IN THE SUPREME COURT OF FLORIDA

JAMES ANSEL HARMON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 69,824

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

(R) will be used to refer to the record on appeal in the instant case, while (SR) will refer to the supplemental record on appeal.

STATEMENT OF THE CASE

On November 18, 1985, the state filed a two count information charging Larry Lee Bennett and James Ansel Harmon, the Appellant, with one count of murder in the second degree and one count of robbery with a firearm. (R1465) On November 21, 1985, a Marion County grand jury indicted Bennett and Harmon for murder in the first degree in violation of Section 782.04(1)(a), Florida Statutes (1985). (R1464) The state subsequently filed a nolle prosequi of the previously filed information. (R1474)

On November 19, 1985, the previously appointed office of the public defender moved to withdraw as counsel for James Harmon due to that office's representation of Larry Bennett, the co-defendant. (R1477) Pursuant to the trial court's order, special assistant public defenders subsequently appeared as counsel for James Harmon. (R1483,1491)

Appellant filed a demand for discovery on December 4, 1985. The state responded on December 6, 1985. (R1484-1487) The state also filed a demand for notice of alibi that same date. (R1488)

On June 13, 1986, Appellant filed a pro se petition for change of attorney. (R1497)

On November 18, 1986, Appellant filed a notice of alibi. (R1557-1558)

During voir dire, the trial court denied Appellant's challenge of juror Almeida for cause. (R114) The trial court also denied Appellant's motion for mistrial made during jury selection. (R135-136)

During opening statement by the prosecution, Appellant objected to the mention of the fact that the victim suffered from diabetes. The trial court overruled this objection. (R10-13)

During the testimony of Steve Germany, the trial court overruled Appellant's two hearsay objections. (R219,268-269)

Appellant made an oral motion in limine concerning evidence of Harmon's drug problem which was granted in part by the trial court. (R305-307)

The trial court overruled Appellant's objection and allowed Investigator Combs to testify as to Harmon's statements to Combs during a telephone conversation wherein Combs did not advise Harmon of his constitutional rights. (R356-358)

The trial court also overruled Appellant's objection and allowed Harmon's taped statement containing irrelevant and prejudicial matters to be played to the jury. (R367-370)

The trial court denied Appellant's motion in limine concerning evidence that the Appellant was engaged in illegal diamond activity and allowed related testimony and evidence. (R463-476,493)

During the testimony of Mark Shadle, the trial court prohibited defense counsel from asking the witness if he was the subject of an outstanding arrest warrant. (R496-499) During Shadle's testimony, defense counsel also alleged a discovery violation. (R674-689)

Appellant alleged a discovery violation when the state called Trisha Jenkins as a witness. (R565-567)

Over Appellant's objection, the state was allowed to elicit testimony that Harmon told a state witness that he had been addicted to cocaine in the past. (R624)

During the testimony of Larry Bennett, Harmon's co-defendant, the trial court sustained an objection by the state, thus restricting cross-examination. (R791)

At several points in the trial, the trial judge commented either directly or indirectly on the credibility of Larry Bennett, a key state witness. (R827,839-841,853,925-926)

The trial court permitted the state to present evidence that Harmon was involved in an insurance fraud scheme over Appellant's objection. (R923-924)

The trial court also overruled defense counsel's objection to the state impeaching their own witness with the testimony of another witness. (R932-933)

At the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal, which the trial court denied. (R936-938)

Over Appellant's objection, the trial court forced defense counsel to continue the trial into the evening hours when trial counsel was extremely fatigued. (R948-953,1045-1046,1061)

The trial court overruled Appellant's objections to the state's cross-examination of defense witness Bobby Sheally. (R1020-1023)

The trial court refused to qualify Joe Taylor, a defense witness, as an expert in the field of crime scene reconstruction. (R1037-1041)

The trial court denied Appellant's motion for mistrial based upon allegations that the trial court commented on Harmon taking the stand as a witness. (R1045,1059-1061,1072-1074)

During the direct examination of James Harmon, the trial court sustained the state's hearsay objection and instructed the jury to disregard Harmon's answer. (R1185-1186)

During cross-examination of Harmon, the trial court denied Appellant's motion for mistrial as well as a requested jury instruction when the state's questions implied that Harmon was wanted for collateral crimes in Texas. (R1212-1214)

At the close of all of the evidence, Appellant renewed his motion for judgment of acquittal which the trial court denied. (R1264-1265)

During final summation by defense counsel, the trial court sustained the state's objection and instructed the jury that the thirteen and a half month delay prior to trial could not be blamed on either party. (R1335) During defense counsel's summation, the trial court also sustained the state's objection and instructed the jury that the evidence did not reveal the violent or non-violent nature of Harmon's six prior felony convictions. (R1359-1362)

The trial court denied Appellant's special jury instruction on circumstantial evidence. (R953-955,1076-1077)

The trial court conducted a hearing following the revelation that a spectator in the audience had passed an envelope containing cash to a juror during closing argument. (R1417-1421)

Following deliberations, the jury returned with a verdict of guilty of murder in the first degree while engaged in the perpetration of a robbery. (R1601)

During the penalty phase of the trial, the trial court permitted the state to argue what the defense contended were inappropriate aggravating circumstances for which the trial court had decided not to instruct the jury. (R1814-1816) Appellant also objected to jury instructions concerning the aggravating circumstances dealing with cold, calculated and premeditated and for the purpose of avoiding arrest. The trial court overruled these objections. (R1810-1814,1816-1821,1824)

Following deliberations, the jury returned with a recommendation that the trial court impose a sentence of life imprisonment upon James Harmon without possibility of parole for twenty-five years. (R1613) The trial court chose to disregard the jury's recommendation and sentenced James Harmon to death. (R1441-1463,1733-1737) The trial court entered written findings of fact finding four aggravating circumstances and rejecting all mitigating circumstances. (R1730-1732) The trial court found that (1) the Appellant was previously convicted of a felony involving the use or threat of violence to another person; (2) that the capital felony was committed for pecuniary gain; (3) that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and (4) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The trial

court rejected the jury recommendation of life and found that the only appropriate sentence in this cause was death.

The trial court denied Appellant's motion for new trial. (R1630-1738) Appellant filed a timely notice of appeal on December 23, 1987. (R1740) This brief follows.

STATEMENT OF THE FACTS

At approximately 12:30 a.m. on October 16, 1985, Deputy Chip Wildy responded to a radio call. He went to a house located in the Florida Highlands, a rural area in Marion County. Through the kitchen window, Wildy saw the body of an elderly man lying on his back on the kitchen floor. (R73-80, 110-111)) Wildy promptly summoned his supervisor. (R78-80) After Sergeant Hamby arrived at the scene, he and Wildy entered the unlocked back door and walked into the kitchen to within two feet of the body. (R105) Shortly thereafter, the pair came back out of the house and called the evidence technicians. (R83-84) Keith Gauger, a medical examiner investigator, examined the body at the scene. He found no lacerations or wounds and failed to discover any trauma. He pronounced Charles Otis Germany dead at 5:05 a.m. (R213-217) Although the medical examiner made the determination at the scene that the death was the result of natural causes, Sergeant Hamby decided to treat the death as a homicide and process the crime scene. (R85,103-104) There were no obvious signs of forced entry at the house. (R100)

Georgia Whitston, an evidence technician with the Marion County Sheriff's Office, processed the scene. (R112,116) She took photographs of the interior of the house. Although she looked for a wallet, she found none. (R120) Whitston found a fully loaded Smith and Wesson .45 revolver in the house. (R120-121) There was a small amount of blood spatter throughout the house in a path going into and through the living room and into one of the bedrooms. The blood spatter was found on the

furniture and the floor. (R122) Whitston opined that the blood spatter indicated someone staggering or walking through the other rooms while dripping blood. (R124) The victim had a small trickle of blood down his back as well as some from his nose and mouth. (R124-125) Towels surrounded the victim's head damming the blood. (R125) The radio was playing and there were no lights on in the house. (R126) Whitston found a coffee cup with coffee in it on the kitchen table. She also found a can filled with silver coins on the table. (R125) The victim had no shoes or shirt on, although he was wearing trousers. His glasses were found near the body. (R126) They found no money in the victim's pockets. (R127) Whitston found a latent fingerprint in blood on the back of the bathroom door. She photographed it and attempted to lift it with negative results. The close-up photograph of the print bore inconclusive results. (R128) Whitston could not explain why she did not simply cut out the portion of the door that contained the bloody fingerprint. (R177-178)

Throughout her processing of the scene that night, Whitston was operating under the belief that the death was a natural one. As a result, the police admitted that they were not as thorough in their investigation of the crime scene. (R170) After their preliminary investigation that evening, the police turned the house over to Stephen Germany who moved and touched many items inside the house that night. (R290,298-299) After finding out that the death was a result of a bullet wound to the back of the head, Whitston returned to the house the next day to process the crime scene more completely. (R170)

Whitston found several latent fingerprints in the house the next day. (R129) She compared these latents with fingerprints of James Harmon and Larry Bennett. One match was made. (R131) Whitston admitted that the fact that Harmon and Bennett had been residents of the house for a short time shortly before the murder reduced any significance in finding their fingerprints in the house. (R132-133) Several cigarettes found at the scene could have been smoked by Larry Bennett but were definitely not smoked by either Harmon or Charles Germany. (R523-524) Whitston opined that the house did not appear to be the scene of a burglary. (R150)

Doctor Thomas M. Techman, a specialist in forensic pathology performed the autopsy on Charles Germany. He determined that the cause of death was a single gunshot wound to the head. The bullet came to rest just in back of the victim's nose. The wound could have resulted in a large gush of blood splashing from the nasal area. (R228-232) Doctor Techman determined that the time of death was between 12 and 36 hours prior to 5:00 a.m. on Wednesday, October 16. (R237) Doctor Techman concluded that the wound did not appear to be a contact wound, i.e., at close range. (R242) The lethal projectile was a small caliber bullet. (R242)

