IN THE SUPREME COURT OF FLORIDA

CASE NO: 69,928

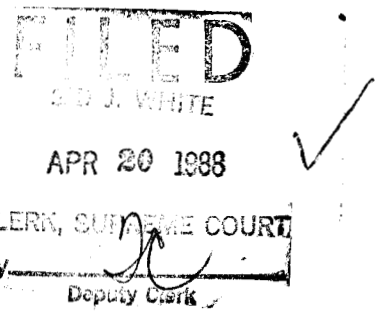
VERNON AMOS,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee.



INITIAL BRIEF OF APPELLANT VERNON AMOS

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REQUEST FOR ORAL ARGUMENT

The undersigned counsel for Appellant respectfully requestS that this Honorable Court hear oral argument for the issues herein raised.

Respectfully submitted,

Craig Boudreau

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PRELIMINARY STATEMENT

Appellant VERNON AMOS was the Defendant, Co-Appellant LEONARD SPENCER was the co-Defendant, and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the Appellant will be referred to as VERNON AMOS, and Appellee will be referred to as the State.

The symbol "R." will be used to designate the record on appeal followed by the page number.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN DENYING VERNON AMOS' MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO ALL COUNTS?

II. WHETHER THE TRIAL COURT ERRED FUNDAMENTALLY BY DENYING VERNON AMOS THE RIGHT TO TESTIFY IN HIS OWN BEHALF?

III. WHETHER THE TRIAL COURT ERRED FUNDAMENTALLY BY DENYING VERNON AMOS' PRE-TRIAL MOTION FOR A JURY VENIRE DRAWN FROM PALM BEACH COUNTY AT LARGE (RATHER THAN FROM A "JURY DISTRICT" OF ONLY ONE-HALF THE GEOGRAPHICAL AREA OF THE COUNTY),

AND

ERRED IN VIOLATION OF "EQUAL PROTECTION" STANDARDS OF STATE AND FEDERAL CONSTITUTIONAL LAW BY DENYING A DEFENSE REQUEST FOR TRIAL IN THE WESTERN HALF OF THE COUNTY OR GLADES JURY DISTRICT,

AND

ERRED FUNDAMENTALLY IN DENYING THE PRE-TRIAL DEFENSE MOTION TO RE-SET THE CASE FOR TRIAL DURING A WEEK WHEN THE JURY POOL ALREADY WAS SCHEDULED TO BE DRAWN COUNTY-WIDE FOR USE IN SELECTING A NEW GRAND JURY?

IV. WHETHER THE TRIAL COURT ERRED FUNDAMENTALLY BY EXCUSING TWO BLACK JURORS ARBITRARILY ON ITS OWN MOTION AND DENIED VERNON AMOS A FAIR TRIAL?

V. WHETHER THE TRIAL COURT ERRED IN DENYING VERNON AMOS HIS RIGHT TO CONFRONT AND CROSS-EXAMINE STATE'S WITNESSES?

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XII. WHETHER THE TRIAL COURT ERRED IN DENYING ALL DEATH PENALTY MOTIONS OF APPELLANT?

XIII. WHETHER THE TRIAL COURT ERRED BY DENYING THE PRECLUSION OF DEATH QUALIFICATION OF JURORS AND A BIFURCATED JURY?

STATEMENT OF THE CASE AND FACTS

The relevant facts are as follows: On June 12, 1986, two black males walked into a Mr. Grocer convenience store at the corner of Gun Club Road and Military Trail in West Palm Beach, Florida. The shorter of the two black males, VERNON AMOS, had a

dollar bill in his hand and asked the store clerk for a pack of cigarettes. The taller black male, LEONARD SPENCER, went over to the cooler where the sodas are located grabbed a soda. The taller man then walked back towards the front counter, set down the can, and began to walk towards the front door. At that time he (the taller man) grabbed a patron, Terry Howard, around the neck and put a gun to his side. Terry Howard was told by the taller black male to get down on the ground. As he hit the ground Terry Howard heard a gunshot fired. (R. 1845).

Terry Howard heard a voice saying "open the cash register." He was not sure if he heard two different voices. (R. 1902). Then the taller of the two black males went over to Terry Howard, demanded the keys to his car and shot him, striking him once in each arm. (R. 1863-1865). When Mr. Howard became conscious he saw that the two men were gone and that the store clerk, Alan McAnich was unconscious with blood underneath him.

Bobby Lee Helvey was entering the parking lot of the Mr. Grocer and observed two black males get into a car. (R. 1911). He observed the taller one enter the driver's side and the smaller one enter the passenger side. Mr. Helvey observed no weapons. (R. 1915).

At approximately 12:20 a.m. a second killing occurred at a bar about a mile north of the Mr. Grocer on Military Trail at a bar called the English Pub. The State's only eyewitness to the shooting was John Foster. Mr. Foster stated that he was the passenger of a pick-up truck pulling into the English Pub parking

lot. (R. 1972). As he pulled into the lot he observed a tall black male and a white male having a scuffle at the trunk of a pick-up truck that was parked in a spot directly across and adjacent to the spot into which his truck was being maneuvered. Mr. Foster testified that he observed a smaller black male towards the front of the truck on the other side of the opened driver's door. The taller black male appeared to be attempting to wrestle keys, presumably to the truck, away from the white male. (R. 1976). John Foster saw the two continue to scuffle and move towards the opened driver's door. He heard a bang. He never saw a gun and never saw a flash. (R. 1990). The white male, Robert Bragman, staggered away having been shot in the head and later died. The two black males hopped into the pick-up. The taller black male attempted to start the truck.

Allen Sedenka, a former policeman, was driving north towards the English Pub. He had heard a report of a shooting at the English Pub on his police scanner. (R. 2180). After he passed the English Pub he saw two black males come out of a wooded area and were walking north along Military Trail. He pulled into the Kentucky Fried Chicken on the opposite side of the road and telephoned the Sheriff's Office. As he was on the phone the two black males came across the street. Sedenka dropped the telephone and went to get into his car as they approached. (R. 2181). The taller black male pulled out a gun and pointed it to Sedenka's head and said, "You're going to drive us." (R. 2182). Sedenka testified that the smaller of the two black males

appeared quite scared and said to Sedenka, "Do what he says or he will kill you." (R. 2245). Sedenka got out of the car, handed the keys to the taller black male. The two got in the car with the taller male driving. They started to pull out of the lot, stopped, switched seats, and drove away. (R. 2184).

Vernon Amos was located and arrested by Sheriff's Deputies two hours later in a junked car at a junkyard. (R. 2070). Vernon Amos had no weapon in his possession. (R. 2083). Vernon Amos has been in custody ever since that arrest.

Vernon Amos was taken to the Palm Beach County Sheriff's Office where he was questioned. (R. 4627). Prior to making a statement the Sheriff's Department allowed Vernon Amos, at his request, to speak with Sgt. Albert Dowdell of the Belle Glade Police Department, a man that Vernon Amos knew from the town where he resided. Sgt. Dowdell promised the Defendant that if he cooperated with the Sheriff's Office in identifying the other black male (Leonard Spencer) that the Sheriff's Office would not recommend the death penalty. (R. 4628). Vernon Amos then proceeded to give a videotaped statement to the Sheriff's Office. (R. 4653). During the statement Vernon Amos tells the detectives that he was unaware that codefendant Leonard Spencer was going to try and rob the Mr. Grocer and that he was forced, at gunpoint, to go with Leonard Spencer and drive. Vernon Amos told them that he had come over from Belle Glade to Palm Beach with Spencer to meet women. (R. 4657). Vernon Amos stated that he only knew the co-defendant as "Spencer" and did not know his first name.

Vernon Amos stated that he thought they were going into the store to buy some cigarettes. Vernon Amos told the detectives that he witnessed the murders at the hands of Spencer and did nothing to help except what Spencer coerced.

Vernon Amos' statement was suppressed after a motion to suppress was filed and the State agreed not to use the statement in its case in chief. (R. 291). Vernon Amos filed a motion to sever defendants prior to trial which was denied. (R. 309). At trial, counsel for the co-defendant was permitted, over objection, to directly comment on the statements which Vernon Amos sought suppression of in his motion to suppress statements. (R. 1811-1817).

Palm Beach County has two "jury districts" that geographically divide the county in half east and west. by local administrative order every criminal trial automatically is set in the eastern district for trial; but, if the crime is alleged to have occurred in the western district, then at the defendant's option and only if he requests if, trial may be had in the western jury district. In whichever jury district a case ends up going to trial, jurors are drawn only from within that jury district for the trial. (R. 5247-5248)

Vernon Amos' crimes were alleged to have occurred in the eastern half of the county, so his trial was set to take place in the eastern district before a jury drawn only from that district. However, Mr. Amos lives in the western half of the county. He also happens to be Black. (R.5423) So, before his trial on two

counts of first degree murder and other felonies, Vernon Amos and co-defendant Leonard Spencer asked the trial court for an order requiring the clerk of the court to draw a jury pool from Palm Beach County at large for selecting petit jurors to try his case. (R.5245-5265, 5422-5424)

In his motion Amos challenged the constitutionality of the "jury district" system used in Palm Beach County, and objected to drawing prospective jurors for his trial only from the eastern half of the county, primarily on grounds of a racial bias built into the system: because, for a trial like his, it would mean drawing prospective jurors only from the eastern half of the county where the population base is less than 10% Black, and drawing none at all from the western half of the county where the population is over 50% Black. (R. 5249-5258)

He also maintained that the system denies defendants tried in the respective jury districts equal protection of the laws (R.5264-5265), and made other challenges to its validity (R.5258-5263). The trial court entered a written order denying the motion. (R.5269-5442)

Later, pursuant to local administrative order allowing persons accused with crimes in the western jury district to request trial in that district (and even though Amos' crime was alleged to have occurred in the eastern jury district), Amos asked that his case be transferred to the Glades Jury District for trial, claiming it would be denial of equal protection to

refuse his request (R.5299-5302, 5422-5424) The court also denied that motion (R. 100-101).

On day of trial Amos renewed his motion for a county-wide jury pool. Once again, the Court denied it. (R. 345-349)

During jury section the trial court on its own motion and over the objection of the defense excused two black jurors for arriving two minutes early from recess on the floor that the trial was being held. (R. 779-782).

During trial the State never elicited in court identification from any of the eyewitnesses. The photopaks that were used were not brought to court until after the witnesses had testified. (R. 3380-3381). The photopaks were not marked for identification until after the eyewitnesses had testified. (R. 5170). The photopaks were never shown to the eyewitnesses nor were they available to be shown.

After the close of the State's case and the denial of Vernon Amos' motions for judgment of acquittal, Vernon Amos was denied his right to testify in his own defense. Vernon Amos, through counsel, stated his desire to testify. (R. 3877). At no point was a motion in limine made by the State or the codefendant Leonard Spencer. The trial court sought to require Vernon Amos to give a proffer of all of his testimony. Vernon Amos offered to give an oral proffer, through counsel, of the substance of his testimony. (R. 3883). The trial court planned to send the jury home for the day and required a live proffer of all of Vernon Amos' testimony with cross examination by the State and the co-

defendant and daily overnight copies to the parties to use the next day. At no point did any party state any particular reason for the proffer other than a claim by the co-defendant that he wanted discovery. The trial court then badgered the defendant with the same question over and over in an attempt to create a better record on appeal. The colloquy went as follows:

> The Court: Mr. Amos you have heard the discussions that we've had with regard to whether you were going to testify or not. Is that correct?
>
> Defendant Amos: Yeah.
>
> The Court: Now, you have in effect told me through your lawyer that you were going to testify. Is that correct?
>
> Defendant Amos: Yeah, was.
>
> The Court: And you are now through your lawyer telling me that you are not going to testify? Is that correct?
>
> Defendant Amos: Under the circumstances, right.
>
> The Court: All right. Now, what are the circumstances that you determine that prevent you from testifying or that make you decide -- rather than to prevent you but make you decide that you are not going to testify?
>
> Defendant Amos: Uh, because of the fact that the State and the codefendant wants transcriptions of this pretrial testimony.

(R. 3888).

* * * * *

> The Court: Mr. Amos, is anybody keeping you from testifying in this case?
>
> Mr. Boudreau: Your honor, I object to that question and I advise my client to maintain his right to remain silent.

The Court: Mr. Amos, I am ordering you to answer this question. Is anyone preventing you from testifying in this case?

(Whereupon, Defendant Amos conferred with Mr. Boudreau.)

The Court: Mr. Amos did you hear my question?

Defendant Amos: (Nods head affirmatively.)

