IN THE SUPREME COURT OF FLORIDA

WILLIE MITCHELL, JR.	:	
Appellant,	:	
vs.	:	Case No. 70,074
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, WILLIE MITCHELL, JR., was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal, which includes the trial transcript, will be referred to by use of the symbol "R". The supplemental record on appeal, which includes the transcript of the jury selection proceeding, will be referred to by use of the symbol "SR". All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Willie Mitchell, Jr. was charged by indictment returned May 14, 1986 with first degree murder in the death of Walter H. Shonyo, and with armed robbery (R653-654). The Public Defender for the Thirteenth Circuit was permitted to withdraw on the basis of conflict of interest, and attorney Silvio Lufriu was appointed to represent appellant (R656-657)

The case proceeded to trial on November 3-7, 1986, before Circuit Judge Harry Lee Coe III and a jury. The jury returned verdicts finding appellant guilty of felony murder first degree (R705) and armed robbery with a deadly weapon (R706). The penalty phase of the trial followed immediately after receipt of the guilt phase verdicts (see R604-610), and resulted in a 7-5 death recommendation (R707). Immediately after the jury was discharged, the trial court announced that he would follow the jury's recommendation, and that he found four aggravating and no mitigating circumstances (R638). The court adjudicated appellant guilty and imposed a sentence of death[1/] (R638,709-710). A week later, the trial court entered a written order setting forth his findings in support of the death sentence (R714-717).

On November 17, 1986, defense counsel filed a timely motion for new trial (R723) and a request to interview jurors (R721). These motions were stricken on November 21, 1986 (R643, SR1029-30). Notice of appeal was filed on December 3, 1986 (R733, see R749-750).

1/ A sentence of ninety-nine years imprisonment was imposed on the armed robbery count (R638,713); this represented more than a fourteen-fold departure from the guidelines recommended sentence of 5 1/2-7 years (R718-719).

STATEMENT OF THE FACTS

The evidence at trial, as to both the murder and robbery counts, was entirely circumstantial (see R584-585). The state's theory of the case was that appellant killed Walter Shonyo in the course of a robbery (see R500,502,506-509,525-529,561,570-571), possibly when he met with more resistance than he anticipated (R438,502, 506-507). According to the state's hypothesis, appellant bit Shonyo on the upper arm during the struggle (see R402,434,509). Appellant denied robbing or killing anyone, but he admitted that he burglarized Shonyo's abandoned truck (R462-467,473-475). The defense theory of the case was that Shonyo was murdered by someone else, under circumstances (among them the bite mark) indicating a homosexual rage killing (see R423-433,439-440,534-535,543-544,549,552-556). The evidence is summarized as follows:

Sam Manning is a supervisor at Fogarty Van Lines on Cumberland Avenue in Tampa (R8-9). Walter Shonyo worked there as a night watchman (R9-10). Shonyo drove a Chevrolet pickup truck; in between his rounds, Shonyo would sit in his parked truck and read (R13,15). When Manning would drive by there at night (which he did about once a week) he never saw anyone with Shonyo (R24, see R12-13). While making his rounds, Shonyo carried a clock, which he would punch at various stations (R14-15,28-29).

When Manning arrived at work on May 1, 1986, neither Shonyo nor his truck was there (R15). This was very unusual (R15). The police arrived, and some blood was found in the parking lot, a couple of feet from where Shonyo always parked (R15-18). Some time later, Manning was asked to come to the police station (R19). The detectives had been trying unsuccessfully to open Shonyo's time clock,

and in the process had punched the clock twice (R19,28). Manning, who had the master key, helped them open the clock and remove the tape (R19-20). The last time punched by Shonyo (excluding the two punches made by the detectives) was 2336 (11:36 p.m.), which, according to Manning, actually meant 12:36 a.m., because the clock had not yet been adjusted for daylight savings time (R21-23).

Lenora Amato, a patrol supervisor with London Yard Security, was responsible for the area around Meridian and Cumberland Streets (R30-31). Fogarty Van Lines is in that area, though they were not one of her company's clients (R32,35). While working this route, Ms. Amato came to recognize Walter Shonyo, though she did not know him by name (R31). She would pass by Fogarty Van Lines three or four times a night, and she would see Shonyo's vehicle parked under a light (R32). Shonyo would usually be reading a magazine or newspaper, and Ms. Amato would wave to him as she passed by (R33). She never saw anyone with Shonyo (R36).

On the night of April 30/May 1, 1986, Ms. Amato passed Shonyo's truck at approximately 10:30 and again around 12:30; they exchanged waves the second time (R33-35). When she came around again at approximately 1:30 or 1:40, she did not see Shonyo, but she did see his truck, with the driver's door open, in the same place by the light (R35-36). She did not see anyone in the truck (R36).

On cross-examination, Ms. Amato testified that on April 28 and again on the 29th she had seen vehicles (one of them brown and white, the other a white pickup truck) on the Fogarty premises (R37-38). She took the tag numbers and later (when questioned in regard to the death of Mr. Shonyo) reported them to the police (R37-38). Also on the 28th or 29th an incident occurred at Seaboard, on the next block over from Fogarty, where an employee who had been drinking pop-

ped the alarm wires to try to get into the building (R38-40). When the police arrived, this person said he wanted to go to jail, and the police refused to take him (R39). The man asked what he would have to do to go to jail, and the police officer said "The only way you could is if you go out and kill somebody." (R39) As far as Ms. Amato knew, this incident had nothing to do with Mr. Shonyo (R40).

James Bivens is a pre-operative transsexual who goes by the name of Priscilla (R41,44-45). He is self-employed as a prostitute on Nebraska Avenue (R43,46). His clientele consists predominantly of white males, some of whom are elderly (R46-48). Priscilla was staying on the 3500 block of North Jefferson with his godsister Elizabeth Oates, because the motels were jammed up (R42,47). In the early morning hours of May 1, 1986, after being dropped off from a date, he saw a man lying in the parking lot bleeding (R42-43,46). He became hysterical, and told Elizabeth Oates to call the police (R42-43). Because of his emotional state, Priscilla did not wait for the police to arrive, but went to the bar to get a drink (R43-44).

Priscilla identified a photograph of Walter Shonyo as the person he saw in the parking lot (R44).

Elizabeth Oates testified that in the early morning of May 1, 1986, her godbrother BB (James Bivens/Priscilla) came into the house and told her to call the police, because there was a white man hurt in the parking lot (R49-51). Ms. Oates thought at first that BB was "telling stories", but when she looked out the door, she saw somebody lying there (R49,51). She then went to a neighbor's house and called the police (R49,51). It took them twenty minutes to arrive (R51).

Officer Javier Guzman of the Tampa Police Department responded to the area of North Jefferson and Ohio, regarding a possible dead body

in the area (R53-54). The call was dispatched through the computer at 2:12 a.m.; Officer Guzman arrived thirty seconds to a minute afterwards (R54). He was waved down by a black female, who pointed to the general area of the parking lot (R54). Guzman went there, and observed the body of a white male lying on his back (R54). The officer checked the body for vital signs, with negative results (R54.). The whole front area of the man's shirt was covered with blood, and there were several apparent puncture wounds over his body (R58,60). The man's belt was off, his zipper was down, and his pants were pulled down "just a certain ways" (R61-62). He had no watch or wallet on him, and his pants pockets were pulled out (R57). Officer Guzman secured the scene, and the emergency medical personnel arrived shortly thereafter (R60-61).

Annie Harden testified that on May 1, 1986, she was living in the Robles Park projects with her daughter Gloria (R65-66). In the early morning of that day, she was in the apartment with Gloria, Gloria's four children, Algernon (Gloria's boyfriend), and Jessie (Annie's son)(R67). She was sitting at the dining room table when appellant came into the apartment (R66-67). Appellant is Annie Harden's cousin by marriage (R67); he had been living there but Annie got mad at him, put him out of the house, and told him not to come back (R69,83). She was not looking at the clock when appellant came in, but it had to be around 1:00 a.m. because the bar was closing (R67-68). Appellant was carrying a cardboard box on his shoulder; the box had handles and contained "a bunch of tools and bags and stuff" (R68). Algernon opened the front door to let appellant in (R69). When he said who it was, Annie got up and went in the kitchen, because she didn't want any part [of] him (R69). Gloria said that Junior (appellant) had been hurt, so Annie came out to take a look (R69-70).

Appellant had a busted lip, and his shirt was all wet and stuck to his body (R70-71,78-80). Annie went to touch him to see what was wrong, and she got some blood on her hand (R70,80). Appellant was wearing a dark shirt and you couldn't see any blood, but when you touched it it was sticky and you got red stuff on your hand (R80). Annie and Gloria both asked him what happened, and Annie said, "[it] looks like somebody kicked your ass" (R70-71) According to Annie, appellant said he had been in a fight with two "niggers" at the bar over a "whore", and that "I had to kick their ass" (R71). Annie opined that it looked like he had gotten the worst of it, but appellant insisted that he had been the winner, and "[i]f they aren't dead, they wish they was dead" (R71). Annie went back and sat down in the corner, because she didn't want any conversation with appellant (R72).

Appellant turned off the lights in the kitchen and the hall; Annie took exception to this because she was watching TV, and because appellant was acting like he was at home (R72). Appellant was looking out the windows and acting nervous (R72-73). Notwithstanding Annie's comment to Gloria that "[h]e go or I go", appellant stayed at the apartment that night (R73).

The next morning, appellant wanted Annie to give him a ride someplace where he could sell the tools (R73-74). She reluctantly agreed, and dropped him off at a Texaco station on her way to her mother's house (R74-75). Appellant went into the station with the box of tools; then came back to the car and asked her to take him somewhere else (R75). When she refused, he told her to go ahead on (R75). He said the man wouldn't give him but $40 for the tools, because they were foreign made (R75).

Subsequently, Annie learned about a man being found dead in her neighborhood (R76). At some later time, she had occasion to talk

to the police, and she told them what she had just told the jury (R76). The police came and got some property out of her apartment (R77).

On cross-examination, Annie stated that she did not smoke any rock cocaine that night, and she did not see Gloria smoking any, but Jessie and Algernon were smoking rock cocaine earlier in the evening (R80-81). Annie has twice been convicted of crimes (R81). She acknowledged that she does not care for Willie Mitchell, and that the feeling is mutual, but said she does not hate him (R81-82).

Gloria Harden was sitting on the front porch when she saw appellant coming across the playground toward the apartment (R86-87). He was carrying a cardboard box, which contained some tools, battery cables, a thermostat, and a paper bag (R88). Gloria went in the house after him (R88). Her mother and her children were upstairs asleep (R88). Appellant had on a black shirt which was covered with blood (R89,92-93). She asked him if he'd been in a fight or what happened, and he said he had gotten in a fight with two "dudes" at the Blue Diamond Bar (R89). Appellant cut all the lights off in the apartment (R89). The next morning, Gloria and her mother took appellant to a filling station where he tried to sell the tools, but couldn't get a satisfactory price for them (R90).

Gloria's brother Jessie subsequently found a small pocket-knife that had dried blood on it in the living room (R91,96). He thought one of the kids had cut himself playing with it (R96-97).

On cross-examination, Gloria stated that she did not smoke any cocaine that night, but Jessie, Algernon, and her mother Annie all smoked rock cocaine earlier in the evening, before appellant's arrival (R95-97).

Carlos Suarez is an employee of Tamburello Service Center, a Texaco gas station (R99). On the afternoon of May 1, 1986, a black man came to the back of the shop and wanted to sell some tools which he had in a cardboard box (R99-100). There was also a set of blue booster cables (R100). Suarez did not buy the tools because Japanese tools are no good for his mechanic work; they pull apart right away (R100). Asked if he saw the man who tried to sell him the tools in the courtroom, Suarez said he thought appellant looked like the man, but that he believed he had a beard at the time (R101-102).

Detective R.J. Childers of the Tampa Police Department went to the Harden apartment on May 2, 1986 (R104). He took custody of a leather glove which was lying on the living room coffee table, a blue windbreaker which was lying outside a closet by the rear door, and a watch which was in a closet under the stairway (R105-110). Detective Childers spoke with Annie Harden, who told him that appellant arrived at the apartment at approximately 1:00 on the morning of the 1st (R111-112).