Stephen Edward Germany, last saw his father, Charles Otis Germany, alive during the Sunday evening hours of October 13, 1985. (R264-265) As a result of Charles Germany's poor health and blindness, several family members became concerned when they could not reach Charles Germany by phone over a period

of several days. (R249-257,265-271) Stephen Germany eventually decided to go to his father's house to check on him. He arrived shortly after 1:00 a.m. on October 16 to find the police already at the scene. (R271-272) Stephen Germany was convinced that his father's death was the result of a murder rather than natural causes. (R219) He was extremely agitated since the police made him wait 45 minutes before they let him near the house. (R272) Stephen Germany walked around the yard looking for evidence. He noticed tire tracks that did not belong there. He also found a Marlboro pack that had not been there when he had visited his father on Sunday. (R273-275) Another empty Marlboro pack was also found in the area. (R275-276) One of the packs had a latent fingerprint lifted from it that did not match either Larry Bennett or James Harmon. (R178-179) Charles Germany did not smoke cigarettes. (R275,1288)

Stephen Germany estimated that his father had between $2,500 and $5,000 in cash at the house before his death. (R277) Stephen Germany was convinced that Larry Bennett and James Harmon had murdered his father. He told the police at the scene that they should apprehend these two individuals. He also described their vehicle. (R284-285) Stephen Germany was also convinced that Marion Germany, his uncle, might have planned the murder with Bennett and Harmon. Stephen also told the police of his suspicions of Marion Germany. Stephen Germany was sure that Marion at least had prior knowledge of the killing. (R293-294)]

Gerald Combs, a major crimes investigator for the Marion County Sheriff's Department, interviewed some of Charles

Germany's family members on the seventeenth. (R338-341) As a result of accusations from them as well as the initial accusations made by Stephen Germany at the scene, Combs concentrated on James Harmon and Larry Bennett as suspects. (R340-341) Combs arranged through Wilfred Goff, a friend of Harmon's, for Harmon to call Combs at Goff's home on the twenty-second. (R353) Harmon called Goff from Texas where he was in close proximity to the Mexican border. (R353-358) Goff had previously told Harmon that the police were looking for him and Bennett. Harmon agreed to meet Combs in Florida for an interview as soon as he could drive there from Texas. (R359) On October 23, 1985, Harmon voluntarily met with Combs and gave a statement which was recorded. (SR1-34) Harmon told Combs of his business arrangement with Marion Germany and accounted for his whereabouts the weeks before and the days after the murder. Harmon had previously told Combs on the phone that Bennett had left him in Texas and declined to return to Florida to try to clear up the situation. (R359) After the statement, Harmon gave Combs consent to search his truck. (R371-372) Combs then declined to arrest Harmon, and Harmon drove back to South Carolina. (R372)

Larry Lee Bennett was the undisputed star witness for the State of Florida at James Harmon's trial. After Harmon had talked to Combs, Larry Bennett approached the police in Glendale, Arizona to whom he gave a statement on October 26, 1985. Bennett recounted to the police that he was with James Harmon when Harmon shot Charles Germany. Although Bennett implicated himself somewhat, he placed complete blame for the murder on James

Harmon. (R533-548) Based upon Bennett's statements, Combs arrested James Harmon for the murder of Charles Germany. (R377-378) Bennett copped a plea to second-degree murder in return for a seventeen year sentence cap. Bennett also agreed to testify against James Harmon. (R567-581) After the trial, the trial court placed Bennett on probation for a period of fifteen (15) years. (See attached Appendix).

Bennett met Harmon in Laredo, Texas where they were both involved in the appliance business. Both also collected handguns which they usually kept in a briefcase during their many travels. (R690-694) Bennett met the Germanys through Jim Harmon. They both left Texas and went east in September of 1985. They went to the house owned by the Germanys in the Florida Highlands. They arrived in early to middle September and stayed for a couple of weeks. (R694-696)

The house in the Highlands was sort of a refuge for the group. Bennett and Harmon usually slept in a small room at the end of the shed while Marion, Buck, and the rest of the Germanys slept in the house. (R697-700) The group bought used appliances around the state, reconditioned them, and resold them. (R702-703)

Near the beginning of October, the group took some of the appliances backck to South Carolina. (R705) That weekend, they sold some of the appliances at a flea market in South Carolina. (R708) During their stay in South Carolina, Bennett

and Harmon spent some nights with Bobbie Faye Gunter, some with the Goffs, and sometimes stayed in a motel. (R711)

Bennett met Marion Germany's daughters, Kathy and Barbara, that weekend. (R712) Bennett and Harmon attempted to fix Kathy's pump at her house, but ended up breaking the pipe. (R713-714) They continued working on the pipe until 11:00 that Monday evening before finally going back to Wilfred Goff's house. (R714) Bennett began preparing for bed when Harmon announced a trip. According to Bennett, it was not unusual for the pair to drive to parts unknown in the middle of the night. (R715) During their preparations to leave, Bobby Sheally came by the Goff's house looking for a certain mechanical part. It took the pair approximately 15 minutes to find it before they could leave. (R715-716) Bennett testified at trial that he did not know where they were going or what they were planning to do. (R716) Bennett thought that they might be going to rob a jewelry store, but he really did not know. (R722) However, Bennett had indicated in previous statements that he knew why they were going to Florida. (R810,814) Bennett drove south on State Road 301 or U.S. 1 with Harmon riding in the passenger seat. (R718-719)

They arrived at Buck Germany's house in the Highlands right at daybreak. They noticed that Buck's car was parked outside. (R722) Bennett did not want Buck to think that they were prowlers, so he identified himself from outside the house. (R723-724) Bennett entered the kitchen through the rear door and began to make some coffee for himself while Buck Germany sat at the kitchen table. Harmon evidently remained sleeping outside in

the car. (R724-725) Buck complained that his refrigerator was malfunctioning, so Bennett performed a quick repair. (R725-726) Harmon entered the house and immediately went into the bathroom. (R726) Bennett leaned against the kitchen table with his head down and talked to Buck Germany. (R727) Bennett eventually looked up and was surprised to see Harmon standing behind Buck pointing a gun at the back of Buck's head. Half a second later, Harmon fired the fatal shot. (R727)

According to Bennett, Germany attempted to stand up but fell forward to the floor. (R728) From Bennett's perspective, it appeared as if Germany's face almost exploded. (R728) Harmon then reached down into Buck's back pocket and retrieved his wallet. He looked inside before removing the cash and placing it in his own pocket. (R730) Bennett retrieved some towels and began to clean up. Harmon told Bennett to wipe the area down for fingerprints. (R730-731) Afterwards, the pair got back into the car and drove back to Columbia on State Road 301. (R739-740) Along the way, Harmon dismantled the murder weapon and threw it into a river approximately 40 miles north of the Florida-Georgia line. (R745) He also cut up Buck Germany's wallet and identification before throwing them out the car window. (R745-746) The pair stopped at a rest area in South Carolina in order to change their clothes. They deposited their old clothes in a dumpster. (R748) Harmon counted out $2,251.00 and gave Bennett the small bills (approximately $250.00) for gas. (R746-747) Over the next few weeks, Harmon gave Bennett additional money. (R747)

Bennett testified that the return trip was quicker than the trip down due in part to lighter traffic. (R750-751) They arrived in Columbia between 3:30 and 4:30 p.m. They stopped at the Goff's house, removed their belongings from the Oldsmobile, and put them in the truck. (R752) They went to Bill James' car lot where they picked up a spare truck tag. (R750-751) They left Columbia late that afternoon for their ultimate destination of Arizona. (R752-753) Throughout the trip, Bennett admitted that he had numerous opportunities to part company with Harmon but did not due to his alleged fear of the Appellant. (R881-882,886)

The state also introduced testimony of Mark Shadle, an inmate who shared a cell with Harmon and approximately twenty other people in November of 1985. Shadle testified that Harmon allegedly told him that he and his brother, Larry, robbed a guy named Germany and, in the process, Harmon shot Germany in the back. (R480-483) After Shadle gave this particular statement to Investigator Combs, the state dropped charges against Shadle that included forgery, uttering, grand theft, and petit theft. (R504-506)

James Harmon testified in his own behalf. During the days prior to Buck Germany's murder, James Harmon was dealing with his own personal domestic problems. He was thinking about trying to get custody of his son without returning to his wife. (R1139-1140) Harmon and Bennett left Kathy Gates' house on Monday night at approximately 10:00 p.m. (R1140) When they arrived at Wilfred Goff's house, Bennett suggested that they go

shoot some pool, but Harmon declined. (R1141) Bobby Sheally came by Wilfred's and Harmon helped him find a receptacle box. (R1142-1145) At some point, Bennett disappeared and Harmon assumed he went to shoot pool. (R1144-1145) During the night, Harmon drove around the countryside thinking about his personal problems. At some point he ended up at a park on the Edisto River where he parked and thought in his solitude. (R1146-1148) Later that morning, he went to Bobbie Faye Gunter's house where he took a bath, changed his clothes and picked up his suitcases. (R1149) He arrived at Wilfred Goff's house shortly before noon to get the truck with the intention to drive to Arizona where his son was living. (R1150) The next time that Harmon saw Bennett was at approximately four o'clock that afternoon at Wilfred's house. (R1152-1153) Bennett appeared to have been "partying" all night. (R1154) When Bennett heard Harmon's plans, Bennett announced his intention to accompany him. (R1155-1156) They then left for Arizona. Harmon also presented several witnesses whose testimony supported Harmon's version of the events surrounding the murder. (R940-1061)

PENALTY PHASE

At the penalty phase, the state introduced a copy of a judgment and sentence for James Harmon's South Carolina armed robbery conviction in January of 1969. (R1771-1786) This was the only evidence that the state introduced at that phase in an attempt to justify the death penalty.