The Court: I'm going to require you to answer out loud and take your hand away from in front of your face.
Did you hear my question?

Defendant Amos: Yeah, I heard you.

The Court: Is anyone preventing you from testifying in this case?

Defendant Amos: I maintain my right to remain silent.

The Court: Your right to remain silent is only as to such matters that might incriminate you under the Fifth Amendment to the United States Constitution.
I am ordering you to answer my question. If you do not, you will be subjecting yourself to contempt of this Court. If I give you a jury trial with regard to that contempt of court and you are found guilty of Contempt of Court, I can theoretically sentence you to life imprisonment in the Department of Corrections of the State of Florida.
If I do not give you a jury trial and you are found in contempt of court, you can theoretically be sentenced to up to five months and twenty-nine days.
I am ordering you to answer my question. Is anyone preventing you from testifying in this case?

(Whereupon, Defendant Amos conferred with Mr. Boudreau.)

The Court: Mr. Amos, did you hear what I asked you?
Mr. Amos, can you hear me now?

Defendant Amos: Yeah.

The Court: Did you hear what I asked you?

Defendant Amos: Yeah, I heard you.

The Court: And what is your response to me when I asked you if someone is preventing you from testifying in this case?

Defendant Amos: Your rules.

The Court: My rules? Is there anything else other than my rule that is preventing you from testifying in this case?

Defendant Amos: No.

(R. 3926-3928).

Vernon Amos was not permitted to testify before a jury of his peers. He sits on death row today waiting to testify.

Vernon Amos made a motion for judgment of acquittal alleging that the State proved nothing more than mere presence. (R. 3646) The motion was denied. (R. 3646).

On November 21, 1986 the jury returned the verdict of guilty to Count I - First Degree Murder (Alan McAnich), Count II - Robbery with a Firearm, Count III - Attempted First Degree Murder with a Firearm, Count IV - Robbery with a Forearm, Count V - First Degree Murder (Robert Bragman), Count VI - Robbery with a Firearm, Count VIII - Aggravated Assault with a Firearm, and Count IX - Robbery with a Firearm. (R.5529).

At the Phase II hearing it was shown that Vernon Amos had a father that was never around. His mother sent him away to live with his grandmother at age seven. He never completed high school. He always had a job of some kind or another. Vernon Amos has two children, one which was born after his arrest. He had a loving relationship with his daughter, whom he supported financially and frequently spent time. His employer at the Food

Way in Philadelphia purchased two suits for Vernon Amos to wear at the trial. (R. 4615-4623).

At the Phase II hearing Vernon Amos attempted to present nonstatutory mitigating evidence to the jury but was prevented by the trial court. This evidence consisted of the testimony of Sgt. Albert Dowdell and the videotaped interview with Vernon Amos which was mentioned with record pages, supra.

Prior to announcing sentence the trial court considered victim impact testimony from family members of the victims. (R. 4939-4973).

On December 17, 1986 the jury returned an advisory sentence of life imprisonment on Count I and recommended death by a vote of 8 to 4 in Count V. (R.5594).

On Christmas Eve, December 24, 1986 the trial court overrode the jury recommendation of life imprisonment in Count I and sentenced Vernon Amos to death in the electric chair. (R.5629-5633).

On December 24, 1986 the trial court, in Count V, sentenced Vernon Amos to death in the electric chair. (R.5634-5638).

On December 24, 1986 the trial court sentenced Vernon Amos to life imprisonment with a three (3) year mandatory minimum "...because of my determination that you had a derringer firearm with you at the time." On Count III the Defendant was sentenced to life imprisonment with a three (3) year mandatory minimum. On Count IV the trial court sentenced Vernon Amos to life imprisonment. On Count VI the trial court sentenced Vernon Amos to life

imprisonment with a three (3) year mandatory minimum "...because of my determination that you had and used your derringer firearm at the time." The trial court sentenced Vernon Amos to five (5) years imprisonment on Count VIII. On Count IX the trial court sentenced Vernon Amos to life imprisonment. The trial court ordered that all of the sentences "...run consecutive to each other and consecutive to the two death sentences imposed by the court in this case." (R.5639).

SUMMARY OF ARGUMENT

Vernon Amos is entitled to reversal based upon the trial court's erroneous ruling denying his motion for judgment of acquittal. Mere presence at the scene of a crime, without more, is insufficient to sustain a conviction as an aider and abettor. Horton v. State, 442 So.2d 1064 (Fla.1st DCA 1983); J.H. v. State, 377 So.2d 1219 (Fla. 3d DCA 1979).

The trial court impermissibly infringed upon or burdened Vernon Amos' fundamental right to testify in his own behalf. In doing so the trial court denied him his right to testify in violation of the Sixth and Fifth Amendments to the United States Constitution.

Despite the fact that Vernon Amos had made a pretrial motion to sever and had requested during trial to make a proffer concerning the defendant's testimony, and there was no suggestion or even possibility of surprise due to the defendant's decision

to testify, the trial court ruled that the defendant would not be permitted to testify in his own behalf unless he first submitted to questioning on the substance of his proposed testimony, including cross-examination by codefendant's counsel and the prosecutor, in the absence of the jury. The court further ruled that any inconsistent testimony given by the defendant during such questioning could be used to impeach his subsequent testimony before the jury. In view of this restriction, the defendant was forced to decide not to testify.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the U.S. Supreme Court held, point blank, that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." In a county with less than 10% Black voters, a very significant concentration of Black voters are removed from jury duty at the main courthouse in the urban eastern half of the county, and are concentrated instead for jury duty at a branch courthouse in the rural western half of the county.

The present jury district system in use in the Fifteenth Judicial Circuit "discriminates racially and is unconstitutional." State v. Alix Joseph, Case No. 87-619 CF A02, Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida (Harold J. Cohen, Judge).

The trial court abused its discretion by excusing two black jurors upon its own motion in an arbitrary manner.

The rules of evidence and the confrontation clause are not always "congruent." California v. Green, 399 U.S. 149 (1970). Vernon Amos was denied his right to cross-examine his accusers by the trial court by using hearsay testimony of identification and denying him the opportunity to cross-examine the witnesses that identified him. The State was permitted to deny this opportunity by not marking the photopaks or bringing them to court until after all the eyewitnesses had testified.

The nations highest court, in Enmund v. Florida, 458 U.S. 782 (1982), held that where the killing is done by a co-felon, a defendant may only be sentenced to death where the defendant himself either attempted to kill or killed someone. In the case at hand, there is no evidence in the record to suggest that Vernon Amos planned the murders or robberies with Leonard Spencer, carried a firearm at any time, participated in the robberies, attempted to kill, or intended to kill.

The trial court impermissibly limited Vernon Amos' presentation of nonstatutory mitigating circumstances and precluded the jury from hearing this testimony. Hitchcock v. Dugger, ___ U.S. __, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Lockett v. Ohio, 438 U. S. 586 (1978); Morgan v. State, 515 So. 2d 975 (Fla. 1987).

The trial court improperly found the existence of three statutory aggravating factors: (a) committed to avoid lawful arrest; (b) committed for pecuniary gain; and, (c) cold, calculated and premeditated manner. First, the court improperly found

the aggravating factor of committed to avoid lawful arrest in the absence of a clear showing that the dominant or only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So. 2d 1278 (Fla. 1979).

Second, the trial court improperly doubled up the aggravating factor of committed while he was engaged in or an accomplice in the commission of or an attempt to commit or in flight after committing or attempting to commit the crime of robbery with the aggravating circumstance of committed for pecuniary gain. Oats v. State, 446 So. 2d 90 (Fla. 1984); Perry v. State, 395 So. 2d 170 (Fla. 1980).

Third, the trial court misapplied the aggravating circumstance that the homicides were was committed in a cold, calculated and premeditated manner. "This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings." Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Bates v. State, 465 So.2d 615 (Fla. 1976).

In light of these invalid aggravating circumstances and the presentation of mitigating factors, the sentence must be vacated and remanded for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

The trial court improperly considered victim impact testimony prior to pronouncing sentence. Booth v. Maryland, _____U.S._____, 55 L.W. 4836, 4839 (June 16, 1987).

Finally, Vernon Amos raises a series of standard death penalty motions that this Court has seen previously and denied.

However, in order to preserve these issues and at the chance that this Court may view them differently with time, Vernon Amos argues them in this his initial brief.

In conclusion, Vernon Amos respectfully requests this Honorable Court reverse the judgment and sentence entered by the trial court.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING VERNON AMOS' MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO ALL COUNTS.

The evidence presented at trial as outlined in the Statement of Facts, supra, fails to establish that Vernon Amos participated in the criminal activities of Leonard Spencer. In fact the only evidence that could infer participation on the part of Vernon Amos was the statement made to witness Alan Sendenka at the third and final crime scene <u>after</u> the murders took place. That statement, occurred after Leonard Spencer had placed a gun to the head of Alan Sendenka upon which Vernon Amos stated, "Do what he says or he'll kill you." Witness Alan Sendenka testified that Vernon Amos appeared "quite scared" when he made this statement. There are two reasonable hypotheses that explained this statement. The first hypothesis argued by the State, is that this statement was made in furtherance of a joint criminal undertaking. The second hypothesis, as argued by Vernon Amos at trial, is that this statement was made in an attempt to make the victim,

Alan Sendenka, aware of Leonard Spencer's homicidal nature. In fact, it is more that reasonable to believe that Vernon Amos, having witnessed Leonard Spencer kill two men that evening, was trying to prevent Alan Sendenka from becoming the third murder victim.

Regardless of the foregoing argument, this statement did not occur until after the two murders had taken place. Horton v. State, 442 So.2d 1064 (Fla.1st DCA 1983) involved a defendant who was present while it appeared that his co-defendant was burglarizing an automobile. The court stated:

> "Before an accused may be convicted as an aider and abettor, it must be shown not only that he assisted the actual perpetrator but he intended participate in the crime. Riles v. State, 112 Fla. 4, 150 So. 132 (1933); Cox v. State, 394 So.2d 237 (Fla. 1st DCA); J.H. v.State, 370 So.2d 1219 (Fla. 3rd DCA 1979)."
>
> Even assuming that Horton knew that Cortney had wilfully entered the buick without authority (trespass), mere knowledge that an offense is being committed is not the same as participation with the requisite criminal intent. Collins v. State, 447 So.2d 364 (Fla. 3rd DCA 1983). Moreover, mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact is not sufficient to establish participation. J.L.B. v. State, 396 So.2d 761 (Fla. 3rd DCA 1981); Collins v. State, supra.

Id. at 1065, 1066.

The Third District Court of Appeal in J.H. v. State, 377 So.2d 1219 (Fla. 3d DCA 1979) stated: "[F]or one to be convicted as an aider and abettor, it must be demonstrated not only that he assisted, but that he intended to participate in the perpetration

of the crime in question." See also: Chaudion v.State, 362 So.2d 398 (Fla. 2nd DCA 1978) (Mere presence insufficient to establish either intent to participate or active participation).

Section 777.011, Florida Statutes (1987), provides:

> "Whoever commits any criminal offense against the State, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principle in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense."

There has been no showing that Vernon Amos either had the intent to participate in any robbery, murder, or other offense charged in the indictment, nor was it shown that he aided, abetted, counseled, hired or procured Leonard Spencer to commit those offenses. Therefore the trial courts erred in denying VERNON AMOS' motions for Judgment of Acquittal at the close of the State's case and at the close of all of the evidence.

II. THE TRIAL COURT ERRED FUNDAMENTALLY BY DENYING VERNON AMOS THE RIGHT TO TESTIFY IN HIS OWN BEHALF.

It is well settled that a defendant in a criminal case has the right to take the witness stand and to testify in his own behalf. Rock v. Arkansas, 107 S. Ct. 2704 (1987). This is a fundamental right which has its sources in several provisions of the federal Constitution. Id. The right is found in the due process clause of the Sixth Amendment, and the Fifth Amendment guarantee against compelled testimony. Id. The right of the

accused to testify in his own behalf is also a "mandatory organic rule of procedure in all prosecutions in all courts of this state." Hall v. Oakley, 409 So. 2d 93, 95 (Fla. 1st DCA 1982), disapproved of on other grounds in State v. Page, 449 So. 2d 813 (Fla. 1984); Fla. Const. Art. 1, §16; accord Cutter v. State, 460 So. 2d 538 (Fla. 2d DCA 1984); Moore v. State, 276 So. 2d 504 (Fla. 2d DCA 1973); Deeb v. State, 131 Fla. 362, 179 So. 894 (1937).

