d 1246 (Fla. 1st DCA 1985). A violation of Edwards occurred, and the trial court should have granted Kyser's motion to suppress.

The Second District Court of Appeal's decision in Anderson v. State, 487 So.2d 85, is on point. Orange County Deputy Helegren arrested Anderson as a suspect in the shooting of a Polk County police officer. A Polk County investigator, Putnell, advised Anderson of his rights while he was still in Helegren's patrol car. Anderson requested counsel. Putnell terminated his interrogation and told a second Polk County officer, Cavallero, of the request. Helegren and Cavallero transported Anderson to the hospital to be identified by the shooting victim. There, a third Polk County police officer, Primeau, took Anderson to a room in the hospital, gave him Miranda warnings and questioned him. Cavallero was present but did not tell Primeau of Anderson's request for a lawyer. Anderson did not reassert his right to counsel. Primeau obtained a confession. The appellate court reversed holding that the confession was obtained in violation of Edwards v. Arizona. Then Acting Chief Judge Grimes wrote,

> Admittedly, Primeau did not know that appellant had previously told Putnell that he wanted to talk with a lawyer. However, our sister court has held that it makes no difference that the officer who initiates the subsequent interrogation is not aware of the suspect's prior request for counsel.Williams v. State, 466 So.2d 1246 (Fla. 1st DCA), petition for review dismissed, 469 So.2d 750 (Fla.),petition for review denied, 475 So.2d 696 (Fla. 1985).

487 So.2d at 86.

Williams v. State, the First District case upon which Anderson relied is also on point. Williams was arrested in Walton County on an Okaloosa County warrant for murder. He was placed in Walton County Sheriff McMillian's car. McMillian advised Williams of his rights and Williams asked for a lawyer. Okaloosa County Undersheriff Jerry Alvord was present in the car at the time. Alvord did not tell any of his deputies of the request. One of his deputies, Keeler, later interrogated Williams, and Williams waived his rights and confessed. The First District Court reversed holding that Keeler's interrogation violated Edwards and tainted the subsequent waiver. 466 So.2d 1246.

The circumstances in this case are no different than the ones in Anderson and Williams. Kyser asked Miller for a lawyer before Boren and McKeithen questioned him about the homicide. The fact that Boren and McKeithen did not have knowledge of the request and that Kyser did not reassert his right to counsel is immaterial. Boren and McKeithen were not free to question Kyser about the shooting unless Kyser initiated

conversation on the subject. Edwards v. Arizona; Oregon v. Bradshaw. However, both Boren and McKeithen testified that they initiated the questioning.(R 1134-1145, 716-717, 1171-1172) Just as in Anderson and Williams, Kyser's statements were obtained in violation of the Fifth and Sixth Amendments.

Admission of Kyser's statements into evidence at trial was not harmless error. The statement allegedly made to McKeithen was the only one admitted which directly linked Kyser to the crime.(R 717-730) Moreover, that statement was the only evidence of the actual circumstances of the shooting. (R 717-730) Without it, the remaining evidence was entirely circumstantial. The statement was not insignificant or cumulative. See, Kight v. State, No. 65,749 (Fla. July 9, 1987). Although Kyser did testify about the shooting during penalty phase, this does not alleviate the prejudice of the guilt phase error. But for the erroneous admission of the statements at guilt phase, Kyser would not have felt compelled to testify. The error cannot be cured by actions taken to ameliorate its impact. See,Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). Furthermore, the statement given to McKeithen contradicted Kyser's testimony, and therefore, prejudiced the defense as impeachment. The statements had an important role in the prosecution's case, and without them, the results of the trial could have been different.

The trial court should have granted Kyser's motion to suppress. This Court must now reverse this case for a new trial.

II

THE TRIAL COURT ERRED IN DENYING KYSER'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE WAS INSUFFICIENT TO SUBMIT THE CASE TO THE JURY ON FIRST DEGREE MURDER UNDER EITHER A PREMEDITATION OR FELONY MURDER THEORY.

The State's evidence proved nothing more than a second degree murder. Neither premeditation nor one of the required underlying felonies for first degree murder was proved. See, Sec. 782.04(1)(a) Fla. Stat. The trial court should have granted Kyser's motion for judgment of acquittal.(R 731-738)

Kyser's statement to Investigator Frank McKeithen was the only evidence of the events surrounding the shooting of Deputy Moore.(R 716-721) The remaining evidence was entirely circumstantial. Kyser told McKeithen that he went to Turtle Lake Apartments to go into storage rooms there.(R 717) He had installed carpet at the apartments in the past and knew that sometimes storage rooms were left open.(R 717) Deputy Moore approached Kyser as he walked through the breezeway of the U-building.(R 717) Kyser could tell Moore was a law enforcement officer because of the emblem he wore on his hat or jacket.(R 717-718) Moore asked Kyser why he was there, and Kyser said he was visiting someone upstairs in apartment U-235; Kyser picked the number merely because he had remembered seeing it. (R 718) When asked for identification, Kyser gave Moore a driver's license.(R 718) The two men then walked upstairs to U-235, but no one answered Moore's knock on the door.(R 718) Moore called for a marked patrol car on his walkie-talkie, and they began

walking across the parking lot.(R 718) According to Kyser, Moore walked in front of him and to his right.(R 719) At that time, Kyser pulled his pistol from his right front pocket with the intent to strike Moore hard enough to stun him and then flee.(R 719) As Kyser struck, the gun accidentally discharged, shooting Moore in the head.(R 719-720) Kyser said he did not remember cocking the gun and did not know how it cocked.(R 719) After the shooting, Kyser fled in his van and threw the pistol away.(R 719)