In mitigation, the defense presented the testimony of Doctor Rodney Poetter, a licensed clinical psychologist who was qualified as an expert in forensic evaluations. (R1786-1788) James Harmon was raised in Columbia, South Carolina in a slightly above average home without any type of physical abuse. His father died in 1972. Harmon maintains contact with his mother, seeing her two to four times a year. During the interview, Harmon broke down and cried on two occasions. One incident occurred when he revealed that his mother did not know of his legal difficulties and he insisted that she not find out. She had undergone a mastectomy approximately seven years before and was undergoing cobalt radiation treatment. Harmon was concerned that news of his predicament would adversely affect her health. (R1790) Harmon cried a second time when he talked of missing his eleven year old son. Harmon also did not want his son to find out about the trial. He maintained contact with the boy and was very proud that he was a good student and an athlete. (R1790-1791)

Harmon is a religious man who attended church regularly until 1976. He still attends occasionally. (R1792) Doctor Poetter found Harmon to be intelligent, ranking him in the top 25

percent of the general population although he only completed the tenth grade. (R1792) Doctor Poetter classified him as an underachiever with a good memory. He saw no evidence of mental illness or thought disorder. (R1792) Personality tests did not reveal much, since Harmon was defensive in responding to the questions. (R1792-1793) He attempted to portray himself as a very stable person without problems. (R1793-1794) Doctor Poetter opined that Harmon did not suffer from any anti-social personality disorders. (R1797) He thought that Harmon was capable of forming long-term relationships with deep emotional feelings. (R1798)

James Harmon remained incarcerated for 13 months prior to his trial. His behavior was that of a model prisoner. He arbitrated several disputes between other inmates. He talked to Doctor Poetter about wanting to study the use of computers in arbitration matters. (R1798) Doctor Poetter concluded that James Harmon could definitely contribute to society. (R1798)

When Harmon attempted to enlist in the armed forces, doctors determined that he was physically unfit as a result of his childhood polio. He also suffered from hypertension and ulcers related to anxiety and tension. (R1799)

SUMMARY OF ARGUMENT

POINT I:

On numerous occasions during the guilt phase of the trial, the state introduced evidence of collateral crimes and bad acts which amounted to a character assassination of James Harmon. This evidence included evidence that Harmon was a drug-abuser, evidence that Harmon was involved with stolen jewelry, evidence that Harmon participated in a conspiracy to commit insurance fraud, evidence that Texas authorities wanted Harmon for other unrelated crimes, evidence that Harmon obstructed justice and committed the collateral crime of possession of a firearm by a convicted felon, as well as numerous other illegal and immoral activities. The result of the introduction of all of this evidence throughout the trial resulted in such evidence becoming a feature of the trial. As a result, Appellant was denied his constitutional right to a fair trial.

POINT II:

On two separate occasions, the trial court allowed hearsay evidence to be admitted over Appellant's objection. One occasion improperly bolstered Marion Germany's alibi where Appellant's theory of defense was that Marion Germany was involved in the murder. As a result, the error cannot be deemed harmless.

POINT III:

On four separate occasions, the trial court directly or indirectly commented on the credibility of Larry Bennett, the co-defendant and key state witness. Defense counsel objected on one occasion, but the trial court persisted. Given the important position of the trial court, Appellant submits that he was denied a fair trial as a result.

POINT IV:

Appellant submits that the trial court abused its discretion in requiring defense counsel to continue the presentation of his case-in-chief until 9:30 p.m. in the evening on the fourth day of this trial, where defense counsel requested a recess at 7:00 p.m. The trial court failed to ask the jury if they wished to continue or were fatigued as well. This resulted in denying Appellant his right to a fair trial.

POINT V:

The jury recommended that the trial court sentence James Harmon to life imprisonment without possibility of parole for a period of twenty-five years. This recommendation was reasonable in light of the evidence of mitigating circumstances heard by the jury at the penalty phase. Additionally, the jury could have had doubts about Appellant's co-defendant's credibility and each of their respective roles in the murder. The trial court failed to follow the standard set forth in Tedder v. State,

322 So.2d 908 (Fla. 1975) in overriding the jury's life recommendation.

POINT VI:

The death sentence imposed by the trial court was improper for a variety of reasons. The trial court improperly relied upon Appellant's hearsay statement without Miranda warnings in finding that the Appellant was previously convicted of a felony involving the use or threat of violence to another person. The evidence did not establish beyond a reasonable doubt that the murder was committed predominantly for pecuniary gain; in a cold, calculated, and premeditated manner; or to avoid lawful arrest. Additionally, the trial court ignored a plethora of valid mitigating circumstances which were established by the evidence. The death sentence in the instant case is disproportionate to life sentences imposed in other cases and especially to the co-defendant's sentence of time served.

POINT VII:

This point urges reconsideration of constitutional attacks on Florida's death sentence and procedure. These issues have already been rejected by this Court and are raised here for preservation purposes.

POINT I

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF COLLATERAL CRIMES OVER OBJECTION WHERE SUCH EVIDENCE BECAME A FEATURE OF THE TRIAL.

At numerous points during the guilt phase of the trial, the state introduced evidence of collateral crimes and bad acts which amounted to a character assassination of James Harmon. Defense counsel objected to much of the impermissible evidence. The trial court allowed its introduction nevertheless. The state also introduced some improper evidence without objection. The state failed to file any notice of similar fact evidence, so this theory of admissibility cannot be relied upon. Appellant contends on appeal that the large volume of collateral crime evidence became a feature of the trial resulting in improper character assassination. This resulted in the jury resolving any doubt in favor of the state in convicting James Harmon of first-degree murder based upon improper and prejudicial evidence.

The objectionable evidence is recounted as follows:

> (1) Evidence that Harmon was an abuser of cocaine (objected to by defense counsel)(R305-307,624);
> (2) Evidence that Harmon was involved with stolen jewelry (objected to by defense counsel)(R463-476,486-490,493);
> (3) Evidence that Harmon participated in a conspiracy to commit insurance fraud (objected to by defense counsel)(R923-924);
> (4) Evidence that Texas authorities wanted Harmon for other unrelated crimes (objected to by defense counsel and a motion for mistrial and curative

instruction denied)(R1212-1214); (5) Harmon's admission elicited by the state that he committed the collateral crime of possession of a firearm by a convicted felon (no objection)(R1226);
(6) Harmon's admission elicited by the state that he obstructed justice (no objection)(R1255);
(7) The trial court's instruction to the jury, requested by the state, that the evidence did not reveal the nature of Harmon's six prior felony convictions, i.e. whether they were crimes of violence or not (objected to by defense counsel)(R1359-1362)
(8) Evidence that James Harmon engaged in an unnamed illegal activity with Marion German (objected to by defense counsel)(R367-370,SR9);
(9) Evidence that Harmon conspired with another inmate to escape from the county jail prior to trial (no objection)(R491);
(10) Evidence that Harmon solicited another inmate to perjure himself in order to provide Harmon with a false alibi (no objection)(R510);
(11) Evidence that Harmon threatened Marion Germany's grandsons with an iron pipe (no objection)(R602-603);
(12) Evidence that Harmon had previously been incarcerated in the Lexington, Kentucky county jail (motion for mistrial denied, curative instruction given)(R647-450);
(13) Testimony that implied that Harmon would not hesitate to rob a jewelry store (no objection)(R722);
(14) Much evidence that James Harmon was heavily involved in firearms and frequently carried them in an illegal manner (no objection)(R281-282,363,380, 490,495,591,600-601, 608,670-672,693-694,736-738,988-989,996-997, 1123-1125, 1221-1225);
(15) Testimony that indicated that James Harmon was a contract killer (no objection)(R633);
(16) Testimony that indicated that James Harmon and Larry Bennett had previously engaged in unspecified illegal and/or immoral activities (no objection)(731); and (17) Evidence that James Harmon introduced Larry Bennett to drug use and that both of them injected

> speed and consumed various other drugs (no objection)(R762,916-917).

The Florida standard for the introduction of evidence revealing other crimes is clear. Williams v. State, 110 So.2d 654 (Fla. 1959), is the leading case in the area. Williams reveals that:

> [E]vidence revealing other crimes is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system of general pattern of criminality so that the evidence of the prior offenses would have a relevant or material bearing on some essential aspect of the offense being tried. Id. at 662.

An extension of Williams occurred in Williams v. State, 117 So.2d 473 (Fla. 1960), which held that the state may not make a prior or subsequent offense a feature instead of an incident of the trial. This Court expressed concern that the testimony of collateral crimes degenerates from the development of facts pertinent to the issue of guilt into a character attack. Appellant contends that this occurred in the case at bar.

The introduction of the type of evidence at hand has been codified in the Florida Evidence Code. Section 90.404(2), Florida Statutes (1985) states:

> (a) Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

However, the statute goes on to provide that the state must furnish written notice to an accused if it intends to offer this type of similar fact evidence. Section 90.404(2)(b), Fla.Stat. (1981). As previously noted, the state failed in this respect.

The evidence that dominated the trial was irrelevant at best and, more likely, intended as an unwarranted character attack. Young v. State, 141 Fla. 529, 195 So. 569 (1939), set forth the firmly entrenched proposition that the state may not assail a defendant's character unless it has been put in issue by the defendant. Young, supra, involved a situation in which the prosecution brought out the fact that the defendant's address was within a neighborhood notorious as a prostitution district. This inflammatory evidence required a reversal of his conviction. Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965), pointed out that the state may not attack an accused's character by showing a propensity to commit crimes. The jury heard a plethora of evidence that revealed that James Harmon had committed a large number and wide variety of collateral crimes and other bad acts. He undoubtedly came across as a drug-using hoodlum who could be hired to kill. The evidence portrayed him simply as a "bad dude." The true issue of his guilt or innocence in the instant was obfuscated by the constant references to unrelated crimes.