Although the right to present relevant testimony is not without limitation, and the right may in appropriate cases bow to accomodate other legislative interests in the criminal trial process, restrictions on the defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. Rock v. Arkansas, supra. The court may not impermissibly infringe upon or burden a defendant's fundamental right to testify in his own behalf. United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); Johnson v. United States, 404 A.2d 162 (D.C. 1979); Apodaca v. People, 712 P.2d 467 (Colo. 1985); see Johnson v. State, 380 So. 2d 1024 (Fla. 1979) (finding that no unreasonable burden was placed on the defendant's right to testify).

While a defendant may waive his right to testify, his decision whether to testify must be made in an atmosphere free of coercion or intimidation, Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); Apodaca v. People, supra, and it must be made freely and voluntarily. Suarez v.

State, 502 So. 2d 526 (Fla. 2d DCA 1987). Such a free and uncoerced decision is critical to the fairness of the trial itself. Apodaca v. People, supra.

In the instant case, during trial when defense counsel stated that Vernon Amos would testify in his own behalf, co-defendant's counsel requested a discovery deposition of the defendant. Despite the fact that Vernon Amos had made a pretrial motion to sever and had requested during trial to make a proffer concerning the defendant's testimony, and there was no suggestion or even possibility of surprise due to the defendant's decision to testify, the trial court ruled that the defendant would not be permitted to testify in his own behalf unless he first submitted to questioning on the substance of his proposed testimony, including cross-examination by codefendant's counsel and the prosecutor, in the absence of the jury. The court further ruled that any inconsistent testimony given by the defendant during such questioning could be used to impeach his subsequent testimony before the jury. In view of this restriction, the defendant was forced to decide not to testify.

The trial court had no authority to make such a ruling and the restriction imposed by the court was arbitrary and disproportionate to any purpose designed to be served and impermissibly infringed upon the defendant's fundamental right to testify. In the face of such a restriction, Vernon Amos' choice not to testify was not freely and voluntarily made, but was coerced by the trial court.

Two points must be noted which relate to the impermissible restriction placed on the defendant's right to testify in this case. First, the defendant made a pretrial motion to sever which was denied. This entire incident could have been averted had the motion been granted. If the trial court deemed it necessary during the middle of trial to allow the codefendant to conduct discovery as to the defendant's testimony, then it would appear that severance was necessary to assure a fair determination of each defendant's guilt. See Crum v. State, 398 So. 2d 810 (Fla. 1981); Fla.R.Crim.P., 3.152(b)(1). Thus, it was an abuse of discretion to deny Vernon Amos' motion for severance.

In the alternative, if denial of the motion for severance is found not to be an abuse of discretion, then the codefendant had no right to discovery of the defendant's testimony in the middle of trial. The defendant did not give a statement to codefendant's counsel prior to trial and then change his story; he simply decided to testify in his own behalf. See O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983). The codefendant was fully aware of what the defendant would say at trial. The trial court exceeded its authority in requiring the defendant to submit to full cross-examination as a prerequisite to being permitted to exercise his right to testify.

Second, it must be noted that defense counsel was fully prepared and, in fact, requested to make a proffer of the defendant's testimony before the defendant took the stand. Certainly, no more was required of the defendant. See, e.g.,

Nava v. State, 450 So. 2d 606 (Fla. 4th DCA 1984) (discussing the purpose of a proffer); Jacobs v. Wainwright, 459 So. 2d 200 (Fla. 1984) (same); Keen v. State, 456 So. 2d 571 (Fla. 2d DCA 1984) (same); Johnson v. United States, supra (noting that defense counsel proferred defendant's testimony); see also Davis v. Jabe, 630 F. Supp. 1102 (E.D. Mich. 1986), rev'd on other grounds, 824 F.2d 483 (6th Cir. 1987) (proffered testimony of defendant's witness). There is no authority for the trial court's ruling requiring the defendant to submit to a thorough examination and cross-examination out of the jury's presence before being permitted to testify, even if his testimony came as a surprise to the prosecution or his codefendant. See id.

Based on the foregoing circumstances surrounding the trial court's ruling, it is clear that the ruling in this case was improper. In various other situations, the courts have held that certain restrictions placed on the defendant's right to testify were impermissible infringements on that right. E.g., Rock v. Arkansas, supra (Arkansas's per se rule excluding all hypnotically refreshed testimony infringed impermissibly on criminal defendant's right to testify in his own behalf); Hall v. Oakley, supra (trial court erred in ruling that if the defendant elected to testify, his testimony could be impeached by the use of a five-year-old petit larceny conviction; it should be noted that the court also held that the defendant is not required to testify in order to preserve such an issue for appellate review; it should also be noted that the court's holding that the petit

larceny conviction could not be used to impeach the witness's testimony was disapproved of in State v. Page, 449 So. 2d 813 (Fla. 1984)); Johnson v. United States, supra (trial court's ruling that if the defendant testified, counsel was required to refrain from questioning his client on direct examination and from arguing his client's testimony to the jury during closing, which resulted in the defendant electing not to testify, denied the defendant his right to testify); United states ex rel. Wilcox v. Johnson, supra (trial court's ruling that if the defendant testified, he would have to represent himself denied the defendant his right to testify); People v. Chavez, 621 P.2d 1362 (Colo. 1981), cert. denied sub nom. Colorado v. Chavez, 451 U.S. 1028 (1981) (requiring a defendant facing habitual criminal charges to choose between his constitutional right to testify in his own defense and his constitutional right to require the state to prove the elements of habitual criminality beyond a reasonable doubt creates an intolerable tension between two constitutional rights in violation of due process of law); People v. Myrick, 638 P.2d 34 (Colo. 1981) (recognizing that a defendant's right to testify may not be impermissibly "chilled" by imposing a penalty for exercising the right); see also Johnson v. State, supra (holding that the procedure used for impeachment in Florida did not place an unreasonable burden on a defendant's right to testify).

As in the foregoing cases, the court's ruling in this instance impermissibly infringed on the defendant's right to

testify and denied him that right. Not only would implementation of the court's ruling have given the prosecution an unfair advantage, it would have subjected the defendant to possible impeachment on impermissible grounds. Under such conditions, the defendant was forced to forego his right to testify. The denial of this fundamental right was a prejudicial and reversible error. Hall v. Oakley, supra; see Demps v. Wainwright, 805 F.2d 1426 (11th Cir. 1986), cert. denied, 108 S. Ct. 209 (1987) (substantial interference with defense witness's free and unhampered choice to testify violated due process rights of the defendant, and when such violation occurs, the court must reverse the conviction without regard to prejudice to the defendant).

Accordingly the defendant's conviction must be reversed.

III. THE TRIAL COURT ERRED FUNDAMENTALLY BY DENYING VERNON AMOS' PRE-TRIAL MOTION FOR A JURY VENIRE DRAWN FROM PALM BEACH COUNTY AT LARGE (RATHER THAN FROM A "JURY DISTRICT" OF ONLY ONE-HALF THE GEOGRAPHICAL AREA OF THE COUNTY),

AND

ERRED IN VIOLATION OF "EQUAL PROTECTION" STANDARDS OF STATE AND FEDERAL CONSTITUTIONAL LAW BY DENYING A DEFENSE REQUEST FOR TRIAL IN THE WESTERN HALF OF THE COUNTY OR GLADES JURY DISTRICT,

AND

ERRED FUNDAMENTALLY IN DENYING THE PRE-TRIAL DEFENSE MOTION TO RE-SET THE CASE FOR TRIAL DURING A WEEK WHEN THE JURY POOL ALREADY WAS SCHEDULED TO BE DRAWN COUNTY-WIDE FOR USE IN SELECTING A NEW GRAND JURY.

The Fifteenth Judicial Circuit consists of only one county, Palm Beach County. Two "jury districts" exist in this circuit. These two jury districts were created, and the boundary drawn

between them, by a local Administrative Order of the Circuit Court, **Administrative Order No. 1.006-1/80,** "In Re: Glades Jury District/Eastern Jury District." The boundary is a north-south line that splits the county into two jury districts, one on the east side of the county, the other on the west side. The boundary line between them divides the county, geographically, exactly in half. The jury districts are used for drawing jury pools within the respective districts for trials of both civil and criminal cases, and in the case of criminal trials for both misdemeanors and felonies, in both County and the Circuit Courts sitting in the districts.

One district is called the "Glades Jury District", drawing jurors only from the area of Palm Beach County west of Twenty-Mile Bend (i.e., Range Line 39), or from that area of the county more commonly known as "the Glades". The other is called the "Eastern Jury District", drawing jurors only from the eastern half of the county along the coast.

The Administrative Order creating the districts was adopted by the Circuit Court hereon authority of Florida Statutes, Section 40.015. That statute says:

Jury Districts; counties exceeding 50,000

> (1) In any county having a population exceeding 50,000 according to the last preceding decennial census an one or more locations in addition to the county seat at which the County or Circuit Court sits and holds jury trials, the Chief Judge, with the approval of a majority of the Circuit Court Judges of the Circuit, is authorized to create a jury district for each courthouse location, from which jury lists shall be

> selected in the manner presently provided by law.
>
> (2) In determining the boundaries of a jury district to serve the court located within the district, the board shall seek to avoid any exclusion of any cognizable group. Each jury district shall include at least 6,000 registered voters.
>
> Section 40.015, Florida Statutes.

The local Administrative Order that was adopted pursuant to the statute says, in pertinent part:

> A Glades Jury District has been established by a majority vote of the Judges of the Fifteenth Judicial Circuit and by resolution of the Board of County Commissioners of Palm Beach County. In implementing this District, the Glades Courthouse Annex is designated as a situs for holding the following jury trials:
>
> CIRCUIT COURT CRIMINAL
> Normally, all felony jury trials are held at the main courthouse in West Palm Beach; however, where the situs of the crime is within the Glades Jury District, defendant's counsel may request a jury trial at the Glades Annex. In all such cases, the Clerk shall furnish defendant's counsel with form of "Notice and Preference re: Jury District", which form shall be signed and filed by him no later that fifteen days after the case is set for trial.
>
> * * *
>
> GRAND JURY
> This Order does not affect the Palm Beach County Grand Jury, which shall be drawn from the county at large.

As a result, and over his objections, Vernon Amos was tried and convicted on capital charges, and received a jury recommendation of death in Count V (which recommendation the court followed), by a jury drawn only from the eastern half of the county.

Totally excluded from the pool of prospective jurors for trial of his case were all persons living in the entire western half of the county where Vernon Amos himself resides, and where a majority of the population, like the Amos himself, is Black.

Now, on appeal, Vernon Amos challenges the constitutional validity of such a jury district system, and of such a trial.

The western half of the county or Glades Jury District is rural, consisting exclusively of small towns like Belle Glade, South Bay, and Pahokee. It is heavily oriented to farming and farm labor, and, so, to minority populations such as Hispanic and Black. (R. 5249).

The Eastern Jury District is urban. It is characterized by wealthy urban communities like Jupiter, Palm Beach, Wellington, and Boca Raton, all communities that are predominantly caucasian, and is dominated by a major metropolitan area of high-density population, i.e., the West Palm Beach metropolitan area. (R. 5249).

[The differences between the two areas of the county were exemplified by some recent stories in the national press just prior to Vernon Amos' trial. At the same time that the towns of Palm Beach and Wellington were receiving national press attention for Prince Charles and championship polo, the town of Belle Glade was receiving the same attention for poverty and an AIDS epidemic. (R. 5249).

Since jury pools in Palm Beach County are drawn from voter registration lists, Vernon Amos in adopting codefendant Leonard

Spencer's motion documented the racial diversity between the two jury districts by presenting facts on the county's registered voters. Data maintained by the Palm Beach County Supervisor of Elections revealed the following about voter registration (and, therefore, about the pools of citizens from which furors are drawn) in Palm Beach County (R. 5250-5251):

TOTALS FOR PALM BEACH COUNTY AS A WHOLE VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACKS	PERCENTAGE BLACK
398,797	29,859	7.487%

TOTALS FOR GLADES JURY DISTRICT VOTER REGISTRATION

TOTAL REGISTERED VOTERS	BLACKS	PERCENTAGE BLACK
9,549	4,974	52.08

In the western half of the county where jurors are drawn only from within that district, the system draws from a voter registration list, from a pool of citizens, that is over 50% Black. Based on voter registration, the western half of the county is 52.08% Black. Yet, in the whole county there are 398,797 registered voters and only 29,859 of those are Black, meaning on a county-wide basis Blacks make up only 7.487% of the population base from which jurors are drawn.