Other evidence in the case corroborated Kyser's version of the events. The location and path of the bullet wound was consistent with it having been produced in the manner Kyser described.(R 605-613) Medical Examiner Sybers stated that the bullet entered through the outer edge of the left ear and travelled in an upward direction toward the front and right side of the head.(R 605-609) This is consistent with Kyser's striking a blow at Moore's head from behind and to the left of Moore. Sybers concluded that the the gunshot producing the wound was fired from one and six inches away.(R 611-613,632) This close range shot is again consistent with an accidental discharge while trying the strike the deputy in the head and neck area. The fact that no bruises or abrasions were found on Moore's neck and head (R 604-605) does not refute the fact that a blow occurred. An inaccurate blow toward the neck and head could have easily fallen on the shoulder where the deputy's jacket would have protected him from bruising. Moreover, a blow landing in that location would have placed the end of the barrel of Kyser's snubnose .38 pistol near Moore's left ear.(R 496-497, 505, 520) Kyser's

pistol was also a double action revolver which did not have to be cocked in order to fire; pulling the trigger alone was sufficient.(R 520) Consequently, Kyser's statement that he did not know how the gun was cocked before accidentally firing is understandable since the gun would fire without being cocked.(R 520) Since the pistol was not recovered, the possibility of malfunction was never explored.

Besides Kyser, no one witnessed the shooting of Floyd Moore. Kyser's version of an accidental shooting does not establish a premeditated murder. And, since no evidence refuted Kyser's account of the homicide, the evidence of a premeditated murder is insufficient. Wilson v. State, 493 So.2d 1019 (Fla. 1986); Jenkins v. State, 120 Fla. 26, 161 So. 840 (1935); Holton v. State, 87 Fla. 65, 99 So. 244 (1924).

> ...where there is a total absence of any other evidence except the defendant's own account of a killing in which he admits giving the fatal wound to the deceased, but states it to have been under circumstances that would have made out murder in the second degree or manslaughter at the most, and there is no other fact or circumstances, nor testimony of witness legally sufficient to contradict the defendant's account of the transaction, a verdict for premeditated murder will not be sustained.

Jenkins, 120 Fla. at 27.

In Wilson v. State, this Court recently applied the above rule and reversed one of the defendant's two first degree murder convictions. Wilson became enraged with his stepmother and began attacking her with a hammer. Wilson's father came to her aid, and after a struggle, Wilson ultimately beat his father and

shot him in the head, killing him. During the struggle, Wilson also stabbed his five-year-old cousin to death with a pair of scissors. Wilson finally made an unsuccessful attempt to shoot his stepmother who was hiding inside a closet. Wilson confessed, contending that both homicides were accidental during the heated family fight. This Court affirmed the defendant's conviction for first degree murder of his father upon finding that the circumstantial evidence was inconsistent with an accidental killing. However, this Court reversed the first degree murder conviction for the death of the defendant's cousin because the circumstances were consistent with an accident, and the prosecution presented no evidence refuting that version of the crime. Wilson's conviction was reduced to second degree murder. 493 So.2d 1019. In the instant case, the circumstantial evidenced is also consistent with Kyser's version of an accidental shooting, and the State did not present evidence refuting it. Just as this Court did in Wilson, Kyser's conviction must be reduced to second degree murder.

The fact that this case involved the shooting of a police officer by a person attempting to avoid detention does not refute an accidental killing. In Hall v. State, 403 So.2d 1319 (Fla. 1981), this Court reduced a first degree murder conviction to second degree murder on exactly this theory. Hall and his codefendant murdered a young woman and drove her car to a convenience store in an adjoining county. The store clerk became suspicious of the two men and telephoned the sheriff's office for assistance. Deputy Coburn responded and confronted Hall and his

codefendant in the parking lot of the store. The deputy was shot in the chest through an opening in his bullet-proof vest with his own pistol. Found near the deputy's body was the pistol used to kill the young woman in the neighboring county. The gunshot came from a distance of two to five feet. No one saw the shooting incident. This Court reversed Hall's conviction holding that the circumstances were consistent with a reasonable hypothesis of an unintentional shooting during a struggle over the deputy's gun.

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

403 So.2d at 1320-1321.

The shooting of Floyd Moore was unintentional. Kyser's confession and the corroborating evidence establish that fact. No alternate theory for the shooting was presented in the prosecution's case. At best, a second degree murder was proved, and

the decisions of this Court mandate a reversal of Kyser's first degree murder conviction.

Kyser's first degree murder conviction can not be upheld on a felony murder theory. The prosecution argued and the court instructed the jury upon three possible underlying felonies-- escape, burglary and attempted burglary.(R 868, 885-887) See, Sec. 782.04(1)(a) Fla. Stat. However, none of these felonies were proved.

An escape theory was presented to the jury on the premise that Moore had arrested Kyser, and consequently, Kyser was a prisoner in custody placing him within the statutory definition of escape.(R 752-757, 806-824) Sec. 944.40 Fla. Stat.; State v. Ramsey, 475 So.2d 671 (Fla. 1985). The problem with this theory is that Moore did not arrest Kyser. At best, Moore temporarily detained Kyser to investigate pursuant to Florida's Stop and Frisk Law. Sec. 901.151 Fla. Stat. A temporary detention does not result in incarceration, and the detainee does not become a prisoner in custody for purposes of the crime of escape. Ramsey, 475 So.2d at 672.

Melton v. State, 75 So.2d 291 (Fla. 1954) defined an arrest as containing four elements:

> ...an arrest involves the following elements:
> (1) A purpose or intention to effect an arrest under a real or pretended authority;
> (2) An actual or constructive seizure or detention of the person to be arrested;
> (3) A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; (4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to

arrest and detain him.