Florida courts have expressed concern over the state dwelling upon irrelevant and immaterial testimony as to collateral crimes of the defendant. Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st DCA 1973).

> A defendant in this jurisdiction is not entitled to a perfect trial but is

> entitled to a fair trial. The prosecution in the instant case was not content to try this man upon the charges lodged against him and upon competent evidence proving his guilt of same but to the contrary the prosecution adduced extensive extraneous testimony which precluded this defendant from receiving a fair and impartial trial. The judgment of conviction is reversed with the directions to grant defendant a new trial. Id. at 466.

Even if a trial judge finds evidence of this type to be otherwise relevant, it is still inadmissible when its probative value is substantially outweighed by its unduly prejudicial nature. Section 90.403, Fla.Stat. (1985); Young v. State, 234 So.2d 341 (Fla. 1970). The case at bar presents a classic example of the above. The probative value of the extensive testimony and argument pertaining to collateral crimes and bad acts was substantially outweighed by its prejudice. The result was that the former offenses were made a feature of the trial. Denson v. State, 264 So.2d 442 (Fla. 1st DCA 1974). The result of the testimony simply demonstrated the bad character of the Appellant thus unduly prejudicing him. See Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977). Although it was not requested, a limiting instruction on the purpose of the introduction of this type of evidence should have been given. Pickles v. State, 291 So.2d 100 (Fla. 3d DCA 1974). As a result of this omission the jury was never informed as to the permissible scope of consideration for such evidence. It undoubtedly weighed heavily on their minds.

Even if this Court finds that the evidence has even minimal relevance, any probative value is substantially

outweighed by the danger of unfair prejudice. See Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982). Evidence with some probative value has been excluded on the basis that the danger of prejudice outweighs its relevance. See Demps v. State, 395 So.2d 501 (Fla. 1981) and Aho v. State, 393 So.2d 30 (Fla. 2d DCA 1981).

The introduction of the objectionable evidence resulted in a character attack upon the Appellant which became a feature of the trial. The issue of guilt or innocence as to the crime charged became tainted. The trial court could have prevented this occurrence by sustaining Appellant's numerous objections and excluding the inflammatory evidence. By not doing so, the Appellant was denied his constitutional right to a fair trial. The conviction should accordingly be reversed and this cause remanded for a new trial. Art. I, §§9 and 16, Fla.Const. and Amends. V, VI, and XIV, U.S. Const.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, BY TWICE PERMITTING HEARSAY TESTIMONY OVER OBJECTION TO THE PREJUDICE OF THE APPELLANT.

Stephen Edward Germany, the victim's son, last saw his father alive when he visited with him the evening of Sunday October 13, 1985. (R264-265) Stephen Germany lived in Orange City, Florida, at the time of his father's murder. (R264) During direct examination by the state, the following occurred:

> MR. MOORE (Prosecutor): Did you get a phone call the following day from anybody concerning your father, on Monday?
>
> WITNESS: On Monday at around 5:00 o'clock, Marion Germany, his brother, called me and asked me when the last time I had seen him was and told me that he was supposed to be --
>
> MR. SHELNUTT (Defense counsel): Objection, Your Honor. There again, that's being offered to prove the truth of the matter asserted. That's hearsay. He's available to testify.
>
> MR. MOORE: Judge, I -- I -- I highly disagree. That's not offered for the truth of the matter asserted, only to show what this witness did.
>
> THE COURT: It shows the state of mind on -- on this witness. So it's not hearsay -- It's not offered for the truth of what the man said. It's offered for this witness' state of mind.
>
> So it's not hearsay. Objection overruled.
>
> Go ahead.

> MR. MOORE: Go ahead. WITNESS: Around 5:00 o'clock on Monday, Marion called me and said that he was supposed to be here already on Monday but something had happened with his daughter's well and it wasn't working and he had to stay there until it was fixed and asked me was I planning on going back over there any time soon.
>
> And I told him, no, that I couldn't, that I was too busy right then.
>
> And he said -- and I thought it kind of strange that he didn't call him; but -- (R268-269)

This testimony constitutes pure hearsay. §§90.801, 90.802, Fla. Stat. (1985). The testimony should have been excluded because of its extremely prejudicial effect. Pursuant to Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983), Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982), and Kennedy v. State, 305 So.2d 1020 (Fla. 5th DCA 1980), reversible error has occurred.

One of the theories of the defense in the instant case was that Marion Germany, the victim's brother, was somehow involved in the murder. In fact, Marion Germany was considered to be a suspect by the police before he was eventually eliminated. (R446) Investigator Combs ruled Marion Germany out as a suspect when he "verified" that he had been in South Carolina at the time of the offense. (R446) The method of verification was not disclosed.

The testimony of Stephen Germany that Marion Germany, his uncle, had told him on the phone that he had been unable to make it down to Florida to the victim's house at the time of the offense constitutes blatant hearsay. This impermissible hearsay evidence bolstered Marion Germany's claim that he had been in

South Carolina at the time of the murder. He allegedly remained in South Carolina rather than arriving in Florida as planned when his daughter's pump developed mechanical difficulties. The jury certainly perceived the testimony as truth of the matter asserted, that being that Marion Germany had an alibi. Extreme prejudice accrues to Mr. Harmon because this hearsay evidence constitutes inadmissible evidence that impermissibly bolsters Marion Germany's alleged alibi. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983). See also Fleming v. State, 457 So.2d 499 (Fla. 2d DCA 1984)(even if homicide victim's state of mind is relevant to a material issue, prejudice frequently outweighs need for its introduction).

The above incident was not the only time during the trial that the trial court allowed hearsay testimony. Keith Gauger, the medical examiner investigator who responded to the scene, testified over objection that Stephen Edward Germany insisted at the scene that his father had been murdered. (R212-213,218-219) At that point, the investigation revealed no foul play and the death was ruled one of natural causes. Stephen Germany's testimony to the contrary should have also been excluded as inadmissible hearsay evidence. The error was compounded by the fact that the hearsay evidence dealt with one of the ultimate issues that the jury had to decide. Additionally, the ultimate conclusion of whether or not the death was a murder was beyond the declarant's expertise. Section 90.702, Florida Statutes (1985), states that experts may render opinions if such an opinion is within the area of their training, skill, experience,

or knowledge. See also Fisher v. State, 361 So.2d 203 (Fla. 1st DCA 1978); Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977). Stephen Germany's hearsay statement was incompetent and improperly admitted.

POINT III

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN IGNORING APPELLANT'S OBJECTION AND COMMENTING ON THE CREDIBILITY OF THE KEY STATE WITNESS ON NO FEWER THAN FOUR SEPARATE OCCASIONS THUS RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL.

It cannot be disputed that Larry Bennett was the key state witness against James Harmon. His testimony constituted the only evidence that was apparently sufficient enough to convince the jury that Harmon was at least at the scene of the murder. Bennett's testimony pointed the finger at Harmon as the triggerman. As a result, the importance of Bennett's testimony cannot be over emphasized. His credibility was absolutely critical.

Defense counsel impeached Larry Bennett on cross-examination. Defense counsel brought out the fact that there were many differences in each of the four statements that Larry Bennett had given prior to trial. Bennett also admitted that he was intoxicated when he gave his first statement to police. (R783-785) Defense counsel elicited the details of Larry Bennett's plea agreement that he struck with the state. (R792-795) Defense counsel also impeached Larry Bennett with numerous prior inconsistent statements throughout cross-examination. It was during one of these exchanges that the prosecutor objected on the basis that the statements were in fact consistent:

> MR. MOORE (Prosecutor): Judge, that's consistent with what he said here today and it's not inconsistent with what he's asked on his other statements. THE

COURT: It appears to me to be also, but it's for the jury to decide that. (R827)

Later during defense counsel's cross-examination of Bennett, the following occurred during an attempt to impeach using Bennett's deposition:

MR. MOORE: Again, I don't think that's inconsistent, Judge.

THE WITNESS: That's --

MR. SHELNUTT (Defense counsel): Judge --

THE WITNESS (sic): That's consistent. That's the same thing.

MR. SHELNUTT: May we approach the bench?

THE COURT: Yes.

MR. SHELNUTT: Judge, with all due respect to the Court, the jury is the one that is going to have to determine whether or not those statements are consistent or inconsistent and, if you keep telling the jury that those statements are consistent, then I think you are invading the province of the jury.

THE COURT: I only said that once. I didn't say that.

MR. SHELNUTT: Judge, you said it at least two or three times.

THE COURT: No. I said it one time, but I said I don't know, it's a jury question.

* * *

MR. SHELNUTT: Judge, I would ask that you refrain from any comments from the bench.

THE COURT: All I'll say is sustained or overruled. (R839-841)

However, the trial court engaged in the same type of comment on two more occasions during Bennett's cross-examination. Larry Bennett testified that to the best of his recollection, Harmon cut the victim's wallet into two pieces. (R851) Defense counsel then asked Bennett if he had ever made a prior inconsistent statement about the number of pieces that the wallet was cut into. (R851-852) When Bennett finally admitted that he did not remember, defense counsel read a portion of his deposition which appeared to imply that the wallet was cut into several pieces. (R852-853) The state attorney objected, pointing out that the implication as to the number of pieces arose from defense counsel's question at the deposition. (R853) The trial court sustained the objection and defense counsel asked that the jury be allowed to assess this issue for themselves. (R853) The court replied:

> If I -- if I make a wrong ruling, if you think it's wrong, say so except on the law. This is a question of fact; but I think that was consistent, but it's up to the jury to use their own judgments on that. (R853)

During redirect examination of Mr. Bennett, the state elicited testimony that Bennett had changed his evil ways since he was arrested. (R925-926) Bennett testified that he had straightened his life out and had returned to the Christian lifestyle in which he was raised. Defense counsel objected based on relevancy and the trial court replied:

> It may have something to do with his credibility perhaps; but I think

> that's far enough as far as that's concerned. . . . but I think that's enough on that subject. (R926)

This was clearly a comment that could have been perceived by the jury as an implication that a reformed Christian has increased credibility, at least in the judge's opinion.