Officer Bruce Shonyo of the Tampa Police Department is the son of Walter Shonyo (R114-115). Officer Shonyo identified a photograph of his father's '73 or '74 Chevy pickup truck (R116). His father kept a toolbox in the back of the truck, in which he had miscellaneous tools, jumper cables, jacks, and rope (R117). The jumper cables were blue with red and black handles (R117). Officer Shonyo identified his father's gloves, windbreaker, and wrist watch (R117-118). Walter Shonyo had a radio which he carried in the truck in a vegetable box with handles on the side; "[i]t had like a coat hanger for an antenna" (R119).

The prosecutor then approached the bench and proffered a line of questioning to show that Walter Shonyo was "a family man" (R119). This, the prosecutor contended, was to rebut the suggestion made by the defense in opening argument to the effect that the victim was engaged in homosexual activities at the time he was killed (R119). The trial court allowed the state to present, before the jury, the younger Shonyo's testimony that his father had been married to his mother for 32 or 33 years, and had two other children (both sons) besides himself (R120).

Detective J.S. Noblitt of the Tampa Police Department responded to the parking lot in the 3500 block of North Jefferson at about 2:30 a.m. on May 1, 1986 (R121-122). Other officers were already present (R122). Noblitt observed the body of a white male; upon closer examination he could see 40-50 puncture wounds to his left side torso area (R122). The man's pants pockets were turned inside out (R122). Noblitt did not see any wrist watch or wallet but there was a wallet insert containing a driver's license near the man's feet (123-124,126-127). There was a large amount of blood near the body, and small droplets of blood leading northbound on Jefferson Street toward Lake (R126,129).

At about 6:30 that morning, the victim's truck was located at the corner of Jefferson and Moore, about 1000-1200 feet from where the body was found (R128-129,144,146). To get from the location of the body to the location of the truck, you would have to go north on Jefferson to Lake, and then around the block; it would take 15-30 seconds (R129,144). Detective Noblitt observed a large amount of red liquid, appearing to be blood, on the floorboard of the truck

(R131-132). Most of the blood was on the passenger side (R132). Also on the floorboard were a security clock, a nightstick, and some rope (R132). The glove box was open (R132).

Later that morning, Detective Noblitt went to Fogarty Brothers Moving Company on East Cumberland, where he spoke with Sam Manning (R135). There was a large pool of blood in the parking lot about fifteen feet from the building, and a trail of blood leading southwest (R135-136). That evening, Sam Manning came to the police station and helped the officers interpret the tape which had been removed from the security clock which was found in the truck (R138-139). While trying to remove the tape, the officers punched the clock twice (R139-140). Excluding those two times, the last time which had been punched in was 2328 hours (R140). Manning advised Noblitt that this actually meant 12:28 a.m., because he had not yet moved the clock forward for Daylight Savings Time (R140-142, see R152-159). For the evening of April 30/May 1, the following times (in military time, and presumably unadjusted for Daylight Savings) had been punched in: 2010: 2012; 2014; 2016; then a twenty-six minute gap; 2042; 2044; 2046; 2048; another twenty-six minute gap; 2114; 2116; 2118; 2120; a twenty-two minute gap; 2142; 2144; 2148; 2148 again; a thirty-six minute gap, and then it goes to 2224 (R142). The last four entries were 2320; 2322; 2326; 2328 (R142).

Fogarty Van Lines is about 2 1/2 miles southeast of the location where the truck was found (R143). It would take about ten minutes to drive from Fogarty to where the body was found, and another 15-20 seconds longer to where the truck was found (R143-144). The apartment on Stratford where Annie Harden and Gloria Harden lived is 300-400 feet from where the truck was parked (R146).

Detective Noblitt was present when a crime scene technician took appellant's fingerprints at the police station (R146-149). At that time, Noblitt observed a laceration on the left side of appellant's lower lip, and some scratches on his left forearm (R149-151). Noblitt estimated appellant's height and weight as 5'10" and 195-200 pounds (R151).

Mary Tate, an identification technician with the Tampa police, took blood samples from the parking lot at Fogarty Van Lines (R164-167,175-176).

Detective B.D. Fletcher took custody of Walter Shonyo's pickup truck at the impound lot; the truck was taken to the FDLE lab in Tallahassee on a flatbed wrecker, and returned to Tampa three weeks later (R177-178). Fletcher also obtained a vial of Shonyo's blood from the Medical Examiner's office, and transported it to the FDLE lab in Tampa (R178).

Algernon Belin was living at the apartment of his girlfriend Gloria Harden on May 1, 1986 (R180). At about 2:00 in the morning of that day, Belin was on the porch, and saw appellant coming toward the apartment carrying a brown box (R181-183). The box had holes on the side for grips (R183). There was a tote bag on top of the box with a clothes hanger sticking out of it, like an antenna, and a set of red and black jumper cables (R183). Appellant was wearing a watch which Belin had never seen before (R184). Belin did not get a good look at appellant's clothing because it was dark (R183-184). Belin did not see any blood on appellant (R186). Appellant went into the apartment, but Belin did not go in at that time (R184). Both appellant and Belin spent the night in the apartment, but they were never in the same room

(R185-186). Appellant slept downstairs and Belin slept upstairs (R185). The next day, Belin went with appellant to a Texaco station to try and sell some tools (R189, see R184).

According to Belin, Annie Harden, Jessie Harden, and appellant smoked rock cocaine that night, while he and Gloria abstained (R186-187). Belin acknowledged that Annie Harden disliked appellant, but he didn't think that Gloria disliked him (R188).

Detective Paul Faulkner testified that on May 2, 1986, he arrested appellant as he came out the door of the Harden apartment at 424 East Stratford (R190-191).

Crime scene technician Perry Bassett took appellant's fingerprints and palm prints at the police station on the day of his arrest (R192-194). She did not notice any injuries to his hands (R196-197).

Doctor Charles A. Diggs, Associate Medical Examiner for Hillsborough County, performed an autopsy on the body of Walter Shonyo at 3:00 p.m. on May 1, 1986 (R197,201, see R820). Dr. Diggs found multiple stab wounds - about 110 of them - mostly over the left lateral (side and back) of the body (R202-204). There were some wounds on the left side of the head, and several defense-type wounds over the left arm (R203-204). The wounds ranged from 1/8 to 3/4 of an inch in thickness (R205). In Dr. Diggs' opinion, the length of the blade used to inflict these wounds would be at least four inches, and the width of the blade would be at least 3/4 of an inch (R206); the weapon could have been a pocketknife (R206). A considerable amount of force must have been used to inflict the wounds, because there were fractures of the ribs underneath the stab wounds (R206,218). In addition to the stab wounds, there was also a bite mark on the back of the victim's

left arm (R204).

Dr. Diggs determined that the cause of death was multiple stab wounds of the chest (R210). The main organs involved were the left lung, the diaphragm, and the left side of the liver (R239), and "as a result then you had extensive hemorrhage inside the chest which caused him to go into shock" (R239). According to Dr. Diggs, these wounds could not have resulted in instantaneous death (R207). Dr. Diggs was of the opinion that the victim was alive (although not necessarily conscious) throughout all 110 stab wounds, because each of them contained hemorrhage along the wound track (R205). This, Diggs testified, indicates that the heart is still beating and there is some blood pressure (R205). For the same reason, Dr. Diggs determined that the victim was still alive when the bite mark was inflicted (R209-210). However, Dr. Diggs was unable to say how long the victim was conscious, or when he would have passed out or gone into shock (R208-209,237-240). It was possible, in Diggs' opinion, that the victim may have struggled with his attacker during all or part of the stabbing (R207-208,239-240). He explained that, while most of the 110 wounds were lethal, the question is "How soon were they lethal?" (R238), and when did they become incapacitating? (R240) "Two kinds of wounds can be lethal. You can stab a person in the heart and he can drop immediately. The other instance is that you can stab a person in the heart and ... he can run sometimes a football field before he drops" (R238). Dr. Diggs did not know how rapidly the stabbing took place, and he did not know when the victim became incapacitated or when he lost consciousness (R208,240).

From his experience as a medical examiner, Dr. Diggs testified that the type of attack in this case is consistent with "homosexual-type killings" and is also consistent with "a vicious attack occurring during

a robbery" (R210). Because the large number of stab wounds suggested "anger-type overtones" found in many homosexual cases and other cases (R210-211,231), Dr. Diggs took oral swabs of the mouth and rectum, for the purpose of having them examined for acid phosphotase (R210-211). The swabs were placed on slides and sent to the Smith Kline Laboratory for testing (R221). The results indicated an oral acid phosphotase level of 2.8 international units per liter and a rectal acid phosphotase level of 17.6 international units per liter (R211). Dr. Diggs testified that these figures are "generally indicative of insignificant or no sexual activity ... especially when you are talking about ejaculation, because the acid phosphotase is basically coming from the prostatic fluid" (R211). Diggs stated that anything above 2000 international units per liter is "positive", and from 195-2000 units is "equivocal" (R212). In addition, a microscopic examination at the autopsy revealed no evidence of live sperm (R212). There is a test known as the P30 which might have yielded more positive results, but this test was not run (R223,234, see R824). The acid phosphotase enzyme, unlike the P30, can be found in substances other than seminal fluid (R234).

Dr. Diggs did not attempt to take a saliva sample from the bite mark (R224). This procedure, according to Diggs, is "generally reserved to the odontologist" (R224). When a bite mark is identified by a medical examiner, he notifies the odontologist, "and as a part of that procedure, many odontologists will take the saliva and then some of them won't" (R224-225). In this case, Diggs had an odontologist look at the bite mark, but he did not know whether the latter had taken a saliva sample (R225). Diggs' records did not indicate that one was taken (R225). When a person sustains a bite, Dr. Diggs testified, "very often saliva is left within the bite mark" and, very often,

a swab can be taken and run for A-B-O antigens (R226-227). If the person who inflicted the bite is a secretor (and 80% of the population are secretors (R227)), generally his blood group can be found in the swab (R224,227). Thus, while there is no guarantee that you will be able to lift a saliva sample from a bite mark (R236), there is, if you did get a saliva sample and you had a suspect, an 80% chance that you could compare his blood group with that revealed by the saliva, and either find it consistent or eliminate him (R227).

Dr. Diggs acknowledged that one of the characteristic patterns of male homosexual killings is the presence of a large number of wounds amounting to "overkill"; the inflicting of injuries far beyond what would be necessary to cause death (R230-231). However, if all of these wounds were necessary to subdue the victim, which Dr. Diggs believed was possible, then this would not be described as overkill (R237, see R208). Once again, it would depend on how soon the victim became incapacitated, which is something Dr. Diggs could not determine (R237-240). Dr. Diggs did express the opinion that the amount of force used to inflict the stab wounds and to break the ribs was "tremendous" (R232-233); it was meant to be done. Asked whether it was done in a rage, Dr. Diggs replied "Oh, yes, it was a rage" R233).

Karen Cooper, of the FDLE's Tallahassee Regional Crime Laboratory, received the Chevrolet pickup truck from the Tampa police, and she observed some stains and some "ridge detail" on the seat cover (R244-252). The seat cover was removed from the truck, and the areas which contained ridge detail were photographed (R246-249,251). The photos were sent to the Tampa crime lab (R250). Ms. Cooper observed

red substance which appeared to be bloodstains in the interior of the truck (R250-252). Most of it was on the floor of the passenger side; there was some on the seat and a little bit on the glove box and the doors (R250).

Sandra Wessells, a crime scene technician with the Tampa police, attended the autopsy of Walter Shonyo, where she photographed the bite mark on the deceased's left arm (R253-254). A three-inch paper ruler was included in the photograph, for use in producing a one-to-one (actual size) photograph (R254-255). The original photograph of the bite mark was subsequently enlarged or reduced to one-to-one size by Linda McCuston, a photo lab technician with the Tampa police (R257-259).

Dr. Richard Powell is a dentist, and is associated with the Hillsborough County Medical Examiner's Office as a forensic odontologist (R261-262). On May 6, 1986, appellant was brought by the police to Dr. Powell's office (R262-263). Dr. Powell took several wax impressions of appellant's upper and lower teeth (R263). He then developed a cast of the upper impressions and a cast of the lower impressions (R264,267). The models were then sent by Detective K.E. Burke to Dr. Joseph Briggle of Coral Gables, Florida (R268,270-271).