75 So.2d at 294; accord, State v. Parnell, 221 So.2d 129, 130-131 (Fla. 1969); Bey v. State, 355 So.2d 850, 852 (Fla. 3d DCA 1978). A review of the evidence in the instant case reveals that only one of the four necessary elements for an arrest was established--Moore had actually detained Kyser. While it is impossible to know Moore's thought processes concerning his intent to arrest, the circumstances of the detention do not evidence such an intent. Moreover, those same circumstances do not show the necessary communication of such an intent or that Kyser understood that he was arrested. Moore did not tell Kyser that he was under arrest. Moore did not search Kyser incident to an arrest. If Moore had performed such a search, the gun in Kyser's front pocket would have been discovered. Moore did not handcuff or otherwise restrain Kyser. Additionally, Moore did not treat Kyser as a person in custody as evidenced by the fact that he walked in front of Kyser as they crossed the parking lot. The fact that Moore called for a marked patrol car is insufficient. He was not on duty as a deputy and may have perceived the need for an on duty officer to continue the investigation or to effect any arrest which may have been necessary. Finally, the fact that Kyser became afraid of the possibility of returning to prison is insufficient. He said that fear arose when Moore first approached him. (R 717) Moore simply had not made an arrest, and Kyser was not in custody as a prisoner and did not escape.

The evidence also failed to prove a burglary or an attempted burglary as possible underlying felonies. There was no

direct or circumstantial evidence that Kyser entered any structure as required for the commission of a burglary. See, Sec. 810.02 Fla. Stat.; State v. Spearman, 366 So.2d 775 (Fla. 2d DCA 1978). Moore stopped Kyser in the breezeway of the building, a common, public area of the complex. Kyser's statement to McKeithen that he went to the apartments to "go in some of the storage rooms"(R 717) did not establish that he accomplished his intentions. An intent to commit a crime is not the commission of one; even an attempt requires the addition of an overt act beyond the mere preparation to commit the proscribed deed. Sec. 777.04 Fla. Stat.; Adams v. Murphy, 394 So.2d 411 (Fla. 1981); Gustine v. State, 86 Fla. 24, 97 So.2d 207 (Fla. 1923). No such additional acts were present. The criminal law does not proscribe thoughts--only acts can constitute a crime. See, Gustine v. State; Goodman v. State, 203 So.2d 341 (Fla. 3d DCA 1967); see,also, W. LaFave & A. Scott, Criminal Law 6-7 (1972).

Since the State's evidence failed to prove a first degree murder, the trial court erred in denying Kyser's motion for judgment of acquittal. Kyser's conviction upon insufficient evidence violated his right to due process. Amends. V, XIV U.S. Const. He urges this Court to reverse his conviction with directions to enter a judgment for second degree murder.

III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER SINCE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE THE EXISTENCE OF ANY UNDERLYING FELONIES AND THE INSTRUCTIONS GIVEN FAILED TO ADEQUATELY DEFINE THE UNDERLYING FELONIES ALLEGED.

At the prosecutor's request and over defense objections, the trial court instructed the jury on the felony murder theory for first degree murder.(R 752-757, 806-824, 886-887) Four felonies were asserted in support of this theory: escape, attempted escape, burglary and attempted burglary.(R 752-757,806-824) The court instructed on all four, but refused Kyser's request for an instruction on the elements of an attempt.(R 807-824, 886) The statutes proscribing escape and burglary were read to the jury, but the court merely told the jury that an attempt to commit one of those crimes would also be sufficient.(R 886-887) .

Initially, the court should not have submitted this case to the jury on a felony murder theory. Some evidence of an underlying felony is necessary to justify such an instruction. See, Washington v. State, 432 So.2d 44 (Fla. 1983); Middleton v. State, 426 So.2d 548, 552 (Fla. 1983). There was no evidence of the commission of any underlying felony. Issue II of this brief addresses this lack of evidence, and those arguments are incorporated by reference here. Furthermore, the erroneous giving of a felony murder theory instruction could have improperly lead the jury to a first degree murder verdict, since there was also no evidence of premeditation.(See, Issue II, supra.) If the jury

correctly concluded that the homicide was not premeditated, the proper verdict would have been second degree murder. But, with the improper instruction on felony murder, the jury could have been mislead into a first degree murder verdict based on that theory. This case is distinguishable from the situation this Court discussed in Washington v. State, 432 So.2d at 47-48., where the erroneous giving of the felony murder instruction was deemed harmless because of the overwhelming evidence of premeditation. The error was not harmless in this case, and this Court should reverse for a new trial.

Adding to the trial court's error is the fact that the felony murder instruction was incomplete. It did not include any definition of an attempted escape or an attempted burglary. While the instructions on the elements of underlying felonies need not be as detailed as the ones for the primary charge, they must define with enough particularity to insure a fair trial. E.g., Brumbley v. State, 453 So.2d 381 (Fla. 1984); Robles v. State, 188 So.2d 789 (Fla. 1966). Omitting the definition of a single element may not be fatal, McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982); Vasil v. State, 374 So.2d 465 (Fla. 1979), but the complete failure to give any instruction on the elements of the underlying felony does not meet this test and is fundamental error. State v. Jones, 377 So.2d 1163 (Fla. 1979). "It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony." Ibid., at 1165. The jury in this case was left to its own devices to

discern what an attempted escape and an attempted burglary are. As a result, Kyser was deprived of his right to due process and a fair trial.

The trial court erred in instructing the jury on first degree felony murder. A new trial is required. This Court must reverse Kyser's judgment and sentence.

IV

THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AND IMPANELED A NEW JURY FOR PENALTY PHASE WHEN THE FOREMAN OF THE JURY WAS EXCUSED FROM SERVICE BECAUSE OF HIS DAUGHTER'S ATTEMPTED SUICIDE.