Appellant concedes that defense counsel objected to only one of the trial court's comments concerning Larry Bennett's credibility. The trial court promised to refrain from any future comments but, as indicated above, failed to fulfill that promise. Appellant contends that this resulted in a denial of his constitutional rights of due process of law and to a fair trial. Art. I, §§ 9 and 16, Fla. Const. and Amends. V, VI, and XIV, U.S. Const.

Appellant contends that the trial judge violated Section 90.106, Florida Statutes, providing: "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." In Ehrhardt, Florida Evidence, §106.1, p.22, it is stated:

> During a jury trial, the judge occupies a dominant position. Any remarks and comments that the judge makes are listened to closely by the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel, Section 90.106 recognizes that a judge is prohibited from commenting on the weight of the evidence, or the credibility of the witness, and from summing up the evidence to the jury. If such comment and summing up were permitted, impartiality of the trial would be destroyed. (Footnotes omitted).

During cross-examination and redirect of Larry Bennett, the judge's comments "could have been interpreted by a jury as a comment on Appellant's veracity and therefore influence their deliberations." Gordon v. State, 449 So.2d 1302, 1304 (Fla. 4th DCA 1984). In sustaining the prosecutor's objection to defense counsel's question on redirect that the defendant's statements had been consistent, the Gordon trial judge stated that the testimony was not true. Admonitions to a witness, if they tend to suggest to the jury a doubt on the part of the court as to his veracity are improper. Robinson v. State, 80 Fla. 736, 87 So. 61 (1920). Likewise, questions directed to a witness which indicate the judge's opinion of the defendant's guilt or the weight or sufficiency of the evidence are also improper. Williams v. State, 305 So.2d 45 (Fla. 1st DCA 1974).

In Millett v. State, 460 So.2d 489 (Fla. 1st DCA 1984), the trial court made four separate comments which the appellate court determined were comments on the defendant's credibility before the jury. Two of these comments stated that the defendant was not being responsive to the questions, while another stated that the defendant had given double statements and asked for clarification. The remaining comment related to the clarity of the witness' response. In holding that the denial of the motion for mistrial was harmless error, the First District Court of Appeal pointed out the overwhelming evidence of guilt which rendered the error harmless. However, the defendant in Gordon, supra, never denied striking the child and no other cause was offered for the victim's near-fatal injuries. The Court

cautioned that another case with less evidentiary force may require reversal.

Appellant submits that the case at bar is one such case. The only evidence tying James Harmon with the offense came from the mouth of Larry Bennett. As such, his testimony was critical and his credibility was paramount. Defense counsel's efforts to impeach Bennett were hindered by the trial court's comments that bolstered Bennett's credibility. Therefore, the error in the instant case cannot be deemed harmless since the comments related directly to the key state witness' credibility. The trial court's action denied Appellant his constitutional right to a fair trial.

POINT IV

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO RECESS THE TRIAL AT SEVEN O'CLOCK P.M. WHERE APPELLANT'S COUNSEL WAS EXHAUSTED AND UNSURE OF HIS EFFECTIVENESS.

On December 4, 1986, the fourth day of trial, the state concluded their case-in-chief. (R855,936) The court personnel commenced trial that day at 7:45 a.m. with argument beginning at approximately 8:15 a.m. (R674,855) This particular day was probably the most critical day of trial since it included the testimony of Larry Bennett, Appellant's co-defendant and the key state witness. (R690-927) Following Bennett's testimony, the state presented one more witness before resting. (R931-936) After Appellant moved for a judgment of acquittal, the defense presented the testimony of one witness. (R940-947) Following a recess for dinner, defense counsel returned to court at 7:00 p.m. and objected to continuing the trial any further that night. Defense counsel pointed out that they had been going hard since 8:00 that morning and argued that Mr. Harmon was entitled to a fresh jury, a fresh judge, and a fresh defense attorney. (R948) Defense counsel stated that if the judge required them to proceed further that evening, Appellant would move for a mistrial. (R949) The state announced their willingness to continue. (R949) On prosecutor stated that he was no more tired than he usually was on any given day. The other prosecutor announced his readiness to "go all night." (R950) Mr. Shelnutt, one of

Appellant's defense attorneys, stated that he had a special problem in that he wore hard contact lenses. After 8:00, his lenses became foggy making it almost impossible to see. Mr. Shelnutt pointed out the difficulty of concentrating on the case under these circumstances. (R949-950) The trial court elicited the fact that Mr. Shelnutt was 30 years old while Mr. Eddy, the other defense attorney, was 34 years old. (R950) The trial judge indicated that he was about the same age or maybe a little older and stated further that he was not tired. (R950) Mr. Shelnutt pointed out that he had experience on both sides and knew that it was a lot easier to prosecute than to defend. (R951) The trial court pointed out that the only alternative was to proceed into the weekend with which defense counsel had no objection. (R951) The trial judge pointed out that the jury might object to working on the weekend and defense counsel suggested that the court specifically ask them. (R952) This was never done by the trial judge. The trial court announced its intention to ask the jury once they returned to raise their hand at any point when they became fatigued such that it affected their concentration. (R951) This was also never done. (R955) Appellant then called Wilfred Goff, Bobby Sheally, Joseph Taylor, and Bobbie Faye Gunter as witnesses in his behalf. (R955-1061) Prior to the testimony of Ms. Gunter, the trial court told the jury that she would be the last witness for the evening since, "Counsel is getting weary and tired because of their age and their poor health, they -- they want us to -- to quit after now and then just take his in the morning and then have closing. So

I guess because of their frailties, we'll have to do that." (R1045-1046) The trial proceedings for that day were finally adjourned at 9:30 p.m. (R1061) Proceedings commenced again the next day promptly at 7:30 a.m. (R1061)

Appellant recognizes that the granting or denial of a trial recess is within the discretion of the trial judge. However, much like the denial for a motion to continue, a trial court's refusal to recess a trial for the evening may constitute an abuse of discretion depending on the circumstances. In Jackson v. State, 464 So.2d 1181 (Fla. 1985), also a capital case, this Court held that the trial court committed reversible error in failing to grant a continuance where the unrefuted facts established that the physical condition of the trial attorney prevented him from adequately representing his client. Jackson's trial attorney suffered a head injury for which medication had been prescribed. Medication caused slurred speech and drowsiness which the trial attorney alleged could impair the effectiveness of his representation. The trial judge denied the motion based upon his belief that the defense counsel was adequately articulating matters then before the court for resolution. During the course of the trial itself, Jackson's defense counsel made several references to his medical problems and how they were adversely affecting his performance. At one point, he made an oral motion to withdraw based upon his inability to effectively assist his client. The trial court denied the motion.

This Court recognized in Jackson that the decision to grant or deny a motion for continuance is within the discretion

of the trial court and that, when such a motion is denied, it may be reversed on appeal only when there has been a showing that the trial judge abused his discretion. This Court also recognized that when the unrefuted facts establish that the physical condition of a trial attorney prevents him from adequately representing his client, a failure to grant a continuance is reversible error. Id. at 1182. The record in Jackson indicated that defense counsel was taking medication that caused drowsiness and dizziness. His doctor subsequently indicated that counsel should not be involved in trial work while recovering from this condition. This Court held that a continuance was required and reversed Jackson's convictions and remanded for a new trial.

The decision to recess for the night is less momentous than a decision to continue a trial. A recess basically deals only with scheduling and whether or not a trial might extend another day or portion thereof. In contrast, a continuance would result in a trial being postponed to another week or month necessitating wholesale changes in everyone's schedules. As such, Appellant submits that a trial court's decision to recess for the evening after a specific request from defense counsel requires a lower abuse of discretion standard than the denial of a motion for continuance.

Defense counsel stated specifically that they were tired and also pointed out that one of them had a personal problem involving the extended wear of his hard contact lenses. In spite of these unrefuted facts, the trial judge insisted in continuing late into the evening during the fourth day of a five

day capital trial. Each day the trial began extremely early and continued late into the day and sometimes evening hours. Defense counsel expressed a willingness to work on the weekend and requested that the jury be polled about their willingness to work an extra day rather than late into the night. The trial court failed to conduct the requested inquiry. The trial court also did not follow through on his promise to tell the jurors to inform him when they became fatigued such that it affected their ability to concentrate. The jurors could have been just as exhausted as defense counsel and just as unwilling to proceed. This was at a critical portion of the trial since it was the day Larry Bennett testified and the state rested. The defense presented all of their case-in-chief except for the testimony of the Appellant. The critical timing of this error cannot be overstated. The trial court abused its discretion in failing to recess for the night at 7:00 that evening and forcing the jury and defense counsel to continue until 9:30 p.m. This resulted in a deprivation of Appellant's constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

POINT V

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN SENTENCING HARMON TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT WHERE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

The critical and proper role of the jury's advisory sentencing verdict in determining the appropriateness of the death sentence has long been recognized and many times explained by this Court. Lamadline v. State, 303 So.2d 17 (Fla. 1974). Because it represents the judgment of the community as to whether the death penalty is appropriate, the jury's recommendation is entitled to great weight. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Odom v. State, 403 So.2d 936 (Fla. 1981). The standards governing the imposition of the death sentence over a jury's recommendation of life imprisonment have now become axiomatic: that a life recommendation carries great, if not controlling weight; the decisions of this Court have strictly followed that standard. See, e.g., Washington v. State, 432 So.2d 44 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Smith, G.E. v. State, 403 So.2d 933 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980) Tedder v. State, 322 So.2d 908 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975). The standards for overruling the jury life

recommendation in the present case have not been met. There was no "clear and convincing" reason, Tedder v. State, supra at 910, no "compelling reason," Burch v. State, 343 So.2d 831, 834 (Fla. 1977), and no "reasonable basis," Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979), for rejecting the jury's life recommendation.