Dr. Briggle, a forensic odontologist and an Associate Medical Examiner in Dade County, testified with regard to his comparison of the cast impressions of appellant's teeth with photographs of the bite mark on Walter Shonyo's left arm[2/] (R273-332). Dr. Briggle's ultimate conclusion was that "this is indeed a match" (R301); i.e., that the bite mark on the deceased's arm was made by appellant's teeth (R301, see R306).

[2/] Dr. Briggle's testimony is set forth in detail in Issue III, infra.

Sam McMullin, a fingerprint analyst with the FDLE, compared photographs of the palmprints on the seat cover of the Chevrolet pickup truck with appellant's known palmprint, and reached the opinion that they were made by the same person (R332-333,338-343).

Mary Cortese, a serologist with the FDLE, received a vial of blood taken from Walter Shonyo, and determined that his blood type was O (R346,349-351). Ms. Cortese further analyzed the blood in terms of "genetic markers", or enzymes, and characterized Mr. Shonyo's blood grouping as C (in the EAP system), 1 (in the AK system), 1 (in the ADA system), and 2-1 (in the PGM system)(R351,see R817). This is a rare type of blood; approximately 1 person in 3500 would have it (R353-354). Ms. Cortese tested a sample of blood taken from the parking lot of Fogarty Van Lines, and suspected bloodstains on the seat cover, blue windbreaker, and watch (R351-359). On the seat cover and the windbreaker, she found human blood which was consistent, as to each of the enzymes, with Walter Shonyo's blood (R351-355). The blood sample from the parking lot, and the blood which was detected on the watch, were identified as human in origin, but the testing was inconclusive as to ABO blood type and as to the enzymes (R355-359). According to Ms. Cortese, the enzymes usually last no longer than approximately 90 days (R358).

The state rested (R360). The defense moved for judgment of acquittal, and the trial court denied the motion (R360-361).

Dr. Lowell Levine, chief of forensic dentistry with the Nassau County (New York) Medical Examiner's office, compared photographs of the bite mark on Walter Shonyo's upper arm with the models of appellant's teeth made by Dr. Powell[3/] (R368-374,379-383). In

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[3/] Dr. Levine's testimony is set forth in more detail in Issue III, infra.

Dr. Levine's opinion, there are problems with the bitemark itself, including the fact that part of the injury pattern was obliterated by a stab wound (R380-382,388), and that much of the mark is diffuse and "everything runs together" (R387, see R389-390,400-401,403). Dr. Levine's ultimate conclusion was that the bite mark did not contain enough characteristics - or any particular unique or individual characteristic - to permit an identification to be made, by himself or by anyone (R383-384,388-389,392, see R377-380,404-405). While he could not absolutely exclude appellant (R388,396,402-405), there were a number of discrepancies and inconsistencies he could not account for (R383-388,396-398). Dr. Levine summed up the situation as follows: "[There] are other people you can exclude, and there are a lot of people you can rule in. There is just not enough there [in the bite mark] to work with" (R405).

Dr. Levine further testified that he has examined hundreds of bite mark cases, and "[b]asically in homicides we find bite mark evidence in two categories of cases" (R374-375). These are (1) cases involving sexual activity around the time of death, "both heterosexual and homosexual, forcible and voluntary" (R374-375), and (2) cases involving children as victims, or where children have been murdered by other children (R375). However, Dr. Levine acknowledged that a bite mark resulting from a struggle between two men in the course of a robbery is something which "could occur" (R402).

Mary Cortese, the FDLE serologist, was recalled by the defense. According to her report, hairs were recovered from the bottom edge of the glove box (stuck under bolts) of Walter Shonyo's truck (R407,411, 816). These hairs were sent out for testing and matching, but she did not have a report back on that (R407-408). According to Ms. Cortese's report, blood samples, fingernail scrapings, hair samples, and saliva

samples were taken from appellant (R408-409,816). As far as she knew, none of these were ever matched to anything on the victim (R407-410). All of the blood in the interior of the truck which Ms. Cortese was able to identify was consistent with Mr. Shonyo's blood (R410-411).

Dr. Michael Baden is director of the New York State Forensic Sciences Consultation Unit, and a forensic pathologist (R412-413). Dr. Baden holds appointments as an associate professor, visiting professor, lecturer (all in pathology), and adjunct professor (of law and medicine) at the N.Y.U., Albert Einstein, and Columbia medical schools, and New York Law School, respectively (R414). He is past president of the Society of Medical Jurisprudence, and past vice-president of the American Academy of Forensic Sciences (R415). He is the author of approximately eighty articles or textbook chapters on various aspects of forensic pathology (R415).

Most of Dr. Baden's career has been spent as Medical Examiner and Chief Medical Examiner for the City of New York; in that capacity he was responsible for the investigation of over one hundred thousand deaths over a twenty-five year period (R416). He has performed about 20,000 medical legal autopsies; more than a thousand of those deaths involved multiple stab wounds[4/] (R416,433). Dr. Baden examined the autopsy report prepared by Dr. Diggs in regard to the death of Walter Shonyo, as well as the photographs which were taken at the autopsy, and he agreed with Dr. Diggs' conclusion that the cause of death was multiple stab wounds of the chest, with internal hemorrhage (R417-418).

4/ In referring to "multiple" stab wounds, Dr. Baden was including cases where the victim is stabbed two, three, or four times, as well as cases like this one where the victim has been stabbed repeatedly (R433).

It was, however, Dr. Baden's opinion that the victim was not alive during the entire time the 110 stab wounds were being inflicted, but that he died soon after the stabbing began (R417, see 418-421). Dr. Baden based this opinion on the fact that there was massive hemorrhage in the chest, but none in the abdomenal cavity (R418). There was a great deal of bleeding from the lung (R437). According to Dr. Baden, "[n]ear the lung and the blood vessels around the lung, unconsciousness, death and shock ensue rather quickly" (R419). "I would think from my experience with stab wounds of the lung and the extent of hemorrhage, he would have been unconscious very quickly", maybe in less than a minute (R437). Dr. Baden's opinion that the victim was already dead, or at least unconscious, during most of the stabbing was also based on the pattern of the stab wounds, which indicated that the victim was completely motionless (R419-421,438-440). To the prosecutor's hypothetical suggestion that the victim could have been conscious and struggling, but immobilized by the weight of a 195-200 pound assailant on top of him, Dr. Baden replied that while such a scenario was within the realm of possibility, "if an individual of two hundred pounds or so tries to [im]mobilize the decedent in the manner suggested, the immobilization cannot be so complete, given the constraints of the cab and the fact that the decedent is an adult man who has some strength, to prevent movement of the chest" (R439-440). Dr. Baden described the injury pattern he saw here: "Every one is vertical, the sharp edge of the knife up, the blunt edge down, as if it was just stabbing into a cork board that isn't moving" (R440).

Dr. Baden testified that it was his opinion, to a reasonable medical certainty, that this death was typical of a "homosexual rage killing" (R424,433,436,439-440), and that all of the information taken

together would not support a concept of a casual stranger robbery (R424-425,435-436,439-440). Several different circumstances, considered in combination, formed the basis for Dr. Baden's conclusion (R424,431-433). First, there was the extremely high number of stab wounds inflicted (R424-425,433). This, Dr. Baden testified, "is typical and immediately suggestive of a rage reaction in which an individual is angry at the other person and wants to mutilate the other person beyond just killing the person" (R424). "In the normal type of nonhomosexual, not rage reaction homicide, as soon as the individual becomes unconscious or is stabbed a few times at most, the perpetrator will leave. There is no reason to keep stabbing if there isn't an emotional involvement" (R425). Dr. Baden had seen cases in his experience as a medical examiner where there had been multiple stab wounds in a robbery situation, but "I am just talking about two, three, or four [stab wounds] could very well occur in a robbery situation but it's the large number that concerns me" (R433).

Second, there was the bite mark (R425,431,433). According to Dr. Baden, "the great majority, 95% of bite marks seen at autopsies in persons who die occur in sexual homicide, either heterosexual or homosexual situations or in battered child situations in which there is an oral psychiatric manifestation of overkill and rage and passion, and it does not occur to casual strangers" (R425). Dr. Baden was asked whether a bite mark could occur during a violent struggle between a robber and his victim; he agreed that this could happen but it would be rare for it to happen (R434).

Third, there was the fact that the victim's pants were lowered and his zipper was down (R425,431,433,436). This, Baden testified,

would be an unusual way to find clothing in a non-sexual homicide (R425). Asked whether it was possible that the pants and zipper may have been pulled down to facilitate a robbery attempt, to make it easier to go through his pockets, Dr. Baden replied "Not in my experience" (R435, see R426). Ordinarily, a robber will take whatever is in the pockets or, if he has a knife, cut out the pockets (R426,435). "Untying a dead person's pants and pulling down the pants is difficult, and I have not seen this as a pattern in a stranger robbery murder" (R426, see R435).

Fourth, there was the relatively high level of acid phosphatase in the victim's anal region (R431,433-435). Dr. Baden noted that Dr. Diggs, in performing the autopsy, had sent out anal and oral swabs for acid phosphatase determination or semen determination (R426). According to Dr. Baden, the only time this procedure is done with a male is if there is concern about some kind of homosexual encounter, because males don't normally have semen in the mouth or anus (R426). Dr. Baden was shown a document from the Smith Kline Bio-Science Laboratories regarding the technique used to perform the chemical analysis as to the presence of acid phosphatase (R426-427,824). This report indicated that the normal range for acid phosphatase in the serum in the blood is from zero to 5.4 international units per liter (R427,824). This, Dr. Baden explained, is because "[r]ed cells and other tissues make acide phosphatase, so it's a normal component of our blood in very small amounts" (R427). In certain disease states and certain types of cancer, the acid phosphatase level may go up a great deal (R427). From Dr. Baden's experience in doing acid phosphatase levels, "anything above 10 is of concern as possibly indicative

of semen because ... most of us here would have zero acid phosphatase in the rectum" (R428). Some people, depending on what they've eaten, might have up to 5 or 10, but above 10 the pathologist must consider the possibility that it comes from someone else's semen (R428-429). The finding of 2.8 international units of acid phosphatase in the victim's mouth would not be unusual, and could have resulted from certain foods (R428); thus, there was no indication that the victim had engaged in oral sex within 24 hours of his death (R434). However, the anal acid phosphatase level of 17.6, Dr. Baden testified, was high enough to "concern me about representing anal sex" (R434-435, see R428-429).[5/]

Dr. Baden testified that there is a protein substance, referred to technically as P-30, which is found only in semen, and which therefore can provide a more conclusive determination of the presence of semen (R429-431). This procedure is of more recent development than the acid phosphatase examination, but it has been done for the past five to seven years (R430). However, the P-30 substance is not detected by the procedure used in this case by the Smith Kline laboratory (R431,824).

Considering all of these factors in combination, Dr. Baden testified, "I evaluate that high level, the relatively high level of acid phosphatase with the whole picture of the pants being down, the

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5/ Asked by the prosecutor "Are you aware that the standard ... to indicate sexual activity ... would be 2,000 units per liter?" (R435), Dr. Baden answered "That is not true. 2,000 might be found in pure semen as can be found in vaginal areas but is not found in anal areas because there are too many other things happening in the anus, so I think that is a wrong standard" (R435).

multiple stab wounds, the bite marks, and, to me, that fits together with a homosexual assault. That doesn't mean - - I am not saying that the victim necessarily is cooperative or uncooperative. It could be a homosexual assault which is not cooperative" (R431) It was, however, in Dr. Baden's opinion, a typical homosexual "rage reaction" murder (see R436,439), and not a casual stranger robbery (see R424-425,433,440).

Patricia Templeton, a resident of the Robles Park projects near 424 Stratford, was awakened by a neighbor at 1:00 or 1:30 in the morning on May 1, 1986 (R4410443). They went out on the porch and saw a white truck going around on Jefferson (R443). She identified a photograph of Walter Shonyo's pickup truck as the vehicle she saw (R444). She couldn't see the driver very well, but he appeared to have long hair processed into "jheri curls" (R444-446).

Jessie Harden was living with his relatives at 424 Stratford on May 1, 1986 (R451). In the early morning of that day, he came back into the apartment from outside, and saw that appellant was there (R451, 453-454). Jessie did not look at appellant's clothing (R454). He did not see any blood on appellant, but it was too dark to really tell (R451-452,454). Appellant had a split lip, which he said he got in a fight at the Blue Diamond bar (R455). Appellant slept on the floor that night (R455). There was a knife lying on the floor three or four feet away from appellant, by the door (R455-456) According to Jessie, everyone - including Annie, Gloria, and himself - was smoking rock cocaine throughout the night, starting around 8:00 or 9:00 p.m. (R452). Jessie testified that his mother, Annie Harden, harbors a strong

dislike toward appellant (R452-453).