After the jury returned a verdict for first degree murder, the trial was continued until the afternoon of the next day for penalty phase.(R 902- 903) The jury remained sequestered as it had been throughout the trial.(R 377) A few hours after adjournment, the bailiff in charge of the jury telephoned the trial judge at his home advising him of the need to release the foreman of the jury from further service.(R 923) Juror Schlief's daughter had attempted suicide by shooting herself in the head and was hospitalized.(R 923) The court released the juror and telephoned counsel about the circumstances informing them that the case would proceed with the alternate juror who was still sequestered with the trial jury.(R 924) When court reconvened, the bailiff revealed that the remaining jurors were aware of Juror Schlief's daughter's attempted suicide and one juror, who was a nurse, had telephoned the hospital to check on her condition.(R 924-925) Defense counsel asked for a mistrial and requested that a new jury be impaneled for penalty phase.(R 905- 906, 924-927) He objected to proceeding because the alternate had not participated in the deliberations during the guilt phase (R 905- 908) and because all the jurors had violated sequestration and were tainted by the knowledge of Juror Schlief's family tragedy.(R 924- 927) The court denied the motions. (R 908-927)

Kyser should not have been forced to proceed to penalty phase with an alternate juror who had not participated in the guilt phase verdict. Section 921.141(1) Florida Statutes provides that the penalty phase shall be conducted before the trial jury, not before eleven members of the trial jury and one who had not fully participated in that trial. The legislature envisioned the possibility that the trial jury might be unable to hear the penalty phase and provided for that situation as well:

> If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant.

Sec. 921.141 (1), Fla. Stat. Merely seating the alternate juror did not comply with these requirements. Kyser was left with a hybrid jury which was neither the trial jury which determined his guilt nor a specially summoned jury charged with the duty of deciding his fate.

In Riley v. State, 366 So.2d 19 (Fla. 1978), this Court rejected the concept of substituting an alternate juror for a primary juror for the penalty phase of a capital trial. The defendant in Riley sought to keep death scrupled jurors on his guilt phase with the understanding that they would be replaced with alternate jurors who did not hold such beliefs against the

death penalty at the beginning of the penalty phase. This Court "|found] no compulsion in law or logic to so structure capital case trials." Ibid. at 21.

The Supreme Court of New Mexico reached a similar conclusion in State v. Finnell, 101 N.M. 732, 688 P. 2d 769 (1984). In that case, the trial court permitted the selection of the twelve primary jurors and six alternates without conducting any inquiry into the jurors beliefs regarding capital punishment. Instead, voir dire on this subject was postponed until the beginning of penalty phase. At the conclusion of penalty phase voir dire, six primary jurors were excused and the six alternates were substituted to consider and deliberate on the appropriate sentence. Looking to New Mexico's death penalty statute, which is similar to Florida's, the appellate court held that the procedure violated the defendant's right to have the original trial jury decide his sentence. The court said,

> The Capital Felony Sentencing Act, NMSA 1978, Sections 31-20A-1 to -6 (Repl. Pamp. 1981), provides for sentencing in capital cases. Section 31-20A-1(B) provides in pertinent part:
>
> > In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury.
>
> This did not occur in the present case. The sentencing proceeding was conducted before six of the original trial jurors and the six alternates. The stipulation which was entered into violated the procedures set forth by the Legislature for capital felony sentencing, and should never have been permitted. The result was to create a confusing situation....
>
> * * * *

> In this case, the defendant was not sentenced by the original trial jury which found him guilty as required by Section 31-20A - 1(B).

Ibid. at 771.(emphasis the court's) Kyser has likewise been deprived of his right to have his trial jury render a recommended sentence. Sec. 921.141 (1) Fla. Stat.

A capital defendant is entitled to a penalty phase jury comprised of jurors who have participated equally in the deliberative process. This is to insure that primary jurors may not, directly or indirectly, apply pressure to jurors who have been substituted and have not had the benefit of the prior deliberations. See, United States v Phillips, 664 F.2d 971, 990-996 (5th Cir. 1981); United States v. Lamb, 529 F.2d 1153 (9th Cir. 1975); see, also, United States v. Kopituk, 690 F.2d 1289, 1306-1311 (11th Cir. 1982). Substituting an alternate juror for the sentencing proceeding after the primary jury has deliberated on the issue of guilt is tantamount to substituting an alternate juror during the deliberations in a noncapital case.See, Sotola v. State, 436 So.2d 1001 (Fla. 5th DCA 1983). In such cases, the newly comprised jury must, at the very least, recommence its deliberations from the start to place the new juror on an equal footing. Sotola, 436 So.2d 1001; Kopituk, 690 F.2d at 1306-1311; Phillips, 664 F.2d at 990-996; Lamb, 529 F.2d 1153. Although a bifurcated process, a capital jury's function is not over until a sentencing recommendation is made.Sec. 921.141(1)(2) Fla. Stat.; State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). Since the jury is to

consider its evaluation of the guilt phase evidence in determining its recommendation, ibid., the deliberations during guilt phase are also part of the deliberations during penalty phase. The capital defendant, just as much as the noncapital defendant, is entitled to a jury composed of jurors who have participated fully in the entire deliberative process. This did not occur in Kyser's case. His penalty phase jury contained a juror who had not fully participated, and the court even denied Kyser's request that the jury be instructed to recommence its deliberations. Kyser has been deprived of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to a fairly constituted sentencing jury.