This means that in a county with less than 10% Black voters, a very significant concentration of Black voters are removed from jury duty at the main courthouse in the urban eastern half of the

county, and are concentrated instead for jury duty at a branch courthouse in the rural western half of the county. This distorts the population mix in both jury districts, and in both districts fails to draw prospective jurors from a fairly representative cross-section of the entire county.

When drawing jurors on a county-wide basis, if using a system designed to draw a fair cross representation of the county, the system would impartially draw from a population mix that is seven and a half percent Black.

Vernon Amos does happen to be Black, and does happen to be a resident of the western half of the county. But, even without those factors, the failure to preserve the county's racial diversity in the county's jury selection process is a defect that is fundamental.

The right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government, and is the cornerstone of a fair and impartial trial, and any infringement of that right constitutes fundamental error. Nova v. State, 439 So.2d 255 (Fla. 3rd DCA 1983), at 262.

In Bass v. State, 368 So. 2d 447 (Fla. 1st DCA 1979), the appeals court reversed a defendant's conviction because of a violation of the fair-cross-representation requirement, where there was a shortage of prospective jurors in the regular venire, and, so, the trial court had the sheriff to summon enough qualified persons to complete the jury panel. A deputy sheriff and the court clerk drew the balance of the jury panel from their

all-caucasian church and their all-caucasian acquaintances. The appeals court found it to be a systematic, though unintended, exclusion of Blacks, and reversed, because,

> The constitutional guaranty of a jury trial includes assurance that the jury be drawn from a fairly representative cross-section of the community.
>
> Bass v. State, id., at 449.

The Fifteenth Judicial Circuit itself is split on the constitutionality of its own jury district system. After commencement of this instant appeal, the same pre-trial demand for a jury pool drawn from the county at large, on the same grounds, was granted in another case by another circuit court judge in Palm Beach County. [And since that time, it has been granted in numerous other cases.] That case now is on appeal to the Fourth District Court of Appeal: Alix Joseph v. State, 4th DCA Case No. 87-6199.

[A certified copy of the circuit court's order in Joseph is attached to Appendix A of the coappellant Leonard Spencer's initial brief and is adopted herein by reference. State v. Alix Joseph, Case No. 87-619 CF A02, Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida.]

Circuit Court Judge Harold Cohen, in Joseph, supra, at 2-3, finds:

> ....that the jury district system used for drawing petit jurors in Palm Beach County discriminates racially and is unconstitutional.

Judge Cohen in Joseph does what Vernon Amos sought in this case: a finding that the present jury district system in use is unconstitutional, and an order directing the Clerk of Court to draw a jury pool from Palm Beach County at large for trial of the case.

Even though Judge Cohen finds a pragmatic reason for the districts, he, nevertheless, finds the racial discrimination resulting from the present system unintentional and not purposeful:

> Nevertheless, the Court cannot overlook the result that has developed, albeit, the un-intentional result, of the "jury district" system. The system presently in use in this Circuit has removed from jury duty in the main courthouse in the Eastern District in West Palm Beach a significant concentration on Blacks. The Black concentration of prospective jurors has then been shifted to the Glades Jury District in Belle Glade and has a significant impact in maintaining a fair racial balance in the overall selection process for petit juries in both the Glades and Eastern Jury Districts of Palm Beach County.
>
> * * *
>
> Although there in so intent found to cause any racial discrimination, the unintended result simply fails to maintain a basic population mix that is not racially discriminatory. In Jordan v. State, 293 So.2d 131 (2nd DCA 1974) the Court said: It should be observed at this point that the record indicates no bad faith or purposeful intention to discriminate in the jury selection process. Yet, the net effect of the system, as it relates to the appellant, was that his jury panel and the venire form which it was selected (as well as the master jury list which was the ultimate source of both) were constituted as if there had been purposeful discrimination. Jury Commissioners, even those with the purest of motives, are "under a constitutional duty to

> follow a procedure - "a course of conduct" - which would not "operate to discriminate in the selection of jurors on racial grounds." Jordan v. State, supra, at 134, citing Avery v. Georgia, 354 U.S. 559, 561.

Judge Cohen quotes from the decision in Jordan v. State, supra, where the appellate court states:

> Apart from the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, the Sixth Amendment to the U.S. Constitution guarantees the accused a trial by an impartial jury. This comprehends that in the selection process there will be a "fair possibility for obtaining a representative cross section of the community." Williams v. Florida, 399 U.S. 78, 100 ... Where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drown from a fair cross section of the community requires that the jury be drawn from the whole county and not from some political sub-units thereof to the exclusion of others. Preston v. Mandeville, 479 F.2d 127 (5th Cir. 1973). A white defendant who was charged with a crime allegedly perpetrated against a black could be similarly aggrieved if the jury list from which his venire were drawn came only from those precincts having a disproportionately high number of blacks.
> Jordan v. State, supra, 134.
>
> State v. Joseph, supra, at pages 4-5

Federal interpretations of these same constitutional standards support Judge Cohen's and Appellant Amos' position here.

The Sixth Amendment of the U.S. Constitution guarantees a jury selection process that draws from a representative cross-section of the community. Federal court decisions make it clear this right is absolute, and that when it is violated no prejudice or bias need be shown for the defendant to have standing to

complain, and that a violation os prohibited even if the defendant himself is not a member of the "class" of citizens unlawfully excluded.

In Peters v. Kiff, 407 U.S. 493 (1972) the U.S. Supreme Court held that the exclusion of blacks constitutes denial of due process to any defendant, white or black. Standing to complain exists even if the defendant is not himself a member of the class excluded. And harm need not be shown.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable...
>
> * * *
>
> It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce*** In light of the great potential for harm latent in the unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.
>
> Peters v. Kiff, 407 U.S. at 503-504 (footnote omitted).

In Duncan v. Louisiana, 391 U.S. 145 (1968), the court extended these Sixth Amendment rights to criminal trials in state courts.

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the government ... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge... The deep commitment of the Nation to the right of jury trial in serious criminal cases

> as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.
>
> Duncan v. Louisiana, 391 U.S. at 155-156.

In Williams v. Florida, 399 U.S. 78 (1970), the court upheld juries composed of only six rather than the traditional twelve, and in doing so reaffirmed that in criminal trials the system used to select the six must draw from a group of laypersons representative of a fair cross-section of the community, and that this latter right is part and parcel of the Sixth Amendment right of fair trial by jury. Williams v. Florida, 399 US. at 101.

Finally, in Taylor v. Louisiana, 419 U.S. 522 (1975), the U.S. Supreme Court held, point blank, that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. at 528.

> We accept the fair-cross-representation requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirements has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power-- to make available to the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155-156, 20 L. Ed.2d 491, 88 S.Ct. 1444. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also

> critical to public confidence in the fairness of the criminal justice system. Restricting service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. .. [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Thiel v. Southern Pacific Co.., 328 U.S. 217, 227, 90 L.Ed. 1181, 66 S.Ct. 984, 166 ALR 1412 (1946) (Frankfurter, Jr. dissenting).
>
> Taylor v. Louisiana, 419 U.S. at 530-531.

In addition to the question of racial bias, Vernon Amos raised a substantial "equal protection of the laws" challenge. (R. 5264-5265)

The constitutional right of "equal protection of the law" means that every one is entitled to stand before the law on equal terms with, and to enjoy the same rights as belong to others in like situation. c.f., Caldwell v. Mann, 157 Fla. 633, 26 So.2d 788 (Fla. 1946).

Palm Beach County's jury-district system denies equal protection of the law to the defendant charged with an offense in the Eastern Jury District. A person charged with a crime in that district, say in West Palm Beach, has no choice but to stand trial at a courthouse in that district, before a jury drawn only from that district. People from the community where the crime is alleged to have taken place automatically are included in the selection process for the petit jury.

But, according to eh administrative order creating the county's jury districts, another person charged with the same crime, when alleged to have occurred in the western or Glades District, say in Belle Glade, automatically gets trial in West Palm Beach using a jury drawn only from the Eastern District. That automatically excludes and completely disqualified for jury service all persons living in the town or area on the county where his crime is alleged to have occurred. This is so unless the defendant himself, in that Belle Glade crime, personally elects to stand trial in the Glades District, which he is free to elect at his total discretion. The case is transferred to that jury district only if and only when he makes that election, and no grounds need be given for his election. Administrative Order 1.006-1/80. (R.5248)

Since the Belle Glade defendant at his option may totally exclude from service on his jury all persons who come from the specific town or area of the county where his crime is alleged to have occurred, he has an automatic and very real change of venue. He may enjoy that change of venue at his discretion. The West Palm Beach defendant has no such right. This holds true even though the two defendants are charged with the same crime in the same county and are to be tried before the same court by the same prosecutor. This is a clear denial of equal protection of the law.

Vernon Amos made just such request for trial in the Glades Jury District, tracking the administrative order (R.5422-5424),

and it was denied (R. 5442). Yet another defendant with identical charges, if alleged to have occurred in the Glades District, could make the identical request to Amos' and it would be granted as a matter of administrative rule, automatically.

The racial factor makes the denial of equal protection even more profound. The accused charged with a crime in the western half of the county has freedom to choose a jury drawn from a group of citizens in the western half of the county that is over 50% Black, or from a group in the eastern half where less that 10% of the population drawn from is Black. The other defendant is compelled to stand trial with a jury drawn from a population base less than 10% Black.

Another factor constituting the same denial of equal protection is the practice described by the trial judge of summonsing people on a county-wide basis for Grand Jury duty, and then, for the convenience of the court, using them for petit jury duty while there. This means that, even in the Eastern District, some defendants are afforded juries drawn from the <u>entire</u> county, while others, such as Amos, are not accorded that right -- not even when they demand it.

This latter practice also shows that the costs and inconveniences to the judicial system of providing a county-wide jury pool are no barrier to granting such a demand.

Equal protection of the law also is denied to citizens of the Glades Jury District who serve jury duty. Citizens of any community o the <u>eastern</u> side of the county are always assured

their names will not be included for jury service for crimes committed in their communities. They are automatically excluded -- unless the accused himself personally elects to have them included as potential jurors, by electing trial in their district.

Another significant challenge Vernon Amos makes is this (R.5263): Since the jury district system fails to draw citizens from a fairly representative cross-section of the county's whole population in either jury district, it fails to comply with an important requirement contained in the statute authorizing creation of jury districts in the first place. Florida Statutes, Section 40.015(2), specifically mandates that when jury districts are created, the districts must maintain the same basic population mix. Clearly that was not done in Palm Beach County.

The particular administrative order of the Fifteenth Judicial Circuit conflicts with still another statute that regulates systems for drawing jurors. (R.5263)

The administrative order in question creates jury districts for use in selecting petit jurors from one of the other half of the county, but requires Grand Jurors be selected county-wide. But Section 905.01(1), Florida Statutes, specifically mandates that the grand jury shall -- and it is a mandatory "shall" -- consist of not less that fifteen nor more than eighteen persons, and,

> The provisions of law governing the qualifications, disqualifications, excusals, drawing, summoning, supplying and deficiencies,

compensation, and procurement of petit juries shall apply to grand jurors.

Section 905.01(1), Florida Statutes.

Amos was entitled by statute to trial before a petit jury summoned and called from the same geographical in the same manner as the Grand Jury.

In Florida the ultimate source of all judicial power is the constitution, statutory allocations of jurisdiction being limited to such as the constitution authorizes. Re Cox, 44 Fla. 537, 33 So. 509 (Fla. 1902); Summer Lbr. Co. v. Mills, 64 Fla. 513, 60 So. 757 (Fla. 1913); and, Dunedin v. Bense, 90 So.2d 300 (Fla. 1956).

The Florida legislature's attempt to write a statute that would authorize each local Circuit Court to create its own jury districts, if and when desired locally, exceeds the legislature's constitutional authority over the judicial branch, in violation of several provisions on the Florida Constitution. Florida Statutes, Section 40.015.

Three provisions in the Florida Constitution require legislative enactments affecting jurisdiction or venue of the courts only by "general law:" Article III, Section 11(a)(6); Article III, Section 11(a)(1); and, Article V, Section 1, Florida Constitution. However, a statute empowering local circuit courts to set up their own jury districts, by local circuit courts to set up their own jury districts, by local option, in not a "general law." If the statute automatically created "jury districts" in all counties that met certain criteria, and created

them based on uniform criteria uniformly applied in all counties, then perhaps the statute might at least be classified as a general law of local application. Cf., City of Miami Beach v. Frankel 363 So.2d 555 (Fla. 1978); and, Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983). Instead, the statute authorized local creation of jury districts; the actual creation of such jury districts is neither automatic nor uniform among the various counties.