Appellant, Willie Mitchell Jr., testified that he was at the Blue Diamond Bar from around 6:00 p.m. until around 12:30 or 1:00 a.m. on the night of April 30/May 1, 1986 (R458-459)[6/] He was drinking beer and smoking marijuana (R458). Appellant was outside the back door sharing a marijuana cigarette with a woman, when two guys got out of a car and one accused him of talking to his "old lady" (R459). One of the guys grabbed appellant from behind, and the guy in front punched him in the mouth (R459). As appellant struggled to get free, the man who was holding him scratched him on the arm (R459). The woman screamed and ran off, and the two men let appellant go and went after her (R459). Appellant then left the Blue Diamond (R459-460). He walked several blocks to the Broadway Bar, had a beer or two, and then walked to the Boston Bar, where he had another beer and talked to some acquaintances (R460). One of these was a man named Albert, whom appellant asked to give him a ride to Robles Park where his cousins were staying (R460). Albert was selling rock cocaine, and he said he'd give appellant a ride after he sold out and was ready "to go re-up" (R460). After about twenty minutes, appellant and Albert got into the latter's car and went to Gene's Bar, where appellant got another beer (R461).

Albert then dropped him off at Central and Lake, and he walked to his cousins' (the Hardens) house (R461). They were all smoking rock cocaine, and Gloria asked appellant if he minded chipping

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6/ On direct examination, appellant acknowledged three prior felony convictions.

in for another rock (R461-462). Appellant had a couple of dollars and he got some money from Gloria; he went out and bought another rock, came back to the house, and they proceeded to smoke it (R462). At that point, it was around 1:30, going on 2:00 o'clock (R462). Everyone, including appellant, wanted to smoke another rock (R462). Appellant had no more money, so he told Gloria he would go down to Fat Freddie's and see if he could pawn his Seiko watch until the next day (R462). On his way there, walking down the sidewalk, he saw a truck parked off to the side (R462). He looked inside the truck, and decided to burglarize it (R463,473-474,477). Appellant leaned through the open windows of the truck, and took a number of different items off the seat and floorboard, on both the driver's and passenger's side (R466,478-479). Most of his body was inside the truck (R478-479). He did not want to open the door of the truck, because it would turn the light on (R480). Among the items appellant took out of the truck were tools, a cardboard box, a windbreaker jacket, a pair of gloves (which were in the toolbox), a radio and the yellow totebag which the radio was in, and a paper bag which contained some books (R463,466-467,480). As he was getting ready to go back to the house, he stepped on something with his foot (R463). He looked down and saw a watch on the ground, outside the driver's door of the truck (R463,467). He picked it up and put it in his pocket (R463,467,485-486).

Appellant testified that it took him less than five minutes to loot the truck (R481). There was no one in the truck, alive or dead (R473). Appellant had no idea how the truck had gotten there (R473). Appellant testified that he did not know Walter Shonyo, and

that he did not kill or rob him (R474-475,476-478,481,483-484).

After cleaning out the truck, appellant decided not to go on to Fat Freddie's, because he wanted to take the tools back to the house (R487). When he got there, Annie Harden asked him if he'd bought another rock; he said no, but that he'd found some tools (R464). It was now around 3:00 a.m. (R468). Appellant went to the house of a man named Jack to try to sell him the tools and jumper cables, but he didn't need them (R468). When appellant returned to the apartment, everyone decided they couldn't get anything else right then, so they might as well go to sleep (R468-469).

The next morning, appellant tried unsuccessfully to sell the tools to Carlos at the Texaco station (R469-470) Later that day, he managed to sell them to a construction worker for $45 (R471). Appellant was arrested at the Harden apartment that night (R471-472). At first he thought Gloria had turned him in for violating his community control (R472). At the police station, however, appellant became frightened when he realized that he was being accused of killing someone, so he made up a story and said he'd taken the property from a business in Ybor City (R464-465,477).

Appellant testified that when he returned to the Harden apartment in the early morning of May 1, he was not covered in blood (R466,475-476). He did not start turning the lights on and off, or looking out the windows (R470). Appellant testified that he is not a homosexual or a bisexual, and that he has never had a homosexual encounter (R472-473).

The defense rested (R489). The state recalled Detective

R.J. Childers as a rebuttal witness. He testified that the distance between the Fogarty Van Lines Building on East Cumberland and the Blue Diamond Bar is exactly two miles, and it takes six minutes to drive it (R498).

The state had the first and last closing arguments, with defense counsel arguing in between. The prosecutor concluded his final closing argument with the following remarks:

> Ladies and gentlemen, during the course of this trial, three people -- three people -- have sat at that defense table. I have sat over there. I've not sat there alone. I have sat there with Walter Shonyo. Every time there is a mention about homosexual activity, every time there is a mention about anal intercourse, and every time there is a mention about oral intercourse, every time there is a mention about semen in the anus, Mr. Shonyo winced and Mr. Shonyo angered and Mr. Shonyo gripped the edge of the table.
>
> He is not here to tell you what happened in that truck that night, but the evidence has told you what happened, and now you can tell him you know what happened, and you can tell him that by coming back in this courtroom, looking him straight in the eye and saying, "Your're guilty, Mr. Mitchell. You're guilty as charged in the two-count Indictment of the armed robbery and the first-degree murder of Walter Shonyo."
>
> Tell him you know what happened in that truck. Thank you, ladies and gentlemen.

The jury returned a verdict finding appellant guilty of felony murder in the first degree and armed robbery (R602). The penalty phase of the trial began immediately thereafter (see R604-610). The state introduced a certified copy of a document from the Department of Corrections' Reception and Medical Center in Lake Butler, for the purpose of showing that appellant was previously convicted of robbery in 1971 (R808-809, see R607,611-613). The defense put on no testimony, but defense counsel made a statement to the jury in which he informed

them that he had contacted two local doctors, Merin and Gonzalez, both of whom were unavailable because they were attending a conference in Washington, D.C.(R619-620) Defense counsel told the jury:

> My associate, Mr. Ray Hernandez, spoke to both doctors on the phone before they left, and they indicated to him they couldn't be here but they also told me what their findings were pursuant to their conversations with my client, Mr. Willie Mitchell.
>
> Doctor Merin told me, told my associate, Mr. Ray Hernandez, that Mr. Mitchell, when he interviewed him, maintained that he was innocent of causing any harm to Mr. Walter Shonyo. And at the same time, he held fast to the fact that he did, in fact, burglarize that truck. That, in fact, from his contact with Mr. Mitchell, that Mr. Mitchell was not suffering from any psychosis or any neurosis.
>
> Doctor Arturo Gonzalez also spoke with Mr. Mitchell, and Mr. Mitchell told him that he did not cause the death of Walter Shonyo, at the same time maintaining that he, in fact, was guilty of burglarizing the truck. They told me nothing else.
>
> So, I am presenting that to you as what this psychiatrist, Dr. Arturo Gonzalez, said, and what Dr. Sid Merin, Ph.D, psychologist said. Other than that, I have nothing else to present to you.[7]

(R620)

7/ Defense counsel's apparent strategy (assuming arguendo that it was a tactical decision) in making this statement to the jury was to preserve the integrity of appellant's claim of innocence, in lieu of arguing statutory or non-statutory mitigating circumstances which might have been inconsistent with that claim. See Straight v. Wainwright, 422 So.2d 827,832 (Fla.1982).Defense counsel's penalty phase closing argument appears to take somewhat the same approach (see R630-631). Whether this remains a constitutionally acceptable stragegy in light of this Court's pronouncements in Buford v. State, 403 So.2d 943,953 (Fla.1981) and Burr v. State, 466 So.2d 1051,1054 (Fla.1985)(both rendered long before the trial of this case) is highly questionable. However, since claims relating to ineffective assistance of counsel cannot ordinarily be raised for the first time on direct appeal [see e.g. State v. Barber, 301 So.2d 7 (Fla.1974); Perri v. State, 441 So.2d 606 (Fla.1983)], appellant will not argue ineffective assistance in this brief, but reserves the right to raise the issue pursuant to Fla.R.Cr.P. 3.850, should that become necessary. See e.g. Williams v. State, 438 So.2d 781,787 (Fla.1983); Blanco v. Wainwright, __So.2d__(Fla.1987)(12 F.L.W. 234,236).

In the penalty phase charge conference, the prosecutor requested jury instructions on the aggravating circumstances of prior conviction of a violent felony; homicide committed in the course of a robbery; and heinous, atrocious, or cruel (R607-608). The prosecutor stated "I don't think I can go with the last one, cold, calculated and premeditated since they [the jury] came back with felony murder" (R608). The trial judge decided, over defense objection (R608-609,610), to give the instruction anyway (R608-610), and the prosecutor revised his opinion for the record to agree with the court's ruling (R609-610).

The jury, by a 7-5 vote, returned a recommendation of death (R637,707). The trial court followed the jury's recommendation and imposed the death penalty, finding each of the four aggravating circumstances on which he instructed the jury, and finding no mitigating circumstances (R638,709-712,714-718).

SUMMARY OF ARGUMENT

Four prospective jurors were removed for cause, on the state's motion, by reason of their opposition to capital punishment, with only perfunctory inquiry into their views on the subject, and with no inquiry at all as to whether they could put aside their personal views and conscientiously apply the law as instructed by the court. Their exclusion, under these circumstances, failed to meet the constitutional standard of Adams v. Texas, Wainwright v. Witt, and Gray v. Mississippi, and was per se reversible error [Issue I]. In addition, the prosecutor's comments during voir dire, in which he diminished the importance of the jury's penalty recommendation, require that appellant's death sentence be reversed for a new penalty proceeding before a new advisory jury, for the reasons set forth in Caldwell v. Mississippi and Adams v. Wainwright [Issue II].

At the trial of this case, the state introduced the testimony of Dr. Joseph Briggle, who, through the technique of the bite mark comparison, purported to positively identify appellant as the person who inflicted the bite mark on the victim's upper left arm. It is appellant's position that, under the particular circumstances of this case (for reasons which are explained at length in the brief), Dr. Briggle's identification was inherently unreliable, and its admission as evidence was fundamental error. See Wright v. State, infra; State v. Peek, infra [Issue III].

The state's theory of the case, supported by circumstantial evidence only, was that appellant killed the victim in the course of a robbery, possibly because he met with unanticipated resistance. Appellant admitted that he burglarized the victim's abandoned truck,

but denied robbing, killing, or even seeing the victim. The defense theory of the case was that the victim was killed by someone other than appellant, and (supported primarily by the testimony of Dr. Michael Baden) that the crime was a homosexual "rage reaction" homicide and not a stranger robbery. The prosecutor's final remarks in closing argument, in which he portrayed the victim seated at the prosecution table, expressing his [the victim's] anger at the allegations of homosexuality, injected grossly improper and prejudicial considerations before the jury, in effect urging them to convict appellant because a not guilty verdict would stigmatize the victim. This was fundamental error [Issue IV].

Appellant, finally, urges this Court to grant him a new trial in the interest of justice, because a juror who believed him not guilty of murder or robbery acquiesced to the verdict only because she failed to adhere to her oath and the instructions of the Court [Issue V].

With regard to penalty, the trial court erred in finding that the homicide was committed in a cold, calculated and premeditated manner, and in instructing the jury (over defense objection) on this aggravating circumstance. Not only was there absolutely no evidence of heightened premeditation, the finding of the "cold, calculated, and premeditated" circumstance was inconsistent with the jury's guilt-phase verdict (felony murder), and with the state's own theory of the case, as expressed in the prosecutor's guilt-phase closing argument. Moreover, an exchange between the judge and prosecutor during the penalty phase closing argument had the effect of informing the jury that the court had made a preliminary determination as to which aggravating circumstances were applicable. See Cooper v. State, *infra*. Appellant's

death sentence should be reversed for a new penalty proceeding before a newly impaneled advisory jury [Issue VI].