The second reason why the trial court should have impaneled a new sentencing jury is the taint knowledge of Schlief's tragedy caused. As foreman, Schlief had attained a position of prominence and leadership on the jury. Having been sequestered from the beginning of the trial, a certain degree of emotional bonding no doubt occurred among the jurors. Naturally, the jurors would be concerned, and perhaps empathize with Schlief's circumstances. The jurors were affected as revealed by the one juror's call to the hospital. Extraneous, influential matters reached the jury in violation of the sequestration order and a presumption of prejudice attached. See, Amazon v. State, 487 So.2d 8, 11 (Fla. 1986); Russ v. State, 95 So.2d 594 (Fla. 1957). Particularly prejudicial to Kyser is the fact that Schlief's daughter suffered a gun shot wound to the head just as Deputy Moore did. The concern and empathy the jurors had

for someone they knew, Schlief and his daughter, might now be transferred to the victim and his family because of the similarity of the wounds. This influence is the same as an impermissible "Golden Rule" argument. See, State v. Wheeler, 468 So.2d 978 (Fla. 1985); Barnes v. State, 58 So.2d 157 (Fla. 1952). Had this kind of experience touched the jurors before the trial commenced, they would have been excluded from service during jury selection. Kyser was on trial for his life. He was entitled to a jury free from such emotional outside influences. The trial court should have granted the request to impanel a new jury.

Kyser's death sentence, based in part upon a recommendation from a tainted and improperly constituted jury, is unconstitutional. Amends. V, VI, VIII, XIV U.S. Const. This Court must reverse his sentence with directions that he be afford a new penalty phase trial before a new jury.

V

THE TRIAL COURT ERRED IN SENTENCING KYSER TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES AND PLACED UNDUE EMPHASIS ON THE JURY'S RECOMMENDATION OF DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Committed During A Burglary.

The trial court should not have found as an aggravating circumstance that the homicide occurred during a burglary or attempted burglary. Sec. 921.141(5)(d) Fla. Stat. First, the evidence was insufficient to prove the commission of a burglary or attempted burglary. Second, even if proved, those offenses were also used as the underlying felonies in the prosecution's felony murder theory and cannot be used in aggravation. Injecting this improper circumstance into the sentencing equation skewed the process in favor of death and violated the Eighth and Fourteenth Amendments.

In finding this aggravating circumstance, the trial judge stated:

> The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of an attempt to commit, or flight after committing or attempting to commit, the crime of burglary, F.S. 921.141(5)(d). The defendant had gone to Turtle Lake Apartments for the purpose of burglarizing storage sheds and stealing anything of value from them. By his own admission he entered one or more of the storage facilities with the intent to steal. He was interrupted in this criminal endeavor by the appearance of Deputy Moore.

(R 1467)(A 3-4) The evidence does not support the judge's factual findings and does not prove a burglary or an attempted burglary. A burglary requires an entry. Sec. 810.02 Fla. Stat.; Norris v. State, 429 So.2d 688, 690 (Fla. 1983); Spearman v. State, 366 So.2d 775 (Fla. 2d DCA 1978). There was no evidence of an entry or an attempted entry presented at either the guilt phase or penalty phase of the trial. The insufficiency of the evidence in this regard during the guilt phase has been discussed in Issue II, supra., and that argument is incorporated by reference. Contrary to the trial judge's sentencing order, the testimony presented during penalty phase did not cure this insufficiency. Kyser did not admit to entering a storage room at the apartment complex. He said that he opened the unlocked door on one of the rooms and looked inside (R 952), but he never said that any part of his body crossed to the inside of the structure. In fact, Kyser adamantly stated that he did not intend to burglarize. (R 947, 967) The court's conclusions concerning the evidence were wrong, and this aggravating circumstance should not have been found.

Assuming for argument that there was sufficient evidence of a burglary or attempted burglary, the circumstance was still improper because these same offenses were the underlying felonies for the felony murder theory of the case.(R 886-887) Since there was no evidence of premeditation (See, Issue II, supra.), the first degree murder conviction may have rested on this felony murder theory. Allowing the underlying felony to

provide an aggravating circumstance, as well as an element of first degree murder, makes every felony murder automatically an aggravated one for which death is then presumed to be the proper sentence. See, State v. Dixon, 283 So.2d 1, 8-9 (Fla. 1973). This is not true for first degree premeditated murder because this Court has not permitted the premeditation element to provide an automatic aggravating circumstance. Rogers v. State, No. 66,356 (Fla. July 9, 1987); Jent v. State,408 So.2d 1024, 1032 (Fla. 1981). Kyser is aware that this argument is not new and that this Court has considered and rejected it in the past. E.g., Brown v. State, 473 So.2d 1260, 1267 (Fla. 1985); White v. State, 403 So.2d 331, 335-336 (Fla.1981). However, he urges this Court to reconsider its position, particularly in those instances where the underlying felony is the only aggravating circumstance.

B.

The Trial Court Erred In Finding As Aggravating Circumstances That The Homicide Was Committed to Avoid Arrest And To Disrupt The Governmental Function Of Enforcing The Laws.

In sentencing Kyser to death, the trial judge found that the homicide was committed to avoid arrest and to disrupt the enforcement of laws (R 1467-1468)(A 4). Sec. 921.141(5)(e) & (g) Fla. Stat. The court ruled that the two circumstances merged under the facts of the case and considered only one aggravating factor.(R 1468)(A 4) See, e.g., Welty v. State, 402 So.2d 1159, 1164 (1981). However, neither should have been found.

Both of these aggravating circumstances pertain to the motives and actions of the killer. They have been applied to persons who consciously plan to kill and actually kill a police officer for the purpose of avoiding arrest or disrupting some governmental function. See, Jones v. State, 440 So.2d 570 (Fla. 1983); They have been applied to persons who kill an officer while deliberately using lethal force during an attempt to avoid apprehension. See, Jackson v. State, 498 So.2d 406 (Fla. 1986); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Songer v. State, 322 So.2d 481 (Fla. 1975). Finally, they have been applied to persons who neither planned to kill, actually killed nor actually used lethal force, but who participated in a criminal episode during which he knew a killing would occur or that lethal force would be used. Copeland v. State, 457 So.2d. 1012 (Fla. 1984). None of these situations are similar to the instant case. The State's best evidence shows an unintentional killing while using nondeadly force to avoid a potential arrest. (See, Issue II, supra.) Kyser's testimony during penalty phase revealed that his wife killed the deputy and her actions were a complete surprise to him. (R 946- 956)(See, Issue V-C, infra.) Under either set of facts, Kyser did not intend to kill and did not intend the use of lethal force. His mental state at the time of the killing does not justify the application of these aggravating circumstances.