This statute's failure to be a general law would be quite clear if the legislature had waited to hear from the circuit judges of each individual circuit, and then enacted special acts for each circuit as requested. Such legislation quite obviously would be "special," not "general." Yet, that is precisely the result of the statute -- that is precisely what it does do. It seeks to accomplish indirectly that which, constitutionally, the legislature can not accomplish directly. The statute does not create jury districts, but, rather, delegates the authority to do so -- that is, the authority to write special acts of local application -- to the local judiciary of the respective circuits. Since that is a power the legislature itself has no constitutional authority to exercise, it is one they have no authority to delegate.

Under the statute, the actual creation of jury districts is not done by the legislature itself, but by the local circuit courts, when and if they desire it. The actual creation of such

jury districts is neither automatic nor uniform among the various counties.

Article V, Section 6(b), Florida Constitution, mandates that the county courts shall exercise the jurisdiction prescribed by general law, and that "[s]uch jurisdiction shall be uniform throughout the state." This statute, and any local administrative orders promulgated under it, would appear to violate that mandate, not only because it is not accomplished by general law, but also because some county courts in the state now have jurisdiction that runs county wide, while others have jurisdiction that runs only throughout their respective "jury districts," being an area less than the full county, as in the case of the Glades Jury District. As a direct consequence of this statute, and contrary to that constitutional mandate, jurisdiction of the county courts is not uniform throughout the state.

Article III, Section 11(a)(5), mandates that there shall be no special law or general law of local application pertaining to, "petit juries, including compensation of jurors, except establishment of jury commissions." The statute in question, and the local circuit court administrative order enacted pursuant to it, directly concern petit juries.

Florida's constitution also says the legislature, "may establish not more than twenty (20) judicial circuits, each composed of a county or contiguous counties and of not less than fifty thousand (50,000) inhabitants * * *." And the constitution says, "There shall be a county judge's court in each county."

Florida Constitution, Article V, Section 7. (Emphasis added). The entire constitutional scheme for the whole judicial system in Florida is predicted exclusively upon the basic unit of the county. The constitution expressly uses counties. No other unit of jurisdiction is made allowance for anywhere in the constitution. It follows, as a matter of logic and constitutional common sense, that the "community" which must be fairly represented in the jury selection process, and the "community" served by any trial court in Florida, is the county -- the whole county.

Amos maintains that any jury district system violates an accused's right to a jury drawn from the entire county, as guaranteed by the Florida Constitution (1968 Revision). Article I, Sections 16 and 22. If "in all criminal prosecutions" the accused shall have the right to a speedy and public trial "by impartial jury in the county where the crime was committed," then trial by a petit jury drawn from less than the entire county -- by a petit jury that totally excludes approximately one-half the geographical area of the county -- fails to comply with that constitutional mandate.

In Jordan v. State, 293 So.2d 131 (Fla.2nd DCA 1974), the court noted that, apart from the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, the Sixth Amendment to the U.S. Constitution guarantees the accused a trial by an impartial jury, which comprehends that in the selection process there will be "a fair possibility for obtaining a

representative cross-section of the community." But the court went on to say that, as a matter of constitutional law:

> Where a county is the political unit from which a jury is to be drawn, the right to an impartial jury drawn from a fair cross-section of the community requires that the jury be drawn from the whole county and not from some political sub-units thereof to the exclusion of others.
>
> Jordan v. State, 293 So. 2d 131 (Fla.2nd DCA 1974), at 134. (citations omitted)

Both the Florida and United States Constitutions confer upon every citizens accused of crime the right to a jury trial by a jury drawn from a fair cross-section of the community served by the court, and in this case that community is Palm Beach County.

IV. THE TRIAL COURT ERRED FUNDAMENTALLY BY EXCUSING TWO BLACK JURORS ARBITRARILY ON ITS OWN MOTION AND DENIED VERNON AMOS A FAIR TRIAL.

Vernon Amos contends that the trial court abused its discretion by excusing two black jurors upon its own motion in an arbitrary manner. In light of Vernon Amos' concerns about receiving a jury comprising a fair cross-section of the community as expressed in Issue III, supra, the trial court acted maliciously.

Vernon Amos asks that this court look beyond the trial courts rationale that they could not follow instructions on when to be at the courtroom, and view the trial court's behavior in

the context of the totality of the circumstances of the trial court's actions towards the accused.

V. THE TRIAL COURT ERRED IN DENYING VERNON AMOS HIS RIGHT TO CONFRONT AND CROSS-EXAMINE STATE'S WITNESSES.

Section 90.801(2)(c), Florida Statutes (1987) provides:

> 90.801 Hearsay; definitions; exceptions.-
> * * *
> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is :
> * * *
> (c) One of identification of a person made after perceiving him.

An accused is entitled to confront and cross-examine his accusers as provided by Sections 9, 16, and 21, Article I, Florida Constitution, and the Sixth and Fourteenth Amendments, United States Constitution.

The rules of evidence and the confrontation clause are not always "congruent." California v. Green, 399 U.S. 149 (1970). Dutton v. Evans, 400 U.S. 74 (1970). In the case at bar not only was Vernon Amos' right to confront and cross-examine witnesses denied, but the rules of evidence were violated.

A witness that testifies at a trial is not always subject to cross-examination on all areas of her testimony. Since the photopaks were not even marked as evidence nor present in the courtroom at the time of the testimony of the eyewitnesses, then

the eyewitnesses are not available for cross-examination. In this situation an accused cannot: have the witness verify that the photopak is the same one he observed; inquire as to the authenticity of the witness' signature on the back of the identified photo; ask the witness what features about the photo identified reminded her of the suspect; ask the witness what features of the other photos made him eliminate them from consideration; or, any other question regarding the items contained in or on the photopak.

VI. THE TRIAL COURT ERRED IN ALLOWING COUNSEL FOR CODEFENDANT TO MENTION SUPPRESSED STATEMENT IN OPENING STATEMENT TO JURY.

At trial during opening statements counsel for the codefendant was permitted, over Vernon Amos' prior motion in limine and objections, to comment to the jury that Vernon Amos made a statement to the police. This error denied Vernon Amos a fair trial and influenced the jury's verdicts.

This Court discussed the harmless error test recently in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986):

> The harmless error rule...places the burden on the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction...(citation omitted)...Application of the test requires an examination of the entire record by the appellate court including a close examination of the permis-

> sible evidence on which the jury could have legitimately relied, and an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135.

There is no doubt that a comment attributing knowledge of the crime to the defendant, by virtue of a statement to the police raises a prejudicial inference in the mind of a jury. There is no doubt that this was a "close case" for the purposes of this rule.

Therefore, Vernon Amos is entitled to reversal of his convictions.

VII. THE TRIAL COURT ERRED BY FAILING TO MAKE A FINDING OF FACT AS TO VERNON AMOS' CULPABILITY UNDER THE ENMUND RULE.

The Eighth and Fourteenth Amendments to the United States Constitution bar the imposition of the death penalty upon Vernon Amos. The nations highest court, in Enmund v. Florida, 458 U.S. 782 (1982), held that where the killing is done by a co-felon, a defendant may only be sentenced to death where the defendant himself either attempted to kill or killed someone.

In its sentencing orders the trial court made a statement regarding the Enmund standard that was merely a conclusion of law with no reference to facts in the record supporting its position: "The evidence in this case demonstrates that VERNON AMOS was not a mere Earl Enmund." This is not a sufficient statement of fact based upon the record to support the conclusion.

In the case at hand, there is no evidence in the record to suggest that Vernon Amos planned the murders or robberies with Leonard Spencer, carried a firearm at any time, participated in the robberies, attempted to kill, or intended to kill.

In State v. White, 470 So. 2d 1377 (Fla. 1985), this court held that Enmund, supra, did not prohibit imposition of the death penalty against a defendant that was present, armed, masked, and did nothing to disassociate himself from either the murders or the robbery except verbally oppose the killings. The facts in White are clearly distinguishable from the case at hand.

Moreover, Vernon Amos contends that the facts in the case at bar are less culpable than even Earl Enmund. In Enmund the facts are clear that Earl Enmund planned the robbery with two co-felons. There is no evidence in the record to prove Vernon Amos was aware that Leonard Spencer was about to rob the convenience store other than the assumption of the trial court.

The recent decision of Tison v. Arizona, ____ U.S. ____, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), held that the death penalty could be imposed on a felony murderer who was recklessly indifferent to human life. In Tison the defendants had aided the escape of their father from an Arizona prison by bringing a large arsenal of weapons into the prison to arm their father and his cellmate. Later after the escape the father killed four persons that they had just robbed. Again, the case at hand does not establish that Vernon Amos had furnished weapons or displayed a reckless indifference to human life.

The death penalty is a cruel and unusual punishment as applied to Vernon Amos in the case at bar and must be vacated. As such, this court is empowered to reverse the trial court's Enmund finding as it did in State v. White, supra.

VIII. THE TRIAL COURT ERRED BY PREVENTING VERNON AMOS FROM PRESENTING STATUTORY AND NON-STATUTORY MITIGATING EVIDENCE.

The trial court denied Vernon Amos the opportunity to present non-statutory mitigating evidence of: (1) his cooperation with the police; (2) his identification of codefendant Leonard Spencer as the gunman at a time when the police had no leads as to his identity; and (3) the promise by the police that if Vernon Amos cooperated and identified the other suspect then they would recommend that Amos not be sentenced to death.

The trial court also refused to allow evidence at Phase II of his statement in which Vernon Amos establishes that he was unwilling witness to Leonard Spencer's crimes and forced at gunpoint to go with Spencer. Two statutory mitigating factors are triggered by this evidence. First, it shows that the capital felony was committed by another and his participation was relatively minor. §921.141(6)(d), Fla. Stat. (1987). Second, it shows that the defendant acted under extreme duress or under the substantial domination of another. §921.141(6)(e), Fla. Stat. (1987).

The trial court cannot limit mitigating evidence. The U.S. Supreme Court has determined that "the Eighth and Fourteenth

Amendments require that the sentencer...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U. S. 586 (1978). See also Eddings v. Oklahoma, 455 U. S. 104 (1982) (sentencer may not refuse, as a matter of law, to consider any mitigating evidence).

Clearly, the evidence proffered by Vernon Amos in the case at hand is probative of his character and the circumstances of the offense.

Section 921.141 (1), Florida Statutes (1987) provides, in pertinent part:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is provided an opportunity to rebut any hearsay statements.

In light of the jury recommendation of life imprisonment in Count I, and an 8-4 vote for death in Count V, the presentation of this evidence may very well have resulted in the two vote difference needed to recommend life in Count V. The trial court's exclusion of this evidence does not agree with Hitchcock v. Dugger, ___ U.S. ___, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987) wherein the judge declined to consider non-statutory mitigating evidence and refused to permit the jury to consider such evidence.

Recently this Court discussed Hitchcock in Morgan v. State, 515 So. 2d 975 (Fla. 1987) wherein the trial court refused to permit the jury or itself to consider nonstatutory mitigating evidence:

> * * * Such a limit on the admission of nonstatutory mitigating evidence places the proffering of that entirely within the control of the prosecution. This we will not permit. It is abundantly clear from the record that the jury was not able to consider, and the trial judge did not take into account, any evidence of nonstatutory mitigating circumstances.
>
> This error may not be considered harmless in light of the close nature of the jury recommendation vote. It is significant that the difference of one vote rendered the jury recommendation one of death rather than mercy. Under such, and other circumstances, the failure to consider nonstatutory mitigating factors cannot be termed harmless error.

Id. at 976.

Based on the foregoing the trial court denied Vernon Amos a full and fair Phase II hearing. The imposition of the death penalty under such circumstances is cruel and unusual punishment, and, as such the death sentences must be vacated.

IX. THE TRIAL COURT ERRED BY SENTENCING VERNON AMOS TO DEATH IN COUNT I OVER THE JURY RECOMMENDATION OF LIFE IMPRISONMENT.

Recently, this Court restated the law regarding jury overrides in Masterson v. State, 516 So. 2d 256 (Fla. 1987):

> We find the test which we enunciated in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), directing that a trial judge should override a jury recommendation of life only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ," has not been met by the evidence in this case.

Id. at 258.