In Tedder v. State, supra at 910, this Court articulated the standard to be applied when it reviews a death sentence imposed notwithstanding a jury recommendation of life imprisonment:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Accord, Washington v. State, 422 So.2d 44,48 (Fla. 1983). This Court in Tedder held that, even though the trial court had found no mitigating circumstances of that case there was no reason to override the jury's life recommendation. This result was obtained even though the defendant had allowed the victim to languish without assistance or the ability to obtain assistance. Thus, the Court apparently recognized that the jury must have considered and weighed the aggravating and mitigating circumstances and found sufficient of the latter to recommend life imprisonment. See also Gilvin v. State, 418 So.2d 996 (Fla. 1982).

In the penalty phase of the instant case, following the state's presentation of James Harmon's lone South Carolina

robbery conviction, the defense tendered testimony to show several mitigating circumstances. (See subsection VI, infra.) No additional information was presented to the trial court to sustain the override. Smith v. State, 403 So.2d 933 (Fla. 1981). The defense presented evidence of non-statutory mitigating circumstances which included the fact that Jim Harmon is a good father as well as a good son. He is a religious man and is intelligent as well. He was a model prisoner prior to trial and acted as arbiter in several disputes between other inmates. He suffers from health problems. The testifying psychologist concluded that James Harmon could contribute to society. (R1790-1799) After 35 minutes of deliberation, a majority of the jury recommended that the court impose a sentence of life imprisonment upon James Harmon. (R1613,1855). This body of reasonable jurors (accepted as reasonable by the state at the commencement of the trial) considered the facts of this case and voted to recommend that a life sentence with a minimum mandatory twenty-five years without parole be imposed.

As discussed in Point VI, three of the aggravating circumstances cannot be sustained and numerous mitigating circumstances, both statutory and nonstatutory are present. Thus it follows, legally and logically that there is no compelling reason that can justify the sentencing judge's decision to override a life recommendation. This Court has reversed death sentences imposed over a jury recommendation of life in cases which were much more heinous than the murder of Buck Germany. For example, in Brown v. State, 367 So.2d 616 (Fla. 1979), the victim was

beaten about the head, shot, and finally drowned. In McKennon v. State, 403 So.2d 389 (Fla. 1981), the defendant murdered his employer by beating her head against the floor and wall, strangling her, slicing her throat, breaking ten of her ribs, and stabbing her. The only mitigating circumstance was the defendant's age of 18. This Court found that there was a rational basis for the jury's recommendation and reduced the sentence to life imprisonment.

In Chambers v. State, 339 So.2d 204 (Fla. 1976), a sentence of death was reversed despite the trial court's findings of one aggravating circumstance and no mitigating circumstances. The victim was beaten to death and died as a result of cerebral and brain stem contusion. The victim was bruised all over the head and legs, her face was unrecognizable, and she had several internal injuries. These factors notwithstanding, this Court found the imposition of the death penalty unwarranted and determined that the jury's recommendation was appropriate. Justice England, specially concurring for three members of the Court, amplified the reasons for reversing the death sentence. In light of the respective functions of the judge and jury in death penalty cases, the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason.

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given the opportunity to evaluate, the jury recommendation should be followed

> because that body has been assigned by history and statute the responsibility to discern truth and mete out justice. . . .[B]oth our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists. Chambers v. State, supra at 208-209 (England, Adkins, and Sundberg, JJ., concurring specially).

In Washington v. State, supra at 48, this Court again reversed a death sentence imposed over the jury's life recommendation. During Washington's attempt to sell stolen guns, a deputy sheriff became suspicious and, approached Washington. Washington shot the deputy repeatedly which resulted in his death. This Court found as mitigating against the above facts the defendant's age of nineteen, the defendant's lack of previous criminal activity, and the defendant's character as testified to by members of his family. On those facts this Court held there was insufficient reason in the record to override the jury's advisory life sentence.

In Gilvin v. State, 418 So.2d 996 (Fla. 1982), this Court again reversed the sentence of death despite a finding by the trial court of six aggravating circumstances and no mitigating circumstances. The victim, an Episcopal priest who had befriended the defendant, was physically beaten with a claw hammer. While the victim lay face-down on the floor, the defendant administered several blows to the back of the victim's head with the claw hammer. The victim had suffered at least 15 blows to the head. Without elaboration, this Court held that there was evidence of nonstatutory mitigating factors upon which the jury

could have based its life recommendation and therefore there was a rational basis which the trial court should have accepted.

Also, in Cannady v. State, supra, a case wherein the victim was shot five times, this Court found that there existed a reasonable basis for the life recommendation since the jury could have relied upon the defendant's age of 21 and his lack of significant criminal activity. Likewise, in Walsh v. State, supra, this Court ruled that a reasonable basis for the life recommendation existed based on the defendant's lack of a prior record and testimony of his good character.

In McCampbell v. State, supra, this Court reversed a death sentence imposed over a jury life recommendation in a case where, during a robbery the defendant shot a security guard in the back of the head, killing him. The Court held that the jury could have been properly influenced in recommending life by factors such as the defendant's employment record, his prior record as a model prisoner, his family background, and the disposition of his co-defendant's cases.

In Goodwin v. State, supra, the murder of four persons who came upon a marijuana unloading operation was held to be cold-blooded and cruel. This Court, however, reversed the death sentence imposed over a life recommendation, noting that even though the defendant helped tie up the victims, knowing that they would probably be killed, he was not the triggerman and was not present during the killings.

Recently, this Court again reversed a death sentence imposed over a life recommendation in Hansbrough v. State, 12 FLW 305 (Fla. June 18, 1987). This Court upheld the trial court's finding of two aggravating factors. The trial court also fashioned a composite non-statutory mitigating circumstance which considered many facets of Hansbrough's life and problems. This Court held that, on the facts and circumstances of that case, there was no reason to override the jury's life recommendation. The evidence of non-statutory mitigating circumstances could have persuaded the jury as to the reasonableness of recommending life imprisonment. This Court compared Hansbrough's case to similar cases and agreed with the contention that the trial court should not have overridden the jury's recommendation and sentenced Hansbrough to death.

In Smith, G.E. v. State, supra, this Court ruled that the jury's life recommendation was reasonable and the judge's death sentence was not justified since nothing in the record showed that the judge had any additional information not known to the jury, and he did not demonstrate how no reasonable man could differ on the matter of sentencing in the case. In discussing the sentence, this Court also noted the questionable credibility of the only witness who connected the defendant to the homicide (which involved a beating and stabbing).

This credibility factor is certainly present in the instant case. The jury could have easily based its life recommendation, in part, on their doubt of Larry Bennett's testimony. The jury may have questioned the respective roles of Harmon

and Bennett in the murder. This factor is one that can provide a reasonable basis for the jury recommending life imprisonment. Wasco v. State, 12 FLW 123 (Fla. March 5, 1987).

In the instant case the trial judge failed to demonstrate how no reasonable man could differ on the death sentence, merely rejecting the life recommendation and concluding that no reasonable man could differ. But a life recommendation is entitled to great weight. See Hawkins v. State, 436 So.2d 44, (Fla. 1983); Rose v. State, 425 So.2d 521 (Fla. 1982); Tedder v. State, supra. Also, as in Smith G.E. v. State, supra, the credibility of the former co-defendant is questionable, at best. Where the evidence is conflicting, as noted in the Chambers, supra, concurring opinion, the jury recommendation must be followed since they, as triers of fact, obviously arrived at a different conclusion on the facts.

Additionally, throughout the trial the jury heard that Larry Bennett, Harmon's co-defendant had entered into a plea negotiation with the state. This assistance agreement called for Bennett to testify against James Harmon in exchange for a plea to second degree murder with a sentencing cap of 17 years. (R1750) Larry Bennett had a presumptive guideline sentence of 12-17 years incarceration. (R572-573,775-776) Within one month of sentencing James Harmon to death for his participation in this crime, the trial court withheld adjudication and placed Larry Lee Bennett on probation for a period of 15 years. (See attached appendix). The disparity in treatment of James Harmon and Larry Bennett is too disparate even if one accepts Larry Bennett's

version as gospel. See Slater v. State, 316 So.2d 539 (Fla. 1975). Larry Lee Bennett was sentenced to a de facto sentence of time served. Such inequality is simply not fair. See also McCampell v. State, supra, and Slater v. State, 316 So.2d 539 (Fla. 1975).

From the record before this Court, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended the sentence of life imprisonment. With regard to this sentence, the trial court found four aggravating circumstances and rejected all mitigating circumstances. The sentencing judge relied on improper and unsupported aggravating circumstances. (See, Point VI, infra.) At most, the findings of such factors in aggravation were questionable. As such, these factual disputes have been resolved by the jury's advisory verdict of life imprisonment. Consequently, the sentencing judge's rejection of the jury's advisory verdict of life imprisonment and imposition of the ultimate punishment constitutes double jeopardy, cruel and/or unusual punishment, deprivation of Appellant's right to trial by jury and due process of law established by U.S. Const. Amend., V, VI, VIII, XIV and by Fla. Const. Art. I, §§9, 16, 22. We recognize this Court rejected this claim in Douglas v. State, 373 So.2d 895 (Fla. 1979) and will not further develop this point herein.