The trial court also erred in finding, and instructing the jury on, the aggravating circumstance that the homicide occurred during the commission of a robbery, since the aggravating factor merely duplicated an element of the offense itself. Collins v. Lockhart, infra [Issue VII]. The court's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance was also improper, since the finding was based on the associate medical examiner's testimony that the victim "could have been conscious" and "could have struggled" while the wounds were being inflicted. Thus, the aggravating circumstance was not proved beyond a reasonable doubt. See e.g. Bundy v. State, infra [Issue VIII]. Finally, appellant submits that the quality of the circumstantial evidence against him (particularly in light of the unreliability of Dr. Briggle's purported bite mark identification) is insufficient to warrant imposition of the death penalty [Issue IX].

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN EXCLUDING FOR CAUSE SEVERAL PROSPECTIVE JURORS BASED ON THEIR OPPOSITION TO CAPITAL PUNISHMENT, WITHOUT DETERMINING WHETHER THE JURORS COULD PUT ASIDE THEIR PERSONAL VIEWS AND CONSCIENTIOUSLY APPLY THE LAW AS INSTRUCTED BY THE COURT.

The very first words spoken in the voir dire of prospective jurors for this trial were these:

> THE COURT: Mr. Benito, don't even ask them their name. Just ask them the ultimate question first about whether they will render the death penalty. You know what I am talking about, the Witherspoon problem first. Don't fool around with anything else when, in fact, they may be excused for cause. Go right to that, "Any of you, blah-blah-blah." Don't even ask them their name. Then when they raise their hand, then you can ask them their name. Bring in the jury. Seat 12.

(SR878)

The law is clear that a juror may not be excluded for cause merely because he is personally opposed to the death penalty, whether for religious, philosophical, political, or other reasons. In its recent decision in Gray v. Mississippi, __U.S.__(case no. 85-5454, decided May 18, 1987)(41 Cr.L.3197), the U.S. Supreme Court reaffirmed the principle that "the relevant inquiry is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" This strict standard has been established in such decisions as Adams v. Texas, 448 U.S. 38,45(1980); Wainwright v. Witt, 469 U.S. 412,424, (1985); Lara v. State, 464 So.2d 1173,1178 (Fla.1985); and O'Connell v. State, 480 So.2d 1284,1286 (Fla.1986). The constitutional basis

of that standard was emphasized in Gray:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amentments.
>
> JUSTICE REHNQUIST, in writing for the Court, recently explained:
>
> > "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S.___,___(1986)(slip op.12).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainright v. Witt, 469 U.S., at 423. To permit the exclusion for cause of other prospective jurors based on their views on the death penalty unnecessarily narrows the cross-section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 U.S. at 523.

Gray v. Mississippi, supra (41 Cr.L. at 3200)

It is important to note, as the U.S. Supreme Court expressly recognized in Wainwright v. Witt, supra (105 S.Ct. at 852), that the burden of demonstrating that the challenged juror will not follow the law in accordance with his oath and the instructions of the court is on the party seeking exclusion of the juror; i.e., the state.

> As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See Reynolds v. United States, 98 U.S. 145,157,25 L.Ed.244 (1879). It is then the trial judge's duty to determine whether the challenge

> is proper. This is, of course, the standard and procedure outlined in Adams, but is equally true of any situation where a party seeks to exclude a biased juror.

Wainwright v. Witt, supra (105 S.Ct. at 852).

In the present case, in accordance with the trial court's directions, the prosecutor opened his questioning of the first group of twelve jurors, and his questioning of each replacement group of jurors, by asking each individual a close variation of the following question: "Under the proper circumstances, could you recommend the death penalty?" (SR886,see SR885-888,941-942,964-965,978-979,987-988, 996,1006,1009,1014-1015,1019-1020). All but five answered yes. The only juror of the original twelve who said she could not vote for a death recommendation was Mrs. Jarboe:

> MR. BENITO [prosecutor][to Ms. Morrison] Under the proper circumstances, could you recommend the death penalty?
>
> A. Yes.
>
> Q. Mrs. Jarboe?
>
> A. I am afraid not.
>
> Q. As you sit here today, you are against capital punishment?
>
> A. I am not against it, it's just that I couldn't vote for that.
>
> Q. Under no circumstances could you vote for a recommendation of death?
>
> A. It's just that I would rather not.
>
> BY THE COURT:
>
> Q. I am sorry. I can't hear you ma'am.
>
> A. It's just that I would rather not.

(SR886-887)

At this point, the prosecutor, quite properly, sought to ascertain whether Mrs. Jarboe's personal views or feelings on the death penalty would prevent or substantially impair the performance of her duties as a juror:

BY MR. BENITO:

> Q. If the law in Florida says that you can recommend the death penalty if you find the proper circumstances, would you have trouble following that law because of your feelings?
>
> A. No.
>
> Q. Ma'am?
>
> A. No.
>
> Q. So, you would be able to follow the law?
>
> A. [Juror nods head.]
>
> Q. You would be able to impose the death penalty under the proper circumstances?
>
> A. I am a law-abiding citizen. If it came to that, I would.
>
> Q. I am trying to determine whether or not you would be able to give this matter a fair and impartial consideration. If you have some misgivings about the death penalty, you may not be able to follow the law because of your personal feelings.
>
> There is no problem with that. I am not trying to chastise you. Don't get me wrong. I am not trying to chastise you about that, but the law allows you to recommend the death penalty under the proper circumstances.
>
> You may have some personal misgivings about that and you may have trouble following the law with your personal feelings about the death penalty, which is acceptable.
>
> A. I would repeat that I would rather not.

(SR887-888)

Even the prosecutor must have recognized that Mrs. Jarboe's responses did not meet the Adams-Witt test, because he did not even move to exclude her for cause, but rather exercised a peremptory challenge (SR940).

The four venirepersons (two prospective jurors and two prospective alternates) who came up later, and who answered the prosecutor's lead question in the negative, were handled quite differently. The sum total of the inquiry was as follows:

> MR. BENITO: And is it Mr. Dewrell? Under the proper circumstances, could you recommend the death penalty?
>
> A. No.
>
> Q. You are opposed to capital punishment as you sit here today?
>
> A. Yes, sir.
>
> Q. You can think of no circumstances where you would be able to recommend the death penalty, is that a fair statement?
>
> A. That is a fair statement.
>
> THE COURT: Motion?
>
> MR. BENITO: Motion to challenge the juror for cause.
>
> THE COURT: I will note the defense objection. You may step down, please.

(SR 942)

> * * * * * *
>
> Q. As to the death penalty, ma'am, under the proper circumstances, could you vote to recommend to a court of law that a man be sentenced to death? ... And Mrs. Richardson, how about you?
>
> A. I am sorry but I do not believe in the death penalty.
>
> Q. No need to apologize.

A. I feel very strongly about it.

Q. You have strong feelings against the death penalty?

A. Yes, I do. I don't believe we have a right to ever take someone's life.

MR. BENITO: State would note a challenge for cause.

THE COURT: I will note the defense objection. You may step down.

(SR 978-979)

* * * * * *

Q. All right. As to the death penalty, Mrs. St. Charles, could you under the proper circumstances render a death penalty?

A. I can't take someone else's life that is what I am saying.

MR. BENITO: I challenge the alternate for for cause.

THE COURT: I will note the defense objection. You may step down. Thank you ma'am.

(SR1014-1015)

* * * * * *

MR. BENITO: As to the death penalty ma'am, under the proper circumstances, could you recommend that a man be sentenced to death?

A. [juror Vilmure]: No.

Q. You are against capital punishment?

A. Yes, I am.

MR. BENITO: At this time I challenge the juror for cause, judge.

THE COURT: I will note the defense objection. You may step down, ma'am.

(SR 1019-1020)

None of the latter four jurors was ever asked whether they could set aside their personal feelings and render a decision based on the law, in accordance with the instructions of the court. Contrast Herring v. State, 446 So.2d 1049,1055-1056 (Fla.1984), and Lara v. State, 464 So.2d 1173,1178-1179 (Fla.1985), in which this Court said:

> It would make a mockery of the jury selection process to ... allow persons with fixed opinions to sit on juries. To permit a person to sit as a juror after he has honestly advised the court that he does not believe he can set aside his opinion is unfair to the other jurors who are willing to maintain open minds and make their decision based solely upon the testimony, the evidence, and the law presented to them.

As Gray v. Mississippi, supra, makes clear, Wainwright v. Witt does not represent a retreat from the constitutional principle of Witherspoon v. Illinois, 391 U.S. 510 (1968). Rather, Witt readjusts the focus of the inquiry away from an (occasionally hair-splitting) analysis of the wording of the questions and answers, and places the emphasis instead on whether, in their totality, the juror's responses demonstrate an inability to obey his oath or follow the court's instructions on the law. Since this determination depends in part on an assessment of the juror's demeanor and credibility, the trial court is accorded broad (but not unlimited) discretion in making it. See Wainwright v. Witt, supra (105 S.Ct. at 852-856). The U.S. Supreme Court recognized that, concomitant with this privilege, is a responsibility:

> In so holding, we in no way denigrate the importance of an impartial jury. We reiterate what this Court stressed in Dennis v. United States, 339 U.S. 162,168,70 S.Ct. 519,521, 94 L.Ed. 734 (1950): "[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor.... In exercising its discretion, the trial court must be zealous to protect the rights of an accused."

Wainwright v. Witt, supra, at 855.

Of the five "death-scrupled" jurors in this case, only the first, Mrs. Jarboe, was given an opportunity to consider whether she could set aside her personal views in deference to the rule of law. That, and not "whether they will render the death penalty" (see SR878), is the ultimate question. If the juror straightforwardly announces that he cannot or will not set aside his personal opinion, he is gone. Herring v. State, supra; Lara v. State, supra. If the juror equivocates, then it is up to the trial court to determine, from the totality of his responses, whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." See Adams; Witt; Gray; Herring; Lara. If the juror advises the court (as Mrs. Jarboe did, for example) that he believes he can set aside his personal views and follow the law, then the juror is clearly qualified to serve and cannot constitutionally be excluded for cause, unless the trial court determines, based on the juror's credibility and demeanor, that his "protestations of impartiality" should not be believed. See Wainwright v. Witt, supra (105 S.Ct. at 852); Patton v. Yount, 467 U.S.___, 104 S.Ct. 2885,2991 (1984).

In the present case, prospective jurors Dewrell, Richardson, St.Charles, and Vilmure were ushered out through the express lane, with only perfunctory inquiry into their views on the death penalty, and without any inquiry into whether they would be willing or able to set aside those views in deference to the law - the dispositive question according to Adams, Witt, and Gray.

It is of some importance to note that neither the trial court nor the prosecutor explained to the prospective jurors

that they would be instructed on the aggravating circumstances and mitigating circumstances as defined by statute, and that their role was to determine which of these circumstances were supported by the evidence, and to weigh them to determine the appropriate sentence. Rather, the prosecutor simply informed the jurors that, in the event of a conviction of first degree murder, there would be a second phase, in which they would be called upon to make an advisory recommendation (by majority vote) to the trial court as to whether the death penalty or life imprisonment should be imposed (SR884). As far as the jurors had any reason to know, it might be solely up to them to define what kinds of circumstances might warrant a death sentence. The prosecutor also told the prospective jurors:

> It becomes important at this time to determine each juror's opinion as to capital punishment, as to the death penalty. I know this is the first time many of you have been asked as to your feelings on capital punishment, but it's a very important part of this case, and we ask that you try to be as honest as you possibly can with regards to your feelings as to the death penalty.

(SR885)

The prosecutor then asked each juror - in all but a few instances it was the first question the juror was asked - a question closely resembling "Under the proper circumstances, could you recommend the death penalty?" (R885-886, et seq.). The juror, in all likelihood being unfamiliar with the operation of Florida's post-*Furman* capital sentencing statute, and having heard the prosecutor say he wanted to know the jurors' feelings on the death penalty, could reasonably have answered "No" if, in his personal opinion, there are no circumstances in which a death sentence is proper. That, in fact,

would be the position of virtually anyone who, for religious, philosophical, or political reasons, is opposed to capital punishment. Yet even firm opponents of the death penalty "may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law" Lockhart v. McCree, 476 U.S. ___ (1986)(slip opinion, p.12); Gray v. Mississippi, supra (41 Cr.L. 3200). Mrs. Jarboe, in fact, did so. Mr. Dewrell, Mrs. Richardson, Mrs. St.Charles, and Ms. Vilmure never got the chance.