Clearly, in the case at hand the circumstances of the Mr. Grocer robbery and murder of the store clerk suggest that a jury could reasonably determine that Vernon Amos was an accomplice whose participation was relatively minor. §921.141(6)(d), Fla. Stat. (1987). In addition, it was shown that Vernon Amos had a father that was never around. His mother sent him away to live with his grandmother at age seven. He never completed high school. He always had a job of some kind or another. Vernon Amos has two children, one which was born after his arrest. He had a loving relationship with his daughter, whom he supported financially and frequently spent time. His employer at the Food Way in Philadelphia purchased two suits for Vernon Amos to wear at the trial. (R. 4615-4623).

Based on the foregoing there is a sufficient evidence to establish a reasonable basis for the jury to find mitigating

circumstances sufficient to recommend the imposition of a life sentence.

In short, the trial court had no legal basis to override the jury's recommendation of life as to Count I. As such, the sentence of death must be reversed.

X. THE TRIAL COURT ERRED BY SENTENCING VERNON AMOS TO DEATH IN COUNT I AND COUNT V ON INVALID AGGRAVATING CIRCUMSTANCES.

A. The death sentence must be vacated as to Count I and Count V because the evidence did not support a finding that the crime was committed for the purpose of avoiding or preventing a lawful arrest.

The trial court found in section **"B"** of the Death Orders that each homicide "was committed for the purpose of avoiding or preventing a lawful arrest." There is no evidence in the record to support a finding that this aggravating circumstance existed. In a very recent decision by this Court, in Hansbrough v.State, 509 So. 2d 1081 (Fla. 1987), at 1086, it was held that:

> In relying on committed to prevent or avoid arrest,the trial court found that Hansbrough had killed the victim to eliminate a witness. The mere fact that the victim might have been able to identify her assailant is not sufficient to support finding this factor. Cited therein, Bates v. State, 465 So.2d 490 (Fla. 1985).

In the case at hand, neither of the victims were police officers. It was never established other than by suggestion that the dominant motive was the elimination of witnesses; moreover,

in both Count I and Count V it was argued by the State that the dominant motive was robbery.

Oats v. State, 446 So. 2d 90 (Fla. 1984), at 95:

> As to the factor of avoidance of lawful arrest, we stated in Riley v. State, 366 So. 2d 19 (Fla. 1978), that the mere fact of a death is not enough to invoke this section when the victim is not a law enforcement official. "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." 366 So. 2d at 22. Also it must be clearly shown that the dominant or only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So. 2d 1278 (Fla. 1979).

See also Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (trial court's presumption of intent not "clear proof"); Rivers v. State, 458 So. 2d 762, 765 (Fla. 1984) (shooting waitress as she turned to run down hallway too speculative).

In short, these were not witness elimination murders. The trial court misapplied Section 921.141 (5)(e), Florida Statutes (1987) and as such Vernon Amos' death sentences must be vacated.

B. The death sentence must be vacated as to Count I because the evidence presented did not support a legal finding that the crime was committed for financial gain.

In paragraph **"A"** of the trial courts's death order as to Count I, the trial court found that the murder "was committed while he was engaged in or an accomplice in the commission of or an attempt to commit or in flight after committing or attempting to commit the crime of robbery." (R. 5630). The trial court also

found the existence of the aggravating circumstance that the crime was committed for pecuniary gain as set out in Section 921.141(5)(f), Florida Statutes (1987).

The trial court erred in doubling up on these two aggravating factors. Oats v. State, 446 So. 2d 90 (Fla. 1984), at 95:

> Concerning the next aggravating factor, that of commission of the crime during a robbery, this must be looked at in tandem with the factor of the crime being committed for pecuniary gain. The state proved both of these factors but the trial court erred by doubling up on them. These two circumstances must be considered cumulative and may not be considered individually when the only evidence that the crime was committed for pecuniary gain was the same evidence of the robbery underlying the capital crime. Perry v. State, 395 So. 2d 170 (Fla. 1980); Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed. 2d 1065 (1977). Thus, only one aggravating factor may be counted.

In short, the trial court impermissibly doubled up on two aggravating factors, thereby misapplying Section 921.141 (5)(f), Florida Statutes (1987). Vernon Amos' death sentence must be vacated.

C. The death sentence must be vacated as to Count I and Count V because evidence presented did not demonstrate that the crime was committed in a cold, calculated and premeditated manner without and pretense of moral or a legal justification.

The aggravating circumstances cited by the sentencing judge under section "D" of the Death Order as to each homicide was not

supported by the law. The sentencing court found that each homicide "was committed in a cold, calculated and premeditated manner". The legislative intent of Section 921.141(5)(i), Florida Statutes, as interpreted by this Court, was for contract type murders. Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Bates v. State, 465 So.2d 615 (Fla. 1976); and State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court just recently held in Hansbrough v. State, supra, at 1086 and citing the Bates opinion, that: "This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings."

In Hansbrough this Court found that a robbery got out of hand when the victim was stabbed in excess of thirty times. The greater weight of the evidence in the case at hand suggests that both murders were robberies that got out of hand.

Since the law does not support this additional aggravating factor, this cause must be remanded for a resentencing consistent with the laws of the State of Florida.

D. The death sentences must be vacated as to Count I and Count V because the trial court did find mitigating factors.

There are three compelling reasons that the sentence should be reversed. First, the trial court improperly instructed the jury regarding aggravating factors that as a matter of law were invalid and not applicable. The jury recommended life in Count I and death by a vote of 8-4 in Count V. However, the jury was instructed that they could consider these circumstances without the benefit of understanding the case law regarding the same. A

two vote swing in Count V would have resulted in a recommendation of life imprisonment.

Second, there was evidence presented about Vernon Amos' family life and work history which the jury must have found mitigating. The trial court never stated in its sentencing order that it found no mitigating circumstances existed. At the close of both sentencing orders the trial court stated:

> Based on all of the foregoing it is the determination of this court that the aggravating circumstances clearly, convincingly and compellingly outweigh any mitigating circumstances. (R. 5632, 5638).

Third, the court prevented the defendant from presenting statutory and non-statutory mitigating factors to the jury. Those factors may have resulted in a recommendation of life imprisonment as to Count V. The trial court also refused to let the jury consider the mitigating circumstance of acting under extreme duress or under the substantial domination of another person. §921.141(6)(e), Fla. Stat. (1987).

Assuming arguendo that this Honorable Court rejects Vernon Amos' contention that if any of the aggravating factors are invalid then there must be a resentencing, then this Court's previous holding in Elledge v. State, 346 So.2d 998 (Fla. 1977), would be controlling. The law is clear that prior to imposing a death sentence, the court must weigh the aggravating circumstances against the mitigating circumstances. Id., at 1003. In a case, such as the instant one, where aggravating circumstances

are legally invalid, and there does exist mitigating factors, then the cause must be remanded for a new sentencing.

Once reaching the conclusion that several of the aggravating circumstances are invalid and there does exist mitigating circumstances, we must return to the issue and holding in Elledge v. State, supra, which mandates a remand in the instant case. In Elledge, this Court held that:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been presented? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial. Id., at 1003.

It is apparent from the facts of this cause and the laws of this country and State that Vernon Amos is entitled to a remand for a new sentencing. Additionally, based upon all the trial court's error, and some obvious bias and prejudice of the trial judge, Vernon Amos would request that the remand be with directions to have a new judge assigned.

XI. THE TRIAL COURT ERRED BY ALLOWING MEMBERS OF THE VICTIM'S FAMILY TO TESTIFY PRIOR TO PRONOUNCING SENTENCE.

This nation's highest court has just recently held that "victim impact statements at the sentencing phase of a capital murder trial violate the Eighth Amendment". Booth v. Maryland, _____U.S._____, 55 L.W. 4836, 4839 (June 16, 1987). In the instant case, the trial judge invited statements' from members of the victim's family. The very concerns feared by the Supreme

Court in Booth came to life in the instant case. In Booth, the Supreme Court held that victim impact statements create a constitutionally impermissible risk that death sentences will be made in an arbitrary manner.

> The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty should live or die.
>
> * * *
>
> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. Booth v. Maryland, supra, at 4838.
>
> We are troubled by the implication that defendants whose victim's were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions. Id., note 8; see also, Furman v. Georgia, 4098 U.S. 238 (1972).

In the instant case, the fears of the Booth Court that the death penalty will be imposed arbitrarily become evident through the words of the trial judge, who in Florida is the sentencing body. The trial judge specifically solicited the advice and recommendations from the victim's family as to what sentence to impose.

In holding victim impact statements violative of the Eighth Amendment to the United States Constitution, the Supreme Court rejected the notion that the existence of emotional distress to

the family of the victim, or the personal characteristics of the victim, were valid sentencing considerations in capital cases. Id., at 4839. Additionally, in Gardner v. Florida, 403 U.S. 349, 358, (1977), the Supreme Court ruled that the decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion".

The problem with allowing the victim's family member to address the sentencing court prior to sentencing is that the focus is unconstitutionally shifted from the defendant to the victim. It is well settled law that the sentencing body is required to concentrate its focus on the defendant as a "uniquely individual human being". Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also, Booth v. Maryland, supra, at 4838. The Booth Court specifically addressed this issue, wherein, Justice Powell, writing for the Majority, held that:

> The focus of a VIS, (victim impact statement), however, is not on the defendant, but on the character and reputation of the victim and the effect of his family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefor will have no knowledge about the existence of characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other that the person murdered. Allowing the (sentencing body) to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were

> irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime. Id., at 4839.

Based upon the holding of the Supreme Court's most recent opinion, of Booth v. Maryland, supra, it is clear that the Eighth Amendment mandates that Vernon Amos' death sentences be vacated.

XII. THE TRIAL COURT ERRED IN DENYING ALL DEATH PENALTY MOTIONS OF APPELLANT

Prior to the commencement of the trial in the instant cause, Appellant, through his counsel, filed six motions to prohibit the use of death penalty in the instant cause, which were all summarily denied by the court. (R. 4694 - 4744).

A. Florida Statutes 921.141 and 922.10 are unconstitutional.

Death sentences in Florida are carried out by electrocution. Florida Statute Section 922.10. Death by electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. Thus, it is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

> "Sometime after dawn on the condemned man's last day, the hair will be shaved from his right calf. A priest or minister will be with him. The Bible will be read and there will be prayer.
>
> His head will be shaved. Completely. A clear greasy substance will be smeared on the top and back of his shiny scalp.

The ointment looks like petroleum jelly. Its purpose is to help conduct electricity and reduce the burning of human flesh.

Now his cell will be opened and two guards will come in. They are his escorts. One will be handcuffed to each arm with chrome plated cuffs that prison officials refer to as "iron claws".

The prisoner will be told it is time to go. Most men walk to their death, quietly and without struggle. Some cry. Some have to be helped.

* * *

The walk is but a few steps. Through one door, across a corridor and through the last door into the chamber. The walls in this room are beige, the tile floor is green. It is an ugly place.

From now until the end is only about five or six minutes depending on the efficiency of the death committee. The executioners have practiced several times. Their work should be finished quickly.

The chair and its leather straps and steel buckles look like something out of science fiction. It is a grotesque thing resting there like a throne, the focal point in a room that measures 12 by 15 feet.

* * *

People begin working rapidly after the man is ushered into the chair by his escorts. A strap two inches wide is buckled across the chest and upper arms. Another is buckled over the lap. One on each arm, one on each leg.

The straps are fastened tight, and the escorts are freed. The body is left alone and helpless, held rigid against the solid oak - so rigid that the wild wrenching and contortions will be minimal when the power crashes into the brain.

Most of the straps are new. There is no breaking out.

* * *

The prisoner is always asked in these moments if he has nay last words.

Some men confess, others proclaim one last time that they are innocent. Some ask their God to have mercy on their soul. Many are silent.

* * *

Now the electrician's assistant will buckle a crude device to the right calf. This is a wide strap lined with a thin sheet of lead that has a screw protruding from it. A wire will be bolted to the screw.

Then the electrician will retrieve the sponge from the bucket. The salt water has made it an efficient conductor of electricity.

He will squeeze it out and prepare the death cap. Onto that sponge is a piece of heavy copper wire mesh. To that is welded another screw.

The sponge is inserted into the death cap so that the screw protrudes through the upper back. The other wire - a cable really - is bolted to that screw.

The death cap, like the other tools of death, are homemade. It is made of black leather lined with sheepskin.

The condemned man will feel that cold sponge on his head, and then the strap will be secured under his chin. Another strap will hold his head back against a cradle formed by two vertical slats in the back of his chair.

Now he will not be able to move.

The electrician will bolt the wire to the screw, and the prisoner will feel him give it a tug to make sure it is secure.

The electrician will put on a pair of thick rubber gloves at some point. They serve but one purpose. Sometimes the cap slops and he has to step up and hold it in place while the power is being applied.