Moreover, the sentencing judge ignored strong and material factors in mitigation. (See Point VI, E, infra.) Therefore, there exists no compelling reason under the facts of the case sub judice that would justify the imposition of death

sentence over the jury's recommendation; it was entitled to great weight. Burch v. State, supra. See also Neary v. State, supra. The evidence in the instant case can certainly be reasonably interpreted to favor mitigation; under such circumstances the trial judge cannot override the jury's recommendation of life. Thompson v. State, 328 So.2d 1, 5 (Fla. 1976). The trial court erred in doing so. Tedder v. State, supra. On the record in this case, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended a sentence of life imprisonment with a mandatory minimum of 25 years. Thus, the trial court clearly erred when it disregarded the recommendation and sentenced James Harmon to death. The sentence must be reduced.

POINT VI

IN CONTRAVENTION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE OF DEATH WHICH IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation that the trial court sentence James Harmon to life imprisonment with a twenty-five year minimum mandatory term. (R1613) In imposing the death penalty, the trial court found four aggravating circumstances: (1) the Appellant was previously convicted of a felony involving the use of violence or threat of violence; (2) the capital felony was committed for pecuniary gain; (3) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and, (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The court concluded without stating any reasons that no mitigating circumstances (statutory or otherwise) applied. (R1730-1732) The trial court also pointed out at the sentencing hearing that James Harmon shows no remorse and steadfastly denies his involvement in the murder. (R1461) Although the trial court's reliance on this impermissible factor [Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983]) does not appear in the written findings of fact since the state prepared them, it is clear that the trial court impermissibly relied upon this

factor in sentencing James Harmon to death. (R1462) Appellant contends that the death sentence imposed upon James Harmon must be vacated especially in light of the jury's life recommendation. The trial court found improper aggravating circumstances and failed to consider relevant mitigating factors. The proper weighing of all factors must result in a life sentence.

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE APPELLANT WAS PREVIOUSLY CONVICTED OF A FELONY WHICH INVOLVED THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON.

In finding this circumstance, the trial court wrote:

> a) That the defendant was previously convicted of a felony which involved the use or threat of violence to another person. Florida Statute 921.141(5)(b). It was proved by introduction of certified copies of Judgement and Sentence from the State of South Carolina that on January 21, 1969, the defendant, JAMES ANSEL HARMON, was convicted of the offense of Armed Robbery. The Court notes that the defendant admitted to Dr. Rodney A. Poetter, Ph.D., who interviewed defendant at the request of Defendant's counsel, that he had actually been convicted of five (5) counts of Armed Robbery in 1968 and 1969. This statement is contained in a five page written report filed with the Court on December 11, 1986. (R1730)

Appellant cannot dispute the trial court's finding of this particular factor under Section 921.141(5)(b), Florida Statutes (1985), since the State did introduce without objection a certified copy of Appellant's South Carolina judgement and sentence for armed robbery in January of 1969. However, the trial court erred in adding that Harmon admitted to Doctor Rodney Poetter that he had been previously convicted of a total of five

counts of armed robbery in 1968 and 1969. As the trial court pointed out in his written findings, Doctor Poetter interviewed James Harmon at the request of defense counsel. (R1730) Appellant takes issue with the trial court's action in using a hearsay admission from a psychological interview arranged by defense counsel for use as mitigating evidence. This Court recognizes that all aggravating circumstances must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Appellant doubts that a mere admission, without more, satisfies the Dixon standard. Furthermore, there is no indication that Harmon was advised of his constitutional rights prior to the psychological interview. Therefore, his admission should be excluded on the basis of Estelle v. Smith, 451 U.S. 454 (1981). Since it is unclear that the trial court still would have found that this aggravating circumstance had been established beyond a reasonable doubt without the impermissible consideration of Harmon's admission to Doctor Poetter, this case should be remanded for a determination by the trial court on that issue.

B. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

In finding that the state had proved this factor beyond a reasonable doubt, the trial court stated:

> b) That the capital felony was committed for pecuniary gain. Florida Statute 921.141(5)(f). It was proved at the trial of this cause by testimony of the co-defendant and witness, Mark Shadle, as well as circumstantial evidence, that Charles O. Germany, the victim was robbed of approximately $2,250.00 and it

> was during the course of the robbery that Charles O. Germany was shot once through the head by the defendant, JAMES ANSEL HARMON. (R1730)

The trial court's finding of this fact is simply not supported by the evidence.

Case law indicates that this aggravating factor is limited in its application to situations where the sole or primary motive for the killings is monetary gain. See Simmons v. State, 419 So.2d 316,317 (Fla. 1982); State v. Dixon, supra at 9. This Court has approved the finding of pecuniary gain only in cases in which an actual robbery was occurring or at least being attempted, or in which the defendant received something of value during the crime. See e.g. Bolender v. State, 422 So.2d 833 (Fla. 1982)(murder during robbery and torture of cocaine dealers); Ross v. State, 386 So.2d 1191 (Fla. 1980)(killed burglary victim and ransacked house for valuables); Antone v. State, 482 So.2d 1205 (Fla. 1980)(contract killing); Hargrave v. State, 366 So.2d 1 (Fla. 1979)(robbery of a convenience store).

In Young v. Zant, 506 F.Supp. 274, 280-281 (M.D.Ga. 1980), the court rejected a finding that the murder was committed during the course of a robbery and for pecuniary reasons in a similar situation. There, the court held:

> Having carefully considered all of the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed in the course of an armed robbery or for the purpose of obtaining money. The only relevant evidence presented at trial indicated

> that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i.e., after the murder had been committed. . . .Based on the evidence presented at trial, that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt.

Id. at 280-281. See also Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979), for an analogous situation concerning the proof necessary to establish that the motive for the murder was to prevent an unlawful arrest.

In his written findings of fact regarding this particular circumstance, the trial court relied upon the testimony of Larry Bennett and Mark Shadle, as well as unspecified "circumstantial evidence" that the victim was killed during the course of a robbery, the subject of which was approximately $2,000. (R1730) Mark Shadle, an inmate who shared a cell with Harmon, testified that Harmon purportedly told him that:

> [H]im and his brother, Larry, robbed the guy and, in the process when they were robbing him, his brother, Larry, mentioned his last name, he says: Yo, Harmon, and he got scared and he shot him. (R483)

This constituted the sum and substance of Shadle's testimony as to this particular issue.

Larry Bennett, Harmon's co-defendant who was at the scene of the murder and consequently should be the state's best witness, testified that he and Harmon left for the Florida Highlands that evening without any discussion concerning the

purpose of their trip. (R721) There was no discussion that evening nor had there been any prior discussions. (R719) Bennett testified:

> Q. Where there any specific discussions between yourself and James on the way down as to why you were going to Florida?
>
> A. No, sir.
>
> Q. Did you know?
>
> A. No, sir.
>
> Q. Did you assume why you were going to Florida?
>
> A. I had several assumptions.
>
> Q. What were some of those?
>
> A. Maybe to go do a jewelry store or I really didn't know.
>
> Q. But you just drove?
>
> A. Yes, sir. (R721-722)

Bennett's testimony further revealed that they eventually arrived at Charles Germany's house where Bennett and Harmon entered and Bennett repaired Germany's refrigerator. Harmon went into the bathroom immediately upon entering the house. While Bennett talked with Germany, Bennett was surprised to eventually look up to see Harmon pointing a gun at the back of Germany's head. Half a second later, Harmon shot Germany once in the back of the head. (R723-728) Bennett then asked Harmon what was going on and Harmon told him to shut up. (R729) Bennett testified that Harmon then took Germany's wallet out of his back pocket, looked inside to find it full of money, and placed it in his own pocket. (R730)

The state failed to meet their burden of proof in establishing that the sole or primary motive for the killing was monetary gain. Bennett testified that he had no idea that the killing or the subsequent theft would occur. Therefore, Harmon could have formed the intent to take the money after the murder. Appellant anticipates that the state and this Court might ask what motive other than pecuniary gain would be present. Harmon could very well have been disgruntled about his business dealings with the Germany brothers. Another possible motive could be anger and resentment over Charles Germany's refusal to honor his previous request for a loan. Under either reasonable hypothesis, the state has failed to meet its burden of proof in establishing beyond a reasonable doubt that pecuniary gain was the primary motive for the killing.

C. THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

In finding that this circumstance was established, the trial court wrote:

> c) That the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Florida Statute 921.141(5)(i). From all of the evidence presented in the trial of this cause, it is clear that the defendant, JAMES ANSEL HARMON, traveled from South Carolina to the residence in Marion County, Florida, where the defendant knew the victim would be alone, with the clear intention of killing the victim, and that the defendant in fact shot the victim through the head at close range from

> behind, in a manner the court characterizes as an execution of the victim. Based on Bates v. State, 465 So.2d 490, 493 (Fla. 1985), the Court finds the murder to have been cold, calculated and premeditated without moral or legal justification. (R1730-1731)

The state failed to prove beyond a reasonable doubt that this particular aggravating circumstance (§921.141(5)(i), Fla. Stat.) was established in Combs v. State, 403 So.2d 418 (Fla. 1981), this Court indicated that Section 921.141(5)(i), Florida Statutes, authorizes a finding in aggravation for premeditated murder where the premeditation is "cold, calculated and . . . without any pretense of moral or legal justification." Id. at 421. This Court indicated that "(i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted, but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of the defendant." Id. (Emphasis supplied). In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court noted that:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing, the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated . . . and without any pretense of moral or legal justification."

Subsequently, in McCray v. State, 416 So.2d 804 (Fla. 1982), this Court noted that (5)(i) "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." Id. at 807.

The trial court's conclusion that Harmon traveled from South Carolina to Florida where he knew the victim would be alone with the clear intention of killing him is simply unfounded in the evidence. As pointed out in the previous section dealing with pecuniary gain, Larry Bennett, the co-defendant, testified that the pair had no preconceived course of action when they left South Carolina. There is absolutely no evidence that James Harmon formulated the intent to kill Charles Germany at any time other than immediately prior to pulling the trigger. The state has simply failed to meet their burden of proving the heightened premeditation required by this particular aggravating circumstance.