C.

The Trial Court Erred In Failing To Consider As A Mitigating Circumstance That The Homicide Was Committed By Another And That Kyser's Participation Was Relatively Minor.

Kyser testified that his wife, Tina Kyser, shot the victim.(R 946-956) Although inconsistent with the statement Kyser allegedly gave Detective McKeithen (R 717-730), his penalty phase testimony is more plausible. He admitted to fabricating prior versions of the shooting, with his wife's assistance, in an attempt protect her from prosecution.(R 956-965) This testimony proved that the homicide was committed by another and that Kyser's participation was relatively minor.(R 946-956) His wife's shooting Moore completely surprised Kyser.(R 954-955) There had been no plan for his wife to leave the van, much less come to Kyser's aid with the pistol carried the glove compartment.(R 946-950)

The penalty phase testimony Kyser gave is more believable than the statement allegedly given McKeithen. According to McKeithen, Kyser related events which had Sergeant Moore, an experienced law enforcement officer, failing to follow common security precautions during the stop. In contrast, Kyser's penalty phase testimony had Moore competently using safety procedures. First, McKeithen's version had Moore forgetting to frisk Kyser, thereby not discovering the pistol in Kyser's front pocket.(R 719-720) Second, McKeithen had Moore allowing Kyser to walk behind him in a location where Kyser's actions could not be observed.(R 719) Kyser's testimony had neither

of the above negligent omissions occurring.(R 954-956) Moore frisked Kyser and found no weapon because Kyser was not carrying one.(R 954-955) Moore also walked behind Kyser as they proceeded through the parking lot.(R 954-955) This testimony should have been considered and weighed in mitigation.

Kyser's penalty phase testimony proved that he did not kill Deputy Moore. He did not participate in the homicide, and his lack of culpability warrants finding the statutory mitigating circumstance provided for in Section 921.141(6)(d) Florida Statutes. See, DuBoise v. State, No. 67,082 (Fla. February 19, 1987); Brumbley v. State, 453 So.2d 381 (Fla. 1984); Hawkins v. State, 436 So.2d 44 (Fla. 1983).

D.

The Trial Court Erred In Failing To Consider Nonstatutory Mitigating Circumstances.

Kyser presented testimony of several nonstatutory mitigating circumstances which should have been considered and weighed in mitigation pursuant to the mandate of Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). First, the degree of his participation in the homicide should have been considered and weighed in mitigation, even if the statutory factor was not present.(See, Issue V-C, supra.) Second, the doubts remaining about his guilt of murder should have been included in the sentencing equation.(See, Issue II, supra.) But, see, Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Burr v. State, 466 So.2d 1051 (Fla. 1985). Third, the

fact that he was a good employer (R 939-940), see, Wilson v. State, 436 So.2d 908 (Fla. 1983), and was the father of a small child was mitigating (R 949). See, Jacobs v. State, 396 So.2d 713 (Fla. 1981). And, finally, the testimony about his nonviolent character was a mitigating factor. (R 939-940, 997-1009) See, Washington v. State, 432 So.2d 44 (Fla. 1983). The trial court's failure to properly consider these circumstances renders Kyser's death sentence unconstitutional. Amends. VIII, XIV U.S. Const.

E.

The Trial Court Erred In Giving Undue Weight To The Jury's Recommendation Of Death, Thereby skewing The Sentencing Weighing Process.

The trial court applied an erroneous legal standard regarding the weight to be afforded a jury's recommendation of death. In his sentencing order, the trial court made the following statement regarding his reasons for imposing the death sentence:

> The Jury has recommended death. That recommendation should be given great weight. The importance of that recommendation cannot be overstressed.

(R 1466)(A 3) While a jury's recommendation of death should be given due consideration, it can, indeed, be overstressed. Ross v. State, 384 So.2d 1269 (Fla. 1980). A recommendation of life is to be given great weight and not overturned absent compelling reasons, Tedder v. State, 322 So.2d 908 (Fla. 1975), but the same is not true for a recommendation of death. Ross, at 1274-1275. With a recommendation of death, the trial judge

is bound to exercise his own independent judgment in imposing sentence. Ibid.

Based on the sentencing court's statements, it is apparent that the court gave too much deference to the jury's recommendation and failed to use its independent judgment in imposing sentence. Kyser's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and must be reversed.

VI

THE TRIAL COURT ERRED IN SENTENCING KYSER TO DEATH BECAUSE A DEATH SENTENCE IS DISPROPORTIONAL TO THE CRIME AND KYSER'S CULPABILITY.

Two different versions of the shooting emerged from the evidence at trial. The State told its story during the guilt phase, and Kyser told his during penalty phase. Under either theory, Kyser's culpability does not justify a death sentence.

1. The Prosecution's Case.

Initially, the State's theory of the prosecution and the crime the State's evidence proved did not match. The State contended that Kyser committed a premeditated first degree murder during the commission of a burglary, but proved nothing more than a second degree murder.(See, Issue II, supra.) Of course, a death sentence is improper for the second degree murder actually proved. However, a death sentence is also improper for the crime as the State alleged and prosecuted it. Even if Kyser had committed a premeditated first degree murder during a burglary, the circumstances of the crime, when compared to other capital cases, does not justify a death sentence. See, e.g., Proffitt v. State, Nos. 65,507 & 65,637 (Fla. July 9, 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). A murder during the course of a burglary, alone, cannot justify the imposition of death. Proffitt.