Now the man is ready.

He is motionless. He can do little more than look straight ahead. In front of him, behind a glass partition, will sit a dozen official witnesses.

Some may soon faint of become sick. All will be there of their own volition. Their manner will be funeral.

They have come here to watch a man die.

* * *

Now the mask that is part of the death cap will be pulled over the head and there will be darkness.

The mask id large and black. It covers the face and neck and reaches down over the chest. It is made of soft leather, and it drapes there, closing off the prisoner's view. It also hides his face from the spectators.

There are only seconds left in his life, only seconds left to wait.

* * *

The executioner stands in a booth behind and to the right of the chair, only four steps from his prey. He will peer at the other human through a 9-inch by 4-foot opening in the wall. His mask will be black.

Before him is a panel of buttons, dials, and switches. A light comes on to tell him when this creation of Westinghouse is ready to use current generated by Florida and Light Co. to kill a human being.

The system is automated. All the man in the black vestments has to do is flip a switch to the left.

The machine is capable of producing 3,000 volts and 20 amps and delivering it into a human body. The amps are the current that will kill the man. The volts are the force behind that current.

* * *

The equipment is designed to go through four cycles, high and low surges, beginning at 2,500 volts and cycling down to 600. The power will flow for about 2 1/2 minutes.

It will happen in just a few seconds now.

The body will lurch upward and backward. It will stiffen and tremble in convulsions. The arms and legs and chest will strain at the straps as the muscles contract tighter than they ever have before.

Muscle tissue will break, and the body will bleed inside. The massive jolt will explode the mind, and the temperature of the brain will rise.

Then the power will cycle down to 600 volts. The muscles will relax and the body will sag slightly. Then the power goes up again and the violent convulsions return. Then it sags again. This goes on through four cycles, for more than two minutes.

The execution goes better if the man has had plenty of liquids during the few hours before. If he hasn't, his flesh will burn more readily.

Sometimes the man in the black mask is signaled to turn the machine off early if the skin begins to burn too much.

Always there is burned flesh. The stench in the death chamber is sickening. Always.

Steam rises from the wet sponge within the death cap, and usually white smoke is given off by the scorching of human meat. A large blister forms on the head.

The nerve cells in the brain are exploded and destroyed. Prison officials and some doctors claim the cells that emit pain impulses are killed at once.

If that is true, the inmate will feel nothing. If that is true, the last sensation he has is sitting in the darkness waiting.

The heart usually stops immediately. A doctor steps forward and listens and pronounces the man dead. But the heart doesn't always stop immediately.

At times it has been necessary to reset the machine, flip the switch again and send a second jolt to stop the heart.

Almost invariably, when the mask is removed, the man's eyes are found to be open.

The executioner is ready now. He watches for the signal.

* * *

When all is ready, if no legitimate appeal has surfaced, if the governor is not moved by some reason to stop it, the signal will be given.

This is the final moment in a ritual that began when the man in the chair broke the law, or many laws, got caught and convicted and could show no defect in his passage through the American system of justice.

The costs to this point come to millions. Police, lawyers, courts, prisons, mountains of paper and years, all leading to this moment when the man sits there in darkness, waiting.

But in the end, the cost of the electricity to exact his punishment if only three or four cents. Maybe even less.

The signal comes now. The executioner turns the switch to the left and earns his $150.00. There is a loud click which the dying man never hears.

Nobody really knows what happens after that.

Both before and after this article appeared in the Tallahassee Democrat, the people of this state and of other states began a process of re-examining the use of electrocution as a method of inflicting the death penalty. Representative of the process of re-examination prompted by the re-commencement of electrocutions, the editors of The Atlanta constitution and The Atlanta Journal wrote as follows after the execution of John Evans in Alabama:

> "Evans was tortured to death. The gruesome process took the better part of an hour, while officials tried to make their electric chair "work" and while attorneys and politicians argued over Evans' half-dead body.
>
> It took three 30-second charges of 1,900 volts to kill Evans, eventually. At the first, the electrode on his leg exploded in fire and smoke, and flames burned around the black shroud over his head. Even a second charge did not kill him. It was not until after the third jolt of electricity that the heart in his battered body finally stopped. The third charge was ordered after Governor George Wallace rejected an argument that the first two amounted to unconstitutionally cruel and unusual punishment and that the horror should be stopped.
>
> The death penalty in America, to our national shame, is essentially an act of double standard justice against the poor.
>
> Still, the calls for general adoption of lethal injections deserve to be heeded, Injections mainly serve to ease a public repelled by the crudities of its own legalized killings and may make executions more acceptable. But that is not an argument for denying whatever real or imagined comforts there may be in them for the condemned and their families. Id., April 23, 1983.

Electrocution has become increasingly re-evaluated and rejected as a method of execution for several reasons:

Electrocution is cruel because it may inflict excruciating pain. Many experts argue that electrocution amounts to excruciating torture. See: Gardner, executions and indignities - An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE .. 96, 125 n. 217 (1978) (herein after cited, "Gardner"). Unquestionably, malfunctions in the electric chair can cause unspeakable torture. See; Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 480 n.2 (1947). The preliminary rituals which accompany electrocution - so graphically described in the Tallahassee Democrat article, supra -- increases the condemned person's apprehension of his death and increase psychological suffering. See; ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT, 1949-53, (CMD. No. 8932, at 253 (1949-1953)) (one requirement of "humane execution is to keep the preliminaries to the actual execution as simple as possible). Electrocution offends human dignity because of the physical violence to and mutilation of the body which occurs during electrocution. As summarized by Gardner:

> Sometimes the victim's eyeballs fall from their sockets. He urinates and defecates, and his tongue swells. The body may catch on fire and the smell of burning flesh permeates the chamber...At the moment the switch is thrown all the muscles of the body contract; the result is severe contortions of the limbs, fingers, toes, and face. The body turns bright red as its temperature rises. Witnesses to electrocution often become emotionally upset by the gruesome aspects of this method of death. Id. at 126.

None of this cruelty and human indignity is necessary because less cruel alternatives are available. See; Gardner at 110-118, 128-129.

In recognition of the availability of less cruel alternatives, within the last year, eight states (Massachusetts, Arkansas, Delaware, New Jersey, Nevada, North Carolina, Washington, and Illinois) have rejected other methods of execution, including electrocution under their capital sentencing statutes. With the addition of these states, thirteen states now have adopted lethal injection (the latest states which have joined are Oklahoma, Texas, Idaho, New Mexico and Montana). As a result, lethal injection is now the favored method of execution among those jurisdictions which have death penalty statutes and persons condemned under those statutes. Lethal injection is generally recognized as a less cruel method of execution than electrocution. Gardner at 128-129.

The foregoing facts demonstrate that electrocution is violative of the Eight Amendment, for it is unnecessarily cruel. See; Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436,447 (1890); Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 463-464, 473-474; Coker v. Georgia, 433 U.S. 584, 592-596 (1977). Because the view of what is "unnecessarily" cruel evolves with society's "standards of decency", Trop v. Dulles, 356 U.S. 86, 101 (1958), a punishment which was constitutionally permissable in the past can no longer be so when less

but equally effective alternatives have become available. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Cf. In re Kemmler, supra (electrocution is not a cruel and unusual punishment). Lethal injection is clearly a less cruel alternative. Gardner at 128-129. Moreover, the majority movement of the states toward lethal injection is a critical index of society's evolving view that this less cruel alternative method of execution is the form of execution compatible with today's standards of decency. Finally, lethal injection id no less effective in accomplishing the two principal societal goals of the death penalty -- "retribution and deterrence of capital crimes by prospective offenders," Gregg v. Georgia, supra, 428 U.S. at 183 - than electrocution. See: Gardner at 113-118. Accordingly, electrocution violates the Eighth Amendment, for it "is nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, supra, 433 U.S. at 592.

B. Florida Statutes 782.04 and 921.141 are unconstitutional

The circumstances to be considered in mitigation under Section 921.141 are insufficient in violation of the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 2 and 9, of the Constitution of the State of Florida. In Section 921.141, it also provides for cruel and unusual punishment in violation of Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 17,

of the Constitution of the State of Florida. Florida Statute Section 921.141 is unconstitutional on its face in that the mitigating circumstances contain language which is unnecessarily restrictive, and the enumerated mitigating circumstances are restrictive in scope and unconstitutionally restrictive in their language. The statutory mitigating circumstances in Section 921.141 are inadequate in that they unduly emphasize certain mitigating circumstances to the jury to the exclusion of other mitigating circumstances on which the defendant may introduce evidence. Because the statute singles out certain mitigating circumstances and raises them to the dignity of a legally stated instruction, it diminishes the forcefulness and effect of other mitigating circumstances which are not dignified by statutory language and judicial instruction. This is akin to instructing on the law of self-defense in a murder case where the defense is insanity and failing to instruct the jury on the law of insanity by letting the evidence of insanity go to the jury. Lockett v. Ohio, 438 U.S. 586 (1978) requires that the sentencing body, the judge and the jury, be allowed to give independent, mitigating weight to any aspect of a defendant's character of record, and to the circumstances of the offense, that the defendant proffers as a basis for a sentence.

The instruction of the statutory mitigating circumstances, could easily lead the jury to denigrate the importance of nonstatutory mitigating circumstances are listed in the Standard Jury Instructions. Florida Standard Jury Instructions In

Criminal Cases at p.80. This subverts the mandate of Lockett, supra.

The modifiers in Section 921.141(6)(b)(e) and (f) also unconstitutionally restrict the consideration of mitigating evidence. These circumstances state:

> (6) MITIGATING CIRCUMSTANCES
>
> Mitigating circumstances shall be the following:
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (Emphasis Supplied) Florida Statute Section 921.141 (6)(b)(e)(f)

In each case, the mitigating circumstances is limited by the modifiers "extreme", "substantial" or "substantially".

This limiting language could lead a jury to give no mitigating weight to mitigating evidence that does not rise to the "extreme" or "substantial" test. For example, there could be evidence that a defendant suffered from a mental or emotional disturbance; but one of more jurors felt that it did not rise to the level of an "extreme" disturbance and thus find it absolutely be free to give:

> independent mitigating weight to aspects of the defendant's character and record and to

> circumstances of the offense proffered in mitigation.
>
> Lockett v. Ohio, 438 U.S. 586, 605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

As such, Florida Statutes 782.04 and 921.141 should be deemed unconstitutional.

C. Florida Statute 921.141(5)(d) is unconstitutional

Aggravating circumstances (5)(d) of Section 921.141, Florida Statutes is unconstitutionally overbroad, arbitrary, and capricious on its face and as applied in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy of the unlawful throwing, placing, or discharging of destructive device or bomb. Section 921.141(5) (d) Florida Statutes

The function of aggravating circumstances has been delineated by the United States Supreme Court.

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: They circumscribe the class of persons eligible for the death penalty. Zant v. Stephens, U.S. 103S. Ct. 2733, 2743 (1983).

The Court in Zant went on to state that:

> An aggravating circumstance must genuinely marrow the class of persons eligible for the death penalty.

Id. at 2742-2743.

Thus, it is clear that an aggravating circumstance can be so broad as to fail to satisfy Eighth and Fourteenth Amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-189 (1976); Furman c. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the of Furman to impose these severe limits because of the uniqueness od the death penalty.

It is well established that, although a state's death penalty statute is constitutional, an individual aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. People v. Superior Court (Engert), 647 p.2d 76 (Cal. 1982); Arnold v. State, 224 S.E. 2d 386 (GA.1976).

Section 921.141 (5)(d) on its face and as applied, had failed to "genuinely narrow the class of persons eligible for the death penalty".

All of the felonies listed in aggravating circumstances (5)(d) are also felonies which can be used as substitutes for premeditation, under the felony murder rule. Section 782.04 Florida Statutes. Thus, all felony murders begin with one aggravating circumstance, regardless of whether the homicide is intentional.

The Florida Supreme Court has specifically held that this aggravating circumstance can be applied, regardless of whether

the homicide is intentional. White v. State, 403 So. 2d 331, 335-336 (Fla. 1981).

Therefore, this aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, supra, at 2733, 2742-2743. Indeed, this circumstance fails to narrow the class whatsoever. All felony murders qualify for this aggravating circumstance. The broad interpretation of this circumstance is additionally objectionable, because it renders our statute arbitrary and capricious. All felony murders are subject to the death penalty; thus allowing judges and juries to arbitrarily pick and choose whether to impose the death penalty. Even if the State puts on no evidence whatsoever in phase two, the defendant will begin with one aggravating circumstance in all felony murder cases. This would shift the burden of proof upon the defendant in the penalty phase of the capital trial. State v. Dixon, 283 So.2d 1 (Fla. 1978). This section creates a presumption that death is a proper sentence. This is an unconstitutional shifting of the burden of proof in a criminal case. Mullaney v. Wilbur, 421 U.S. 684 (1975).