This Court has given numerous examples of what is necessary to sustain a finding that Section 921.141(5)(i) has been met. It is well established that the level of premeditation necessary to convict a defendant during the guilt phase, does not automatically rise to the level of premeditation required by the aforementioned section. Preston v. State, 444 So.2d 939, 946 (Fla. 1984). The Preston court explained that this aggravator has been established when the facts show a particularly lengthy, methodic or involved series of atrocious events and when there has been a substantial period of reflection and thought by the perpetrator. Id. at 946. In the instant case, neither of these situations is present. There is no evidence illustrating a methodic planning of events by the Appellant. Nor is there evidence establishing Appellant's lengthy period of contemplation. See also Hardwick v. State, 461 So.2d 79, 81 (Fla.

1984) and Middleton v. State, 426 So.2d 548 (Fla. 1982). The trial court's reliance on Bates v. State, 465 So.2d 490 (Fla. 1985), is misplaced. In Bates, this Court found the evidence insufficient to prove beyond a reasonable doubt that Bates had committed the murder in a cold, calculated, and premeditated manner. As in the instant case, the Bates murder was not an execution or contract murder and lacks the requisite heightened premeditation.

Further, the trial judge also found that the capital felony was committed for pecuniary gain. (R1730) This Court has stated that the premeditation of a felony, namely robbery, cannot be transferred to a murder that occurred in the course of the felony for the purpose of Section 921.141(5)(i). Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). The defendant told a friend that he stole the victim's purse, jewelry and car in order to make it look like a robbery. Id. at 80. This Court stated that the fact that a robbery was planned is insufficient to support a finding that the murder was committed in a cold, calculated, and premeditated manner. The aggravator emphasizes the cold calculation prior to the murder, not the robbery. Cannady v. State, 427 So.2d 723 (Fla. 1983)(fact that victim was shot five times does not support finding that murder exhibited heightened premeditation). Where a murder occurs during the commission of a robbery and is susceptible to conclusions other than that it was committed in a cold, calculated and premeditated manner, Section 921.141(5)(i), cannot be applied. Peavy v. State, 442 So.2d 200,

202 (Fla. 1983). The evidence to support a finding of this aggravating circumstance is simply not present in the instant case.

D. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN ORDER TO AVOID ARREST.

In finding this aggravating circumstance, the trial court stated:

> That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Florida Statute 921.141(5)(e). Using the standard set forth in Clark v. State, 433 So.2d 973 (Fla. 1983)(sic) it is clearly shown from the evidence that the dominant motive for the murder in this instant case was to eliminate the only witness other than the co-defendant. The evidence showed that the victim, Charles O. Germany, knew the defendant and the co-defendant. Upon arrival of the defendant and co-defendant at the residence of the victim, the co-defendant identified himself to the victim and was granted admittance to the residence. The victim and co-defendant were thereafter located in the kitchen area of the residence when the defendant entered and walked directly into the bathroom. Upon defendant's exit from the bathroom, the co-defendant spoke the name of the defendant and the defendant, JAMES ANSEL HARMON shot the victim through the head from behind. Defendant then ordered the co-defendant to wipe-off everything that he had touched. The Court finds that his murder was a witness-elimination murder, with the dominant motive of avoiding lawful arrest for Robbery, since it was clearly shown at the trial of this cause that the victim, Charles O. Germany, was almost 69 years of age, legally blind and in ill health and the robbery could easily have been accomplished without killing the victim. (R1731)

In Riley v. State, 366 So.2d 19, 22 (Fla. 1978), this Court held that:

> [T]he mere fact of death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. (Emphasis added).

The mere fact that a victim might be able to identify an assailant is insufficient. Bates v. State, 465 So.2d 490, 492 (Fla. 1985). Moreover, "it must be clearly shown that the dominant or only motive for the murder was the elimination of" the witness. Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Menendez v. State, 368 So.2d 1278 (Fla. 1979). Compare Herring v. State, 446 So.2d 1049 (Fla. 1984)(defendant stated that he shot robbery victim a second time to prevent his testifying against him); Clark v. State, 443 So.2d 973 (Fla. 1983)(defendant told cellmate that victim could identify him, victim knew defendant, victim knew or soon would know that violent felony had been committed on her husband); Vaught v. State, 410 So.2d 147 (Fla. 1982)(victim announced that he recognized assailant, defendant shot victim five times to make sure he was dead).

While the victim in this case did know Larry Bennett and James Harmon, there is no indication that this was the dominant motive for the murder. As in Bates v. State, 465 So.2d 490 (Fla. 1985), the contention that Harmon killed the victim solely to avoid his identifying him is mere speculation. If this Court upholds the finding of this aggravating factor in the instant case, the circumstance could be applied to every capital

murder where the victim knew the assailant. There is simply no other proof to sustain the trial court's finding of this circumstance. Larry Bennett's testimony that the pair supposedly wiped off any items that they had touched does not support the finding of this circumstance. The action of wiping down the area, if it occurred, could very well have been intended to conceal the identity of the murderers and, as such, it constituted an afterthought following the shooting.

This Court disapproved the finding of this circumstance in Rembert v. State, 445 So.2d 337 (Fla. 1984), where Rembert and the victim had known one another for a number of years. The trial court concluded that Rembert's intention was to eliminate the only witness who could testify against him. This Court found that the state failed to demonstrate beyond a reasonable doubt the requisite intent needed to establish this aggravating factor. Id. at 340. The victim in the instant case was not the only witness who could testify against him since Larry Bennett also witnessed the crime. Therefore, the evidence supporting this factor in the instant case is even less than the evidence found to be insufficient by this Court in Rembert, supra.

Additionally, Appellant contends that the trial court engaged in impermissible doubling in finding this particular factor as well as finding that the murder was cold, calculated and premeditated. Provence v. State, 337 So.2d 783 (Fla. 1976). Specifically, the heightened reflection that it takes to consciously decide that a witness is to be eliminated is necessarily the same heightened premeditation needed to support a cold,

calculated and premeditated killing. Planning to commit the robbery cannot automatically be transferred to support heightened premeditation of murder. Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). The same mental gymnastics are present when a conscious decision is made to kill someone because he is a witness. Accordingly, the same factor is in this instance being improperly doubled. If witness elimination can be used at all, it may only be used once.

E. THE TRIAL COURT ERRED IN SUMMARILY CONCLUDING THAT NO MITIGATING CIRCUMSTANCES WERE PRESENT.

The only written consideration of any mitigating circumstances by the trial court was:

> The Court hereby finds no mitigating circumstances in this case, either under Florida Statute 921.141(g) or otherwise. (R1731)

The trial court's consideration of the mitigating circumstances are so inadequate that meaningful review by this Court is precluded. Holmes v. State, 374 So.2d 944 (1979). A detailed statement of findings of fact is required. Hall v. State, 381 So.2d 683 (1978). Findings of a trial judge should be made with unmistakable clarity to afford meaningful appellate review. Mann v. State, 420 So.2d 578 (Fla. 1982). This is especially important due to the great deference the trial court's findings enjoy. Lucas v. State, 490 So.2d 943 (Fla. 1986). A general statement such as the one written by the trial judge in the instant case is by far too all-encompassing to warrant recognition as credible

evidence that specific evidence was in fact considered but rejected. It simply does not afford meaningful appellate review.

At the penalty phase, the defense presented evidence that established that Jim Harmon is a good father as well as a good son. His mother was in failing health at the time of the trial and he hid his legal difficulties from her, afraid that it might affect her health. Harmon was also concerned about his eleven year old son finding out about his predicament. Harmon maintained contact with both his mother and his son. He was proud that his son was a good student and an athlete. (R1790-1791) James Harmon is a religious man who attended church regularly until 1976. (R1792) Doctor Poetter was of the opinion that Harmon was not a desensitized person and reacted the way most people would in an emotional situation. (R1791) Doctor Poetter testified that James Harmon is a smart individual in the upper 25 percent of the population. (R1792)

Harmon attempted to enlist in the armed forces but was declared physically unfit for service due to childhood polio. He also suffers from hypertension and ulcers related to anxiety and tension. (R1799)

Doctor Poetter also testified that James Harmon is capable of forming long-term relationships and has deep emotional feelings. (R1798) During his 13 months incarceration while awaiting trial, he was a model prisoner. He was not involved in any physical altercations and even acted as arbiter in several disputes between other inmates. (R1798) He wants to study the use of computers for use in such arbitrations. Doctor Poetter concluded that James Harmon could contribute to society. (R1798)

The trial judge erred in ignoring valid nonstatutory mitigating circumstances especially in light of the jury's life recommendation. The jury obviously found that these mitigating factors do exist and concluded that they outweighed the aggravating circumstances if any. The trial court's action in overruling the jury's life recommendation and sentencing James Harmon to death cannot be justified.

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 685 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the State will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349, 358 (1977); Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§ 9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

The amendment of Section 921.141, Florida Statutes (1979) by adding aggravating factor 921.141(5)(i) (cold and calculated) renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution because it results in arbitrary application of this circumstance and in death being automatic unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 414 U.S. 185 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida , 428 U.S. 242 (1976), that this Court's obligation to review death

sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979) (emphasis added).

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing cases, arguments, and policies, Appellant respectfully requests this Honorable Court, as to Points I through IV, to reverse his convictions and remand for a new trial; as to Points V and VI, to vacate the sentence and remand the cause to the trial court with instructions to impose a life sentence; and as to Point VII, to declare Florida's death penalty statute unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 and to Mr. James Ansel Harmon, #105506 P.O. Box 747, Starke, Florida 32091 on this 1st day of July, 1987.

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