Since the burden of demonstrating, through questioning, that a juror is unqualified due to bias is on the party seeking to exclude the juror [Wainwright v. Witt, supra], and since "the State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional sentencing schemes by not following their oaths' Wainwright v. Witt, 469 U.S. at 423", Gray v. Mississippi, supra (41 Cr.L. at 3200), then it is apparent that the state failed to establish a constitutionally acceptible basis for the removal of these four jurors. For that matter, as in Gray v. Mississippi, supra (41 Cr.L.3201)(where the trial court violated Mississippi procedure by failing to question the jurors himself with regard to their ability, notwithstanding their opposition to the death penalty, to follow the evidence and the law)[8/] and as in O'Connell

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8/ The Gray opinion (41 Cr.L.3201, n.11) notes that the Mississippi Supreme Court requires the trial judge, in a capital case, to ask the venire members:

(Continued)

v. State, 480 So.2d 1284 (Fla.1985)(where, as here, the trial court violated Florida Rule of Criminal Procedure 3300(b) by removing the jurors for cause on the state's motion, before the defense had any opportunity to examine them)[9], the truncated voir dire in this case

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8/ (Cont'd)

> if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released.

Appellant is not suggesting, of course, that Florida courts are required to follow Mississippi procedure, or that it makes any constitutional difference whether it is the trial court, the prosecutor, the defense attorney, or even the bailiff who ascertains whether the jurors will or will not follow the law. But unless and until the juror is asked by someone whether he can set aside his personal opinion and follow the law as instructed by the court, the state cannot meet its burden of demonstrating that the juror is unqualified to serve by reason of his opposition to the death penalty.

9/ Fla.R.Cr.P. 3,300(b) provides that after a panel of prospective jurors has been sworn:

> The court may then examine the prospective jurors collectively. Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror may be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved.

See O'Connell v. State, supra, at 1286; Williams v. State, 424 So.2d 148 (Fla.1982).

did not even satisfy the applicable rules of procedure, much less meet the constitutional minimum predicate for exclusion of death-scrupled jurors.

The erroneous exclusion of even one juror in violation of the Adams-Witt-Gray standard is constitutional error which goes to the very integrity of the legal system [Gray v. Mississippi, supra (41 Cr.L. at 3202)], and which can never be written off as "harmless error". Gray v. Mississippi, supra; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 422 So.2d 171 (Fla.1983). Appellant's death sentence must be vacated, and the case remanded for a new penalty proceeding, before a fairly selected advisory jury. See Gray v. Mississippi, supra; Chandler v. State, supra.

ISSUE II.

THE PROSECUTOR'S STATEMENT DURING VOIR DIRE, IN WHICH HE DIMINISHED THE IMPORTANCE OF THE JURY'S PENALTY RECOMMENDATION, VIOLATED THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL SENTENCING.

At the beginning of the voir dire, the prosecutor told the prospective jurors that, in the event of a first degree murder conviction, there would be a second phase in which the jury would be called upon to make an advisory recommendation to the court as to what penalty appellant should receive (SR884). The prosecutor continued, "So, it becomes important in this case [to determine each juror's opinion as to capital punishment (see SR885)] and you must realize that the ultimate decision as to whether or not the man lives or dies is made by Judge Coe " (SR884-885).

In Caldwell v. Mississippi, __U.S.__,105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985), the U.S. Supreme Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury is aware of its "truly awesome responsibility", the Court wrote:

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

Caldwell v. Mississippi, supra (105 S.Ct. at 2641-2642)

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir.1986), the Eleventh Circuit determined that the Caldwell principle is applicable to the Florida capital sentencing scheme, notwithstanding the potential availability of the "override" provision of the statute, which, under certain carefully limited circumstances, permits (but never requires) the trial court to reject the jury's recommended sentence. See Tedder v. State, 322 So.2d 908 (Fla.1975), and its numerous progeny. Under Florida law, the jury's recommendation "is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091,1095 (Fla.1983); see e.g. McCampbell v. State, 421 So.2d 1072 (Fla.1982); Tedder v. State, supra. A Florida capital defendant is entitled by law to a meaningful jury recommendation [see Richardson v. State, supra, at 1095], and in cases where a death sentence was predicated on a tainted jury death recommendation, this

Court has not hesitated to reverse for a completely new penalty proceeding.[10/] Recognizing the importance of the jury's penalty recommendation, the Eleventh Circuit in Adams v. Wainwright, supra (at 1530) concluded that the jury's role in Florida capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell."

The statement that "the ultimate decision as to whether or not the man lives or dies is made by Judge Coe" not only encourages the jury to abdicate its own sense of responsibility, it is actually somewhat misleading. Unlike several western states under whose death penalty statutes the trial court is solely responsible (subject to appellate review) for the capital sentencing decision, Florida has a "trifurcated" sentencing procedure in which the jury, the trial court, and this Court each plays a critical role. See State v. Dixon, 283 So.2d 1 (Fla.1973); Tedder v. State, supra. For that matter, the Governor (who decides clemency petitions and signs warrants), the Cabinet, and the federal courts also have significant impact on whether a particular capital defendant lives or dies, but that certainly doesn't mean the prosecutor is free to make a point of this to the jury. Caldwell v. Mississippi. The Eighth Amendment requires reliability in capital

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10/ See e.g. Patten v. State, 467 So.2d 975 (Fla.1985)(improper "Allen charge" given to deadlocked penalty jury); Robinson v. State, 487 So.2d 1040 (Fla.1986); Toole v. State, 479 So.2d 731 (Fla.1985) (inadequate jury instructions in penalty phase); Dragovich v. State, 492 So.2d 350 (Fla.1986)(improper cross-examination in penalty phase); Teffeteller v. State, 439 So.2d 840 (Fla.1983)(prosecutorial misconduct in penalty phase closing argument); Trawick v. State, 473 So.2d 1235 (Fla.1985); Dougan v. State, 470 So.2d 697 (Fla.1985)(improper evidence and argument); Valle v. State, __ So.2d __ (Fla.1987)(12 F.L.W.51) (improper exclusion of evidence offered in mitigation).

sentencing [Caldwell], and the recognized purpose of Florida's trifurcated procedure is to provide safeguards - safeguards which were missing under the prior statutory scheme - against unwarranted imposition of the death penalty. State v. Dixon, supra, at 7-8. Every participant in the process - each juror, the trial judge, and each member of this Court - must consider the question of penalty as if a man's life depended on it; that is the essence of the Caldwell rule. For this reason, appellant requests that this Court follow the reasoning of the Eleventh Circuit in Adams, and recede from its opinion to the contrary in Pope v. Wainwright, 496 So.2d 798,805 (Fla.1986).

Appellant recognizes that defense counsel failed to object to the prosecutor's statement. It is appellant's position that:

(1) Remarks which minimize the jury's sense of responsibility for its penalty verdict diminish both the reliability of the sentencing decision and the fundamental fairness of the penalty proceeding itself, in violation of the Eighth Amendment [Caldwell v. Mississippi, supra, 86 L.Ed.2d at 246-247]. A sentence of death imposed pursuant to such a proceeding violates due process [contrast Caldwell v. Mississippi, 86 L.Ed.2d at 245-247 with Donnelly v. DeChristoforo, 416 U.S. 637 (1974)], and therefore must be considered fundamental error. See, generally, Sanford v. Rubin, 237 So.2d 134 (Fla.1970); Pait v. State, 112 So.2d 380 (Fla. 1959); Peterson v. State, 376 So.2d 1230 (Fla.3d DCA 1979).

(2) Given the status of the law on November 3, 1986, when the jury was selected, defense counsel could reasonably have believed that no legal basis for an objection existed. In Darden v. State, 475 So.2d 217,221 (Fla.1985), decided September 3, 1985, this Court at least strongly implied that it considered the Caldwell holding inapplicable

under Florida's capital sentencing procedure. On October 16, 1986, two and a half weeks before the trial of this case, this Court even more emphatically rejected the Caldwell claim in the Florida context, saying "We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a 'true sentencing jury'" Pope v. Wainwright, supra, at 805. The Eleventh Circuit's decision in Adams, which held that the eighth amendment principles expressed in Caldwell do apply in Florida death penalty trials, was issued on November 13, 1986, ten days after appellant's trial began and six days after the jury recommended death (and the trial court immediately pronounced sentence). Thus, if the reasoning of Darden and Pope ultimately prevails on the merits, appellant will obviously be entitled to no relief on this issue. But if the reasoning of Adams ultimately prevails, appellant should not be denied the relief to which he is constitutionally entitled, merely because his trial attorney failed to anticipate that decision.

ISSUE III.

UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE, THE IDENTIFICATION OF APPELLANT BY THE TECHNIQUE OF BITE MARK COMPARISON UNDERMINED THE RELIABILITY OF THE GUILT-OR-INNOCENCE DETERMINATION; THUS, THE ADMISSION OF THIS EVIDENCE VIOLATED THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL TRIALS, AND WAS FUNDAMENTAL ERROR.

A. Introduction

Expert opinion is worth no more than the reasons on which it is based. LeFevre v. Bear, 113 So.2d 390,393 (Fla.2d DCA 1959);

Kelly v. Kinsey, 362 So.2d 402,404 (Fla.1st DCA 1978). Under some circumstances, the introduction of inherently unreliable or misleading expert testimony may amount to fundamental error, requiring reversal even in the absence of an objection below. See Wright v. State, 348 So.2d 26 (Fla.1st DCA 1977); State v. Peek, unpublished opinion of the Circuit Court of the Tenth Judicial Circuit of Florida, issued November 2, 1983.[11/] Appellant submits that this is just such a case.

B. Bite Mark Evidence: In General

At the outset, appellant recognizes that this Court (in agreement with the appellate courts of many other states[12/]) has rejected the contention that bite mark identification evidence is per se unreliable and that it should never be admitted into evidence. Bundy v. State, 455 So.2d 330,348-349 (Fla.1984). That, however, is not the

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[11/] A copy of the Order Vacating Judgment and Sentence in Peek is attached to this brief as Appendix A.

[12/] See Chase v. State, 678 P.2d 1347,1350 (Alaska App.1984); State v. Garrison, 585 P.2d 563,566 (Ariz.1978); People v. Marx, 54 Cal.App. 3d 100,112,126 Cal.Rptr. 350,357 (1975); People v. Watson, 75 Cal.App. 3d 384,142 Cal.Rptr. 134(1977); People v. Slone, 76 Cal.App.3d 611,143 Cal.Rptr. 61 (1978); State v. Asherman, 478 A.2d 227,242 (Conn.1984); Smith v. State, 322 S.E.2d 492,493 (Ga.1984); People v. Johnson, 289 N.E.2d 722 (Ill.App.1972); People v. Milone, 356 N.E.2d 1350 (Ill.App. 1976); People v. Prante, 498 N.E.2d 889 (Ill.App.1986); Niehaus v. State, 359 N.E.2d 513,516 (Ind.1977); State v. Peoples, 605 P.2d 135, 139 (Kans.1980); Commonwealth v. Cifizzari, 492 N.E.2d 357,362-363 (Mass.1986); State v. Sager, 600 S.W.2d 541 (Mo.App.1980); State v. Kleypas, 602 So.2d 863 (Mo.App.1980); Bludsworth v. State, 646 P.2d 558 (Nev.1982); (People v. Smith, 443 N.Y.S.2d 551 (Dutchess County, 1981); People v. Middleton, 444 N.Y.S.2d 581 (N.Y.C.A.1981); State v. Temple, 273 S.E.2d 273 (N.C.1981); State v. Green, 290 S.E.2d 625,630 (N.C.1982); State v. Sapsford, 488 N.E.2d 218 (Ohio App.1983); Kennedy v. State, 640 P.2d 971,978 (Okla.Crim.App.1982); State v. Routh, 568 P.2d 704,705 (Or.App.1977); State v. Jones, 259 S.E.2d 120,125 (S.C.1979); Patterson v. State, 509 S.W.2d 857,863 (Tex.Crim.App.1974); State v. Howe, 386 A.2d 1125,1131-1132 (Vt.1978); State v. Stinson, 397 N.W.2d 136 (Wis.App.1986).

substance of appellant's argument. Rather, it is appellant's position that, in light of the totality of the evidence in this case, Dr. Briggle's identification of appellant as the person who inflicted the bite mark on Walter Shonyo's left arm was highly unreliable, yet devastating, evidence which went directly to the heart of the case. Especially in view of the heightened need for reliability mandated by the Eighth Amendment in trials where the death penalty may be imposed [see Beck v. Alabama, 447 U.S. 625,637-638 (1980); Caldwell v. Mississippi, 472 U.S.__, 86 L.Ed.2d 231 (1985)], the introduction of Dr. Briggle's identification testimony was fundamental error.