The North Carolina Supreme Court has recognized the problems with a broad reading of a similar aggravating circumstance, and has held that it can only be applied when the aggravating felony is committed during a premeditated murder. State v. Cherry, 257 S.E. 2d 551, 567-568 (N.C. 1979). The Court specifically held that the underlying felony could not be used both as a substitute

for premeditation and as an aggravating circumstance. Id, the Court stated:

> A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing with no strikes against him. This is highly incongruous, particulary in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived...
>
> Once the underlying felony has been used to obtain a conviction of first degree murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution of sentence. Neither so we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.
>
> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.
>
> 275 S.E. 2d at 567-568.

The logic of the North Carolina Supreme Court's opinion takes on greater constitutional significance in light of the requirement of Zant v. Stephens, supra that the circumstances

"genuinely narrow" the class, This circumstance wholly fails in this regard.

D. Florida Statute 921.141 is unconstitutional

The death penalty is imposed in Florida in an arbitrary, discriminatory manner -- on the basis of factors which are barred from consideration in the sentence determination process by the Florida death penalty statute and the United States Constitution. These factors include the following: The race of the victim, race of the defendant, the place in which the homicide occurred (geography), the occupation and economic status of the victim, occupation and economic status of the defendant, and the sex of the defendant. The imposition of the death penalty on the basis of such factors violates the Eighth and Fourteenth Amendments to the United States constitution and requires the dismantling of the statutory system which allows it to happen.

Four years after Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court referred to Furman as having

> mandate(d) that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976). Four years after Gregg, the Court held that sentencing discretion is "suitably directed and limited" only if a death penalty statute

> channel(s) the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In accordance with these principles, the Florida death penalty has enumerated aggravating and mitigating circumstances to provide the "specific and detailed guidance" of sentencing discretion which must be provided. To this end, the statutorily-enumerated aggravating circumstances are the only factors which can be considered in support of the imposition of the death penalty. Cooper v. State, 335 So.2d 1133, 1139 n.7 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977).

Despite the Eighth Amendment's requirement that sentencing discretion be suitably directed and limited, and the Florida death penalty statute's attempt to comply with that mandate through the use of and exclusive list of aggravating circumstances, the death penalty is still imposed in Florida for reasons other than those aggravating circumstances. Death sentences are still imposed in Florida, for example, because the victim was a white person instead of a black person, because the defendant is a black person rather than a white person, because the homicide was committed by chance in a county where the death penalty is much more frequently imposed rather than in a county which seldom imposes the death penalty, because the victim held a job in a skilled or professional occupation, because the defendant is a

man instead of a woman, or because of the defendant's economic status.

Not only does the imposition of death sentences on the basis of this factors violate the Eighth Amendment's requirement of carefully channeled sentencing discretion; it also violates due process by its reliance upon constitutionally impermissible, irrelevant factors. See; Zant v. Stephens, _____U.S._____, 103 S.Ct 2733, 2747 (1983). Certainly there can be no dispute that the consideration of race (of the defendant or of the victim) in the course of deciding a capital sentence violates the Thirteenth and Fourteenth Amendment's mandates abolishing slavery and all badges of slavery and requiring the equal treatment of all people without regard to considerations of race. Likewise, the Fourteenth Amendment's requirement of equal protection indisputably forbids the differential treatment of people on the basis of sex or on the basis of totally irrelevant considerations such as geography or societal or economic status.

That death sentences are imposed on the basis of these factors is not, however, a simple matter to demonstrate. Juries and judges do not tell un that the real reason they have recommended or imposed death in particular cases is one or more of these constitutionally impermissible factors. Accordingly, circumstantial evidence must be relied upon to demonstrate the determinative role played by these factors in the course of capital decisions in this case. Statistical evidence is,

therefore, the form of circumstantial evidence which must be examined in relation to this claim.

The best-developed statistical evidence available at this time with respect to the imposition of the death penalty is Florida has focused upon only one of the constitutionally impermissible factors: the race of the victim. Taking into account all publicly available data respecting the imposition of the death penalty in Florida, this evidence persuasively demonstrates that the race of the victim is a determinative factor in the imposition of the death sentence in Florida

XIII. THE TRIAL COURT ERRED BY DENYING THE PRECLUSION OF DEATH QUALIFICATION OF JURORS AND A BIFURCATED JURY.

This issue is one which was expressly reserved by the United States Supreme Court in Witherspoon v. Illinois, 391, U.S. 510 (1968). The Court in Witherspoon held that the available data, at the time, (in 1968) was "too tentative and fragmentary" to determine whether a death qualified jury is prosecution prone. 319 U.S. at 517-518. The Court went on to explicitly state that this issue would have to be reconsidered, if better data was presented.

> Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of

> accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution. 391. U.S. at 520 n.18.

Thus, the United States Supreme Court has specifically left open the issues involved here. The Court has held that this issue is one which should be revisited if more complete data is presented. The Court has also posited the bifurcated jury as one possible method of harmonizing the interests of the prosecution and the rights of the defendant pursuant to the Sixth and Fourteenth Amendments.

Subsequent to the decision in Witherspoon, the Eighth Circuit Court of Appeals has held that this issue requires an evidentiary hearing. Grigsby v. Mabry, 637 F.2d 525, 526-528 (8th Cir. 1980). A federal district court recently held an evidentiary hearing on this issue and declared the practice of death qualification unconstitutional, on a wide variety of grounds (The court granted the relief requested by the defendant, in this case). Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983).

The Eighth circuit affirmed the District Court's decision and finding that death qualified juries are unfairly and unconstitutionally prosecution prone, on January 30, 1985. Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985). On October 7, 1985, the United States Supreme Court agreed to review that decision, and to decide, for the first time, whether the death qualification of jurors before the guilt/innocence phase of a bifurcated capital

trial violates the Sixth and Fourteenth Amendments to the Constitution. Cert. granted sub nom Lockhart v. McCree, _____ U.S._____, 106 S.Ct. 59 (1985). The United States Supreme COurt reversed the judgment of the Court of Appeals. Lockhart v. McCree, ____U.S.____, 54 U.S.L.W. 4449. However, the Court in Lockhart did not deal with the precise issue raised here; the disproportionate exclusion of blacks and women by the process of death qualification. Indeed, the Court in Lockhart reaffirmed the fact that blacks and women are cognizable classes and their exclusion violated the United States Constitution. 54 U.S.L.W. at 4452-4453.

The right to a fair, representative, cross-sectional jury was originally based solely on the due process and equal protection requirements of the Fourteenth Amendment. The earliest cases dealt with the exclusion of blacks from the jury service. Strauder v. West Virginia, 100 U.S. 303 (1880). However, the Court in Strauder made clear that the principles involved would also apply, if the group excluded was "white men" or "naturalized Celtic Irishmen." Id., at 308. In Hernandez v. Texas, 347 U.S. 475, the Court extended this doctrine to Mexican-Americans.

The Court in Peters v. Kiff, 407 U.S. 493 (1972) held that the exclusion of blacks constitutes a denial of due process to any defendant, black or white.

> When any large and identifiable segment of the community is excluded from the jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable...

> It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce... In light of the great potential for harm latent in the unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, and doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants rather than giving it to too few. 407 U.S. at 503-504 (footnote omitted).

The Court in Duncan v. Louisiana, 391 U.S. 145 (1968) extended the Sixth Amendment to state criminal trials.

> A right to trial is granted to criminal defendants in order to prevent oppression by the Government... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge... The deep commitment of the Nation to the right of the jury trial in serious criminal cases as a defense against arbitrary law enforcement qualified for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. 391 U.S. at 155-156.

The Court in Williams v. Florida, 399 U.S. 78 (1970) concluded that in a criminal trial "a group of laymen representative of a cross-section of the community" 399 U.S. at 101.

In Taylor v. Louisiana, 419 U.S. 522 (1975) representativeness became the central consideration.

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. 419 U.S. at 503.

Duren v. Missouri, 439 U.S. 357 (1970) outlined the require-

ments for establishing a violation of the fair cross-section requirement.

> In order to establish a prima facie violation of the fair-cross-section requirement,the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process. 439 U.S. at 364.

Duren also makes clear that:

> In Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. The only remaining question is whether there is adequate justification for this infringement. 439 U.S. 368 n.26.

The available evidence clearly shows that the process of death qualification disproportionately excludes blacks and women.

The currently available evidence indicates that the exclusion of persons who can fairly decide the question of guilt or innocence, but who cannot vote for a death sentence, serves to disproportionately exclude blacks and women. It is clear that both blacks and women are cognizable classes and cannot be disproportionately excluded from jury service. Strauder v. West Virginia, supra; Taylor v. Louisiana, supra. The Available data demonstrates that those excluded by death qualification are disproportionally blacks and women and that the process of death qualification thus indirectly denies a defendant a cross-sectional jury.

The requirement of death qualification is particularly senseless in Florida. The first, and perhaps the best, measure of the State's interest is the statutory scheme which governs jury selection in this State. Florida Statutes, Section 913.13 (1985) provides that "[a] juror who has beliefs which preclude him form finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." This section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will vote to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death qualification procedure followed in this or any other case. The only other relevant statutory authority is Florida Statutes, Section 913.03(10), which authorizes the removal of jurors whose "state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, of the person whose complaint the prosecution was instituted that will prevent him from acting with impartiality..." But reliance on this provision to justify the exclusion of jurors who will be fair to both sides in the guilt phase but not in the penalty phase arises only if the same jury must decide both guilt or innocence and penalty. See; Winick, Witherspoon in Florida: Reflection on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. Rev. 825, 835-40 (1983).

Florida Statutes, Section 921.141(1) provides, in relevant part:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by Section 775.082. The proceeding shall be conducted by the trial jury as so as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of the penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition on the penalty.

Nothing in this statute precludes a trial judge from, for example, seating alternate jurors who attended the guilt phase of the trial, on the jury during the sentencing phase in place of jurors who would not consider imposing the death penalty. The substitution of a small number of alternates would be simple, efficient, and fair. The jury would thus be impartial in both the guilt and sentencing phases. Under current practice, the trial jury is not impartial in the critical determination of the defendant's guilt or innocence. Impartiality in the sentencing phase is bought too dearly when the cost is impartiality in the more important determination of guilt or innocence.

This is especially true in Florida for two reasons. First, the verdict in the sentencing phase need not be unanimous. Even if the sentencing jury were less than impartial, it might still reach the same result by a smaller majority. This point is discussed in greater detail below. In general, the determination

of guilt or innocence is more important because the cost of an erroneous conviction is surely far higher that the social cost of and erroneous sentence of life imprisonment. See; 4 W. Blackstone, Commentaries of the Laws of England, 358 (better that ten guilty men go free than one innocent person be convicted).

Florida law gives the trial judge the final decision on sentencing in a capital case. Florida Statutes, Section 921.-141(3). The jury's recommendation receives "great weight" in the judge's final decision, Tedder v. State, 322 So.2d 908 (Fla. 1975), but judges retain, and not infrequently exercise, the power to override jury recommendations of life imprisonment or death. See; Mello and Robson, Judge over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. Univ. L. Rev. 31 (1985).

> Because the trial judge decides sentence without being bound by a jury recommendation, he may impose capital punishment in an appropriate case even if 'automatic life imprisonment' jurors remain on the capital jury and vote, as inevitably they will, for life imprisonment. Indeed, whatever guidance the judge is provided by a jury whose members include "automatic life imprisonment' jurors. Since voir dire questioning will identify those jurors as being 'automatic life imprisonment' jurors, the judge will be aware of the number of such jurors sitting on the capital jury and will be able to give appropriate weight to the jury's advisory vote on sentence.
>
> Winick, supra, 37 U. Miami L. Rev. at 852 (footnotes omitted).

In sum, Florida's statutory procedure already provides ample safeguards against "erroneous" failures to impose a death

sentence. For this reason, the State's interest in an impartial jury in the sentencing phase is insubstantial by comparison to the defendant's constitutional right to have an impartial jury decide the question of guilt or innocence.

CONCLUSION

For the reasons set forth above, the Appellant, VERNON AMOS, respectfully prays this Honorable court to reverse the judgment and sentence entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida.

Respectfully submitted,

Craig Boudreau

CRAIG A. BOUDREAU, ESQUIRE