The two aggravating circumstances the trial court found do not qualify Kyser for the death penalty. Committing a murder

when confronted during a burglary in order to avoid arrest is not an offense justifying the death penalty. In Richardson v. State, 437 So.2d 1091, this Court reviewed a similar case and concluded that the death sentence was inappropriately applied. The defendant in Richardson beat his victim to death when the victim confronted him during a residential burglary. The victim knew Richardson, and the motive for the murder was to avoid arrest. On appeal, Richardson contended that the trial court erred in overriding the jury's recommendation of life after finding six aggravating circumstances and no mitigating ones. This Court agreed, disapproved two of the aggravating circumstances and reversed for imposition of a life sentence. 437 So.2d at 1094-1095. Kyser's offense is even less aggravated than Richardson's; the trial court found only two aggravating circumstances. (R 1467-1468)(A 3-4) Kyser's death sentence, like Richardson's, is improper.

This Court has consistently reversed death sentences imposed simply for murders committed during a burglary or robbery, even though both the jury and trial judge voted for death. See, Proffitt v. State, Nos. 65,507 & 65,637 (Fla. July 9, 1987)(The defendant stabbed his victim as he awoke during the burglary of his dwelling.); Caruthers v. State, 465 So.2d 496,(The defendant shot convenience store clerk three times during an armed robbery.) Rembert v. State, 445 So.2d 337,(The defendant bludgeoned store owner during a robbery.) Even the absence of mitigating circumstances has not affected this outcome. See, Rembert, 445 So.2d at 340. Just as in these

cases, Kyser has done no more than commit a murder during a burglary. His death sentence cannot stand. He urges this Court to reverse his sentence with directions to impose life imprisonment.

2. Kyser's Testimony At Penalty Phase.

The United States Supreme Court in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), held that a death sentence could not constitutionally be imposed upon a defendant convicted of felony murder who did not take life, attempt to take life or intend that a life be taken during the course of the underlying felony. Such an individual's culpability is not the same as the one who kills, attempts to kill, intends that a killing occur or acts with reckless indifference to life while committing the underlying felony. Ibid.; Tison v. Arizona, 481 U.S.__, 109 S.Ct.__, 95 L.Ed.2d 127 (1987). Kyser's culpability falls within the Enmund standard, and his death sentence violates the Eighth and Fourteenth Amendments.

Kyser never intended that lethal force be used on the night Floyd Moore was killed. Although he kept a pistol in his van, he did not carry one on his person as the walked through the apartment complex looking for something to steal.(R 941, 954, 996) His only intent was to commit theft.(R 946- 947) Even if confronted, his plans did not envision the use of lethal force.(R 948-949) It was Kyser's wife who escalated the the episode to include the use of lethal force. She shot Deputy Moore without Kyser's knowledge and to his complete surprise.(R 955) Although not even guilty of a felony murder

(See, Issue II, supra.), Kyser's culpability is certainly no greater than that of the defendant in Enmund. He did not kill, attempt to kill, contemplate that a killing might occur or act with reckless indifference to human life.

This Court decided a similar case in DuBoise v. State, No. 67,082 (Fla. February 19, 1987). DuBoise and two other young men planned to rob a woman of her purse. The crime also became an abduction and a rape. There was no plan to kill. As DuBoise began to rape the woman, his co-perpetrators struck the woman with a board to DuBoise's surprise. This Court reversed the death sentence, holding that Enmund precluded its imposition and that the jury correctly recommended life. Kyser's culpability is even less than DuBoise's, since he was not participating in a violent crime at the time his wife shot Moore. Like Duboise, Kyser did not kill, attempt to kill or intend that a killing take place; he was surprised at the use of lethal force. Kyser's death sentence, like DuBoise's, is disproportionate.

In Hawkins v. State, 436 So.2d 44 (Fla. 1983), this Court reversed the defendant's death sentences because his codefendant killed their robbery victims contrary to Hawkins' intentions. The evidence showed that both Hawkins and his codefendant were armed when they entered the victims' house. However, there was no plan to kill. To Hawkins' surprise, his codefendant shot both victims at the conclusion of the robbery. Holding that Hawkins should not have been sentenced to death over the jury's recommendation, this Court reversed. Kyser's

death sentence should also be reversed. Like Hawkins, he did not intend to kill and did not kill. Kyser is even more deserving of a life sentence, because, unlike Hawkins, he was not involved in a violent felony which included the use of a firearm.

Kyser's death sentence is disproportional to his crime and his personal culpability. The sentence violates the Eighth and Fourteenth Amendments to the United States Constitution, and this Court must reverse this case for a life sentence.

VII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT COULD NOT RECOMMEND DEATH WITHOUT FIRST FINDING THAT KYSER KILLED, ATTEMPTED TO KILL, OR INTENDED TO KILL OR USE LETHAL FORCE.

The evidence in this case did not prove that Kyser actually killed, attempted to kill, or intended to kill or use deadly force as required before a death sentence is constitutional. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). As presented in Issue VI, supra., this Court should reverse Kyser's death sentence on that basis. At the very least, Kyser is entitled to a new penalty phase trial at which the new jury is instructed to make factual findings concerning the degree of Kyser's culpability vis-a-vis Enmund. See, Jackson v. State, 502 So.2d 409 (Fla. 1986). The jury should have been instructed on Enmund's threshold requirement for a constitutional death sentence. Ibid., at 412-413.

Although Cabana v. Bullock, __ U.S.__, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), held that the Constitution does not compel specific jury findings on Enmund questions, this court chose to adopt a jury instruction requirement. Writing the opinion in Jackson, Justice Ehrlich stated,

> In Cabana the Supreme Court recognized that instances may arise in which an appellate court's fact finding on the Enmund issue would be "inadequate." 106 S.Ct. at 698, n. 5. In order to ensure a defendant's right to an Enmund factual finding and to facilitate appellate review of this issue, we direct the trial courts of this state in appropriate cases to utilize the following procedure. The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death,

> the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed....