As the legal basis for this assertion, appellant relies on the fundamental error analysis set forth in Wright v. State, supra, at 27 and 31, and State v. Peek, supra, slip opinion, p.1 and 8-10 (App.A)[13/].

13/ Peek's conviction and death sentence were vacated pursuant to Fla.R.Cr.P. 3.850 on two related but independent grounds. The court in Peek found, first, that the introduction of illusory and misleading scientific testimony at trial was fundamental error [Appendix A.1-10]. Fundamental error can be corrected, even in the absence of objection below, at any time, whether by Rule 3.850 motion [Peek, supra, p.10] or on direct appeal [Sanford v. Rubin, 237 So.2d 134 (Fla.1970); Peterson v. State, 376 So.2d 1230,1234-1235 (Fla.3d DCA 1979); Wright v. State, supra, at 31]. The court in Peek also found that defense counsel's failure to move to strike the hair analyst's probability testimony or move for a mistrial was "a deficiency measurably below that of competent counsel" [Peek, supra, p.12]. Claims of ineffective assistance of counsel are properly raised on a 3.850 motion (as in Peek), but are not ordinarily cognizable on direct appeal. State v. Barber, supra; Perri v. State, supra; Williams v. State, supra; Blanco v. Wainwright, supra. [See footnote 7 on p.30 of this brief]. Consequently, appellant is relying, at this time, only on the "fundamental error" portion of the Peek opinion, but reserves the right to raise the ineffective assistance claim pursuant to Rule 3.850, should that become necessary. See Blanco v. Wainwright, supra.

As can be seen from those opinions, however, this is an issue which depends almost entirely on the facts. Before turning specifically to the testimony of Dr. Briggle and Dr. Levine, some of the basic principles of bite mark comparison and identification should be examined.

The landmark case on the admissibility of bite mark identification evidence - one cited in most of the subsequent decisions in the various jurisdictions - is People v. Marx, 54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975). The bite mark in Marx was described by the odontologist as one "[which] will be recorded as one of the most definitive and distinct and deepest bite marks on record in human skin" People v. Marx, supra, 126 Cal.Rptr.at 354. The odontologist testified that in the past be had refused to give any definitive opinion in other bite mark cases because the marks were not sufficiently detailed to serve as evidence. People v. Marx, supra, 126 Cal.Rptr. at 354, n.8. This, however, was the clearest bite mark he had ever seen. Id.

Citing Marx, this Court observed in Bundy:

> ...the basis for the comparison testimony - that the science of odontology makes such comparison possible due to the significant uniqueness of individual dental characteristics - has been adequately established. [Bundy] does not contest this supposition. Forensic odontological identification techniques are merely an application of this established science to a particular problem.[14/]

Bundy v. State, supra, at 349.

14/ See also Bundy v. State, supra, at 337 ("Both experts explained that because of the wide variation in the characteristics of human teeth, individuals are highly unique so that the technique of bite mark comparison can provide identification of a high degree of reliability") and 348 (trial court found that science of odontology, "which is based on the discovery that the characteristics of individual human dentition are highly unique", is generally recognized by scientists in the relevant fields).

Like Bundy, appellant does not contest the supposition that the significant uniqueness of individual dental characteristics makes bite mark comparison possible; indeed, in some cases, it may even make bite mark identification possible. But that does not close the question; it is only the starting point. Whether, in a particular case, a reliable bite mark comparison or identification can be made depends not only on the acknowledged fact that every person's dentition has unique and individual characteristics, but also on whether unique and individual characteristics are discernible from the bite mark. And that is a factor which varies sharply from case to case.

In Moenssens and Inbau's text, Scientific Evidence in Criminal Cases (Second Edition, 1978), the chapter on Forensic Odontology is prefaced by the following observation (at 644) "It has ... been suggested that, in rare cases, a person may be identified by his bite impression left in food products, or even in the skin of victims of crimes. The latter would have particular application in battered child cases and in sexual attacks of varying natures." The subsection (§16.05, p.650-652) on "Bitemarks and their Identification" contains the following discussion:

> It is still a hotly debated issue whether an individual can be identified by his bitemarks left on a human being, cadaver, or elsewhere. Forensic odontologists are not entirely in agreement as to whether such identification is possible. Most would agree that, in exceptional circumstances, when the bitemark is deep, pronounced, clearly visible, and well preserved, and contains unusual characteristics of the teeth that made the impressions, an identification is possible. All would agree that a careful investigation and examination of bitemarks is valuable as an investigative lead to either suggest the possibility or impossibility of a particular individual having made questioned impressions. But all odontologists would certainly not agree that it is possible to determine the exact individual in a

significant number of cases.

The difficulties in examining bitemarks and evaluating their worth for identification purposes are many and varied. First of all, the marks which may be discovered may have changed their shape and size considerably from the time they were inflicted. Skin tissue is very elastic. Some bitemarks disappear altogether after a short while, some remain for days. Most become significantly altered as time goes by. Bitemarks inflicted when a subject was alive may change, in addition to the natural elasticity of the skin, due to tearing of the tissue, subsequent bleeding, swellings, and discolorations of the skin, whether or not the skin was punctured by the teeth. The change in shape is sometimes drastic; the change in size may be a shrinkage as well as, though more rarely, an enlargement.

If the bitemark was left upon a dead body, or immediately prior to death, the skin alteration will be entirely different. It has been said that the turgor of the skin may last for several hours after death, during which time the marks remain quite visible, but after the turgor leaves the bitemarks may become indistinguishable except under ultraviolet light.

* * * * * *

A bitemark is not an accurate representation of the teeth that caused its impression. To understand this, one must consider the bite dynamics and its effects on the impression made by the teeth. The lower jaw (mandible) is movable and delivers the bite force against the upper jaw (maxilla) which is stationary. The upper teeth hold the substance which is being bitten as the lower teeth approach for the purpose of cutting the substance. When referring to bitemarks in skin, this would mean that the skin is curved between the upper and lower teeth but as the lower jaw moves up to cut the tissue, the skin is stretched away from its normal curvature between the teeth. It will be considerably out of shape when the force is actually inflicted that causes the skin to be pinched between the upper and lower teeth. In this whole process, the skin itself has not been stationary, because it tends to slip along the upper teeth until they catch hold when the bite occurs.

Bitemarks also show changes and become distorted when the posture of the victim changes. They may shrink in one dimension and become elongated in another. If, as some odontologists have said, there is no mouth which is identical to another, bitemarks made by different persons may certainly appear identical because the great variety in characteristics that may be found in the teeth themselves is not visible in an impression of the teeth.15/

If a cast is made of a bite impression left at a crime scene, there is a good chance that it does not accurately represent the true shape of the dental apparatus of the suspect who made the impression. The forensic odontologist who has a possible suspect in mind will take impressions of the teeth of that individual for comparison purposes, but considering the changes that may have occurred in the questioned bitemark before casting, the chances of making a reliable and accurate indentification are highly dependent upon the quality and extent of the crime scene bitemark as well as the presence of certain easily recognizable characteristics. A very questionable proposition in many cases.

Photography of teeth impressions is also recommended as a matter of course, but it, too, has serious limitations. A photograph is a two-dimensional pictorial representation that depends for its validity and easy examination primarily on its three-dimensional features. Also, photography renders a representation in a flat plane whereas the impressions may occur on a curved surface, such as a human arm or leg.

It is these many limitations that cause most forensic odontologists to recommend bitemark examinations as furnishing excellent investigative leads only, with rare cases permitting identification of a particular individual. In that sense, bitemark identification is indeed quite distinct and different from, for example, fingerprint identification or even the comparison of disputed handwritings.

15/ See also Wecht, Forensic Sciences (Vol.2, 1986), §28.05 (Forensic Odontology, Examination of Bite Marks)("Compared to impression materials used in dentistry, the skin is a poor medium for bite mark registration. This is so because of the variable elasticity of skin, the topographical curvature, and the probability that all aspects of the bite may not be consistently duplicated in that medium.")

Where an adequate predicate (i.e. a bite mark containing sufficient unique or individual characteristics) exists to permit a reliable identification to be made, such testimony is admissible. Bundy v. State, supra. Like any other expert testimony, it is then to be given whatever weight the jury chooses to accord it. On the other hand, where, as here, there is no sufficient predicate[16/] for the purportedly scientific testimony, and where the identification based thereon is inherently unreliable, it is not merely a question of weight for the jury - such testimony is entitled to no weight, and should not be admitted. Cf. Farmer v. City of Fort Lauderdale, 427 So.2d 187,190-191 (Fla.1983)(regarding the unreliability of polygraph evidence). If a motion to exclude the bite mark identification had been made in this case, the trial court would have heard the testimony of both Dr. Briggle and Dr. Levine before ruling on whether there was a sufficient predicate - i.e., sufficient indicia of reliability - to permit the identification to be made before the jury. Unfortunately, since there was no objection below, appellant must rely on the doctrine of fundamental error. Wright v. State, supra; State v. Peek, supra. Nevertheless, it is appellant's position that this Court can and should consider the totality of the evidence in determining the issue, rather than merely characterizing the areas of disagreement between Dr. Briggle and Dr. Levine as matter of "weight and credibility", since (if appellant's position prevails) Briggle's testimony, and especially his

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[16/] See e.g. LeFevre v. Bear, 113 So.2d 390,393-394 (Fla.2d DCA 1959); Johnson v. State, 314 So.2d 252-253 (Fla.1st DCA 1975); Wright v. State, supra, D'Avila, Inc. v. Mesa, 381 So.2d 1172 (Fla.1st DCA 1980); Victoria Hospital v. Perez, 395 So.2d 1165 (Fla.1st DCA 1981); Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla.4th DCA 1983); see also Fla. Stat. §90.705(2).

ultimate conclusion, was inadmissible and entitled to no weight.[17/] Further, in light of the fact that the science of bite mark identification is still in its developmental stages, appellant submits that this Court can and should consider the comparative qualifications and experience in that field of Dr. Briggle and Dr. Levine, before determining whether Briggle's identification of appellant as the person who inflicted the bite mark should have been heard by the jury in this capital trial. The relevant testimony is as follows[18/]:

C. Dr. Levine

Dr. Lowell Levine is Chief of Forensic Dentistry with the Medical Examiner's Office of Nassau County, New York (a suburb of New York City with a population of approximately two million)(R371). Before going there, Dr. Levine was Chief of Forensic Dentistry with the New York City Medical Examiner's Office, from 1968-1980 (R370-371). He was on the faculty of the New York University medical and dental schools for approximately fifteen and twenty years respectively (R370).

17/ Even assuming arguendo that only Dr. Briggle's testimony could be considered, it remains appellant's position that even that testimony, of itself, fails to establish sufficient indicia of reliability (i.e., fails to demonstrate that the bite mark contained sufficient unique or individual characteristics) to permit an identification to be made.

18/ Since his explanation of "class characteristics" and "individual characteristics" is central to an understanding of why the bite mark in this case provided no basis for an identification, appellant will take the liberty of discussing Dr. Levine's testimony before turning to that of Dr. Briggle.

Dr. Levine has been qualified as an expert witness many times in the courts of fifteen or sixteen states[19/], as well as in the U.S. Senate and the U.S. House of Representatives (R372). The cases involving bite marks which Dr. Levine has examined number in the hundreds[20/], and he has published many articles on the subject of bite mark evidence (R374).

Dr. Levine has served as a consultant for the Central Identification Lab which does MIA identifications in Honolulu (R370). In 1985-86, in Brazil, Dr. Levine was a consultant to the U.S. Department of Justice Marshall's Service and the Office of Special Investigation with regard to the investigation, and ultimate identification of the body, of Nazi fugitive Joseph Mengele (R371). He was a consultant to the U.S. House of Representatives Select Committee on Assassinations, which investigated the death of President Kennedy (R371). On two occasions, he served as a consultant to the Argentine government, with regard to the investigation of the disappearances, and possible murders, of some 9,000 persons at the hands of military leaders formerly in power (R372). Dr. Levine has also worked on cases for the Naval Investigative Service, and in September 1986 was the leader of a team sent to Indonesia by the Navy to train that country's military and police forces

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19/ It is worth noting that in several of the reported decisions, including Bundy, on the subject of bite mark identification, Dr. Levine testified for the state. Bundy v. State, 455 So.2d 330 (Fla.1984) (case no. 57,772, see initial brief of appellant, p.20-21,37,105-108); People v. Smith, 443 NYS 2d 551,553-554 (Dutchess County,1981); People v. Prante, 498 NE 2d 889,897 (Ill.App.1986).