502 So.2d at 412-413.

Kyser realizes that this Court intended this instruction procedure to have prospective application only for trials occurring after December 24, 1986. Ibid. However, his case is exactly the type of case where "appellate court's fact finding on the Enmund issue would be `inadequate.'" Ibid. at 412; Cabana, 88 L.Ed.2d at 720. Such a finding in this case requires the resolution of factual disputes and the evaluation of witnesses' credibility not previously made below. The appropriate finding is not inherent in the jury's verdict for first degree murder. It could have been based on the prosecution's felony murder theory, alone, and the evidence showed an accidental, unintentional killing. (See, Issues II and VI, supra.) Moreover, Kyser's testimony at penalty phase injected substantial additional evidence which was relevant to the Enmund issue. His testimony demonstrated that he did not pull the trigger or even intend the use of lethal force. (R 946-965) The jury's recommendation of death, after hearing this evidence, does not establish a determination of the Enmund question, because the jury was never directed to make one. Consistent with insuring due process and a fair resolution of the factual issue, the jury should have been instructed on the Enmund standard. This Court should reverse Kyser's death

sentence and remand with directions that a new penalty phase trial be conducted.

VIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE KYSER'S PRIOR JUDGMENTS FOR BURGLARY AND LARCENY INTO EVIDENCE DURING PENALTY PHASE SINCE THIS CONSTITUTED EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

At the beginning of the penalty phase, the State offered certified copies of four judgments which indicated that Kyser had prior convictions for grand larceny and burglary.(R 928-937) Kyser had been convicted of two counts of larceny in Alabama in 1968 and of two counts of burglary in California in 1969.(R 928) The court admitted these judgments into evidence (R 934), and the prosecutor made the following arguments to the jury:

> ...I submit to you that there's no other conclusion after you have listened to the aggravating circumstances in this case other than a verdict of 12 individuals recommending to this Court the death penalty for the murder of a Bay County Law Enforcement Officer doing his job, stopping a man who his whole life has done nothing but one crime after another, not only his own admission but by his prior convictions.
>
> Read through those things in the convictions. Burglary of occupied dwellings. Never did a violent act in his life?
>
> * * * *
>
> ...Here's a man who has been a recidivist all of his life, back and forth, and in and out and back and forth, and in and out and finally, finally took the life of a Law Enforcement Officer.

(R 1019-1020)

These judgments were improperly admitted and argued as nonstatutory aggravating circumstances. Aggravating circumstances are limited to those enumerated in Section 921.141 Florida Statutes, and only evidence relevant to that list of

factors is admissible in aggravation. E.g., State v. Dixon, 283 So.2d 1 (Fla. 1973). Prior convictions for violent felonies qualify as aggravating circumstances, Sec. 921.141(5)(b), Fla. Stat., but convictions for nonviolent felonies do not. E.g., Barclay v. State, 470 So.2d 691 (Fla. 1985); Lewis v. State, 398 So.2d 432 (Fla. 1981). Burglary and larceny are not violent felonies, ibid., unless allegations in the charging document or judgment indicate acts of violence were involved. Mann v. State, 453 So.2d 784 (Fla. 1984). There were no such allegations in this case, and the prosecutor conceded that he did not prove a prior conviction for a violent felony.(R 1023)

Evidence of convictions for nonviolent felonies may be admitted to rebut a defense argument that the mitigating circumstance of no significant history of prior criminal activity exists. See, Sec. 921.141(6)(a), Fla. Stat.; Mikenas v. State, 407 So.2d 892 (Fla. 1981). However, the convictions are inadmissible for this purpose if the defense does not assert the existence of this mitigating factor. Fitzpatrick v. Wainwright, 490 So.2d 939 (Fla. 1986); Maggard v. State, 399 So.2d 938 (Fla.1981). Kyser made no such assertion in either the evidence presented to the jury or argument.(R 937-1017, 1028-1036) The court did instruct on all the aggravating and mitigating circumstances, including this one (R 1037-1040), but Kyser did not request such an instruction.(R 917-918) These judgments for burglary and larceny were not admissible as rebuttal evidence.

A reading of the prosecutor's argument reveals the true reason the State presented the judgments--to attack Kyser's character.(R 1019-1020) This attack was outside the scope of permissible aggravating factors. The jury was tainted, and Kyser's death sentence which was based on that jury's recommendation is in violation of the Eighth and Fourteenth Amendments. This Court must reverse the trial court's sentencing decision.

IX

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH DIMINISHES THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir. 1987).

The trial court read the standard penalty phase jury instructions to the jury. In part, those instructions stated:

> The final decision as to what punishment shall be

> imposed rests solely with the Judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant.
>
> * * * *
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge...

(R 935, 1037) Although not a misstatement of Florida law, the instruction is incomplete and misleading. It fails to advise the jury of the importance of its recommendation. There is no mention of the requirement that the sentencing judge give the recommendation great weight. Additionally, there is no mention of the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Kyser realizes that this Court has recently ruled unfavorably to this position in Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, Kyser asks this Court to reconsider this ruling and reverse his death sentence.

CONCLUSION

Upon the reasons and authorities presented in Issue I and III, Walter Grant Kyser asks this Court to reverse his judgment and sentence for a new trial. For the reasons in Issue II, he asks that his judgment for first degree murder be reduced to one for second degree murder. For the reasons expressed in Issues IV through IX, Kyser asks that his death sentence be reduced to life imprisonment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Gary Printy, Assistant Attorney General, The Capitol, Tallahassee, FL, 32301, and by U.S. Mail to Walter Grant Kyser, Florida State Prison, P. O. Box 747, Starke, FL, 32091, this 6th day of August, 1987.

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