20/ Based on this experience, Dr. Levine testified that in homicides bite marks are found in two broad categories of cases: (1) those "involving sexual activity around the time of death, both heterosexual and homosexual, forcible and voluntary" (R374-375), and (2) those in which the victim is a child, or where children are murdered by other children (R375).

in the forensic sciences (R370).

Dr. Levine is a diplomate of the certification board of forensic odontology (R373). He is a fellow of the Academy of Forensic Sciences, and a member and past officer of a number of other professional associations (R374-375). He has lectured on the subject of forensic odontology "[dozens] and dozens of times throughout the world" (R374).

In People v. Smith, supra, at 533, the court described Dr. Levine (a prosecution witness in that case) as "a forensic odontologist of the widest experience as an expert witness, author, and lecturer in legal and academic circles", and further noted "As appears from the Court's own research, Dr. Levine has been cited extensively in both the decisional law and the odontological literature for his numerous writings and appearances."

In the trial of the instant case, Dr. Levine testified that human bites (as distinguished from animal bites) leave patterned injuries (or marks) which are ovoid in shape, and from 2 1/2 to 4 or 4 1/2 sonometers in width (R375-376). Human bites sometimes leave a central ecchymotic area, or black-and-blue suck mark, and they (unlike animal bites) do not lacerate or tear the skin (R376). In a human bite, because the upper teeth fit over the lower teeth, the patterning left by the upper teeth will be wider than that left by the lower teeth; that is one way you can tell them apart (R376-377). Also "[in] the upper teeth, the two incisors in the middle are very wide, and the two incisors next to them are narrower. They leave class characteristics and sizes which are rectangles. ... The lower teeth which are also incisors leave rectangles also, so what we expect to see in the lower

is four rectangles all around the same width as the lower teeth and the uppers, four rectangles, the middle tooth wider and the two next to them narrowing" (R377). Markings of this kind, Dr. Levine explained, are what is referred to as "class characteristics", because they are typical of human dentition; they are the kinds of characteristics that teeth generally leave on the skin (R377). He continued:

> Basically, in forensic sciences, we talk about class characteristics and individual characteristics, and sometimes they get a little bit muddied; but to give you an analogy, if you see something sitting out there with a motor and windows and body and four wheels, it's a car. So that's a class characteristic of cars.
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> If you see that same thing that says "Chevrolet" on it, you know that would still be a -- it would individualize it in that now we have Chevrolets but that is still a class, so it's individual and class. Now, it's a car and a Chevrolet, but there are a lot of Chevrolets. We see one that is red with a broken headlight.

(R377-378)

Asked to explain how bite mark comparison is done, Dr. Levine replied that the pattern injury in the skin is photographed, and then the odontologist looks for all the unique and individual characteristics than can be found in the injury (R378).

> Then if we get models of teeth, we will make exemplars or make bite marks in wax something like this. It's called aluwax, a-l-u-w-a-x, and we will compare all the unique and individual characteristics in the bite mark and the tissue of skin with the unique and individual characteristics of the bite mark in the wax. That basically is the simplest way to explain it.

(R378-379, see R385,404)

There is no standard number of "points of similarity" which are needed to make an identification (R379-380); in fact, there is really no such thing in bite mark comparison that defines what a "point" is (R379). Rather, what is important is the presence, or absence, of

enough unique or individual characteristics to support an identification (see R378-380,385-386,389,392,404). Dr Levine explained:

> Theoretically, if you had one tooth that was unique, say, shaped like a Sheriff's badge, and you found that one thing in an injury pattern in the skin, that one thing, we have had a case like that where in a hundred years of dental injury you couldn't find anything similar. That one thing could be identified and it's similar in the other forensic sciences.
>
> On the other hand, if you don't have enough individual and unique characteristics, you can't arrive at a conclusion. So, there is really no number and basically your conclusions really are based upon training and experience of the examiner and, admittedly, you know, this area is somewhat subjective and it really depends on the training and experience of the examiner. 21/

(R379-380)

Dr. Levine testified that after performing the bite mark comparison, the next step is to write a report of the findings (R379). He testified that he had seen no report in this case, which was unusual, since "[in] my experience, we have got to give reports to prosecutors" (R379). 22/

Having examined the photographs of the bite mark on Walter Shonyo's left arm, and the cast impressions of appellant's teeth, it

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21/ In determining whether Dr. Briggle's identification of appellant, by the technique of bite mark comparison, as Walter Shonyo's assailant was reliable enough to go to the jury in this capital trial, appellant urges that this Court give careful consideration to the enormous disparity in the experience and recognition in the field between Dr. Levine and Dr. Briggle; particularly since bite mark identification is neither an exact science nor a fully matured one.

22/ Dr. Briggle did not write a report in this case, although he did prepare reports in the five previous cases in which he had testified as a forensic odontologist (R307-310, see R279). Asked why he did not write a report in this case, he replied "No particular reason" (R308).

was Dr. Levine's opinion that there were not enough individual characteristics - or any one particular unique characteristic - discernible from the bite mark to permit an identification to be made, by himself or by anyone (R383-384,388-389,392, see R377-380,404-405). For one thing, a large portion of the mark[23/] is "so diffuse and dried and dessicated that there is really no characteristic there and everything runs together; and in order for someone to say one thing left a particular thing, they would really be taking a guess" (R387,see R403-404). Another segment of the mark, located in the portion which Dr. Briggle and Dr. Levine agreed was made by the lower teeth of the assailant[24/] (R285,386,393,813), was also described by Levine as "very diffuse" (R403) and "just too wide an area that is all the same" (R404). There were spaces between 10 and 11 and between 14 and 15, and this was one of the reasons why Dr. Levine could not absolutely rule appellant out (R402-404). Asked by the prosecutor if he saw any consistency on

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23/ The portion of the mark which Dr. Levine described as "diffuse ...dried, and dessicated" with everything running together, is the segment which was labeled 6,7,17,18,8 and 9 by Dr. Briggle (R387,see R324,331,786,813). According to Briggle, these numbers represent an upper lateral incisor (6), an upper canine (7), two upper bicuspids (17 and 18), and two lower bicuspids (8 and 9) (R324,813). This is the segment where the most pronounced bruising appears (see State's Exhibit 26, R786). Dr. Briggle was of the opinion that the "drag pattern" of the injury in this area indicated that there was movement while the bite mark was being inflicted (R329-330). See Moenssens and Inbau, supra, at 650-652, regarding distorion of bite marks.

24/ This is the segment labeled by Dr. Briggle as 10,11,12,13,14,15 (R403-404,see R324,331,786,813). These numbers, according to Briggle, represent the four lower incisors (11-14), flanked by the two lower cuspid (or canine) teeth (10 and 15)(R324). Dr. Briggle testified that lower teeth generally leave much better marks than do upper teeth (R294), and Briggle and Levine agreed that this was true of the mark in the instant case (R294,385-386, see R786).

11,12,13 and 14 (the lower incisors), Levine answered "As a group size-wise they are similar, but then all our incisors would be relatively similar"(R403). "The four incisors are just the sides. We are not seeing any unique characteristics from any one of them. In other words, each tooth should use unique things" (R404).

In the area of the upper incisors, as Briggle and Levine agreed, the bruising pattern was much fainter than in the area of the lowers, as is typically the case (R289-290,294,385,400). Dr. Levine emphatically disagreed with the prosecutor's suggestion that the light marking or absence of marking at the portion of the bruise labeled 4 and 5 represented a "consistency" with the model of appellant's teeth, which showed the two front teeth (or central incisors) to be shorter than the upper lateral incisors (R399-401). Dr. Levine testified that, in his experience, the absence of marking or light marking does not mean that the teeth are higher in the arch or that they are missing (R400). Sometimes teeth do not leave a mark, and for that reason, in the field of bite mark comparison, "... we never interpret negative evidence. We always interpret positive evidence, the presence of marking" (R400-401). To the prosecutor's question "... you do not see a consistency there as to why these two teeth, 4 and 5, did not make a mark because they are shorter than teeth 3 and 6?", Dr. Levine replied "While that is a reasonable assumption for an amateur, you don't see that in actual bite mark evidence" (R401).

In addition to the general diffusion of the bite mark, and the lack of individual characteristics, there were a number of other specific problems with the mark (R383). There was a penetrating

wound, possibly a stab wound, in the bite mark area itself (R380-382, 388). The penetrating wound was inflicted after the bite mark, and it took away a portion of the injury pattern (R381-382,388). Dr. Levine expressed the opinion that perhaps if there had been some unique or individual characteristic where the stab wound was, it might have been possible to either eliminate or identify appellant (R388). Also, there was a lot of skin laceration in the area of the mark attributable to the lower teeth (R385-386).[See Moenssens and Inbau, supra, at 650-652, regarding distortion of bite marks, and observing that "[b]itemarks inflicted while the subject was alive may change, in addition to the natural elasticity of the skin, due to tearing of the tissue, subsequent bleeding, swellings, and discolorations of the skin, whether or not the skin was punctured by the teeth"].

With regard to the effects of a bite mark being made through clothing[25/], Dr. Levine testified that such bite marks are very often diffuse, or muddy, "so we really don't pick up individual characteristics depending on the clothing." Sometimes the fabric pattern of the clothing will be superimposed on the skin, leaving the shapes of the teeth but with the cross-hatching of the fabric (R390).[26/]

25/ Dr. Briggle testified that the bite mark on Walter Shonyo's arm appeared to have been made through clothing (R284). He acknowledged that the clothing can have an effect on the mark, though he didn't know if he would consider it a distortive effect (R314). Briggle testified, "When an injury pattern occurs through clothing by teeth you have clothing bunching up and it causes these little striations" (R284). It may also cause more pronounced bruising (R314). See Moenssens and Inbau, supra, at 650-652.

26/ Dr. Levine also testified that, if the clothing is available, it should be examined for saliva (for blood type comparison); he stated that "although you might not be able to group it, it's very easy to find the enzyme in saliva" (R390).

Asked by the prosecutor if he found any consistencies between the bite mark and the models of appellant's teeth, Dr. Levine said, "Basically in one area" (R395-396). This area involved the spacing, on either side of the lower teeth, between the lateral incisor and the cuspid (or canine tooth)(R386,396-397,402-404). This was one of the reasons why he could not conclusively rule appellant out (R403-404). However, there were also a number of discrepancies and inconsistencies which he could not account for (R383-388,396-398). In the part of the mark made by the lower teeth (an area with a lot of skin laceration), there were discrepancies between the bite mark and the aluwax impressions left by the models of appellant's teeth, "including the fact that the sizes are somewhat wrong" (R386). Dr. Levine continued, "That is not a huge problem unless you get gross distortion, in which case the skin is elastic and gives some, but when you start to give gross distortion, then this is wrong"(R386). The upper teeth, Dr. Levine stated, are more of a problem "because if you look at the bite mark in wax that has been left by the upper teeth --- it's considerably wider than the one in the photograph, and you have to explain that away and, very candidly, I can't explain it" (R386, see R388).27/

27/ According to state witnesses Sandra Wessels and Linda McCuston, both technicians with the Tampa police, and according to Dr. Briggle, the original photograph of the bite mark was reproduced to one-to-one size (actual size), by means of a procedure in which a ruler is placed beside the bite mark in the original photograph (R254-256,258-260,281, 786). A second ruler is then placed on a surface upon which the photographic image is projected, and adjustments are made in the size until the projected image of the ruler in the photograph is the same size as the measurement ruler (R258-260).

On cross-examination, the prosecutor asked Dr. Levine, "And basically your opinion here today with all your years of expertise in forensic odontology is that you cannot tell this jury that this man did not make that bite mark" (R396). Dr. Levine agreed that he could not positively exclude appellant; "If I could explain away a lot of things, yes, it would be possible" (R396, see R388,402-405). Asked on re-direct whether other people could have made this bite mark, he replied "Well, sure" (R404). He summed up the situation as follows: "[There] are other people you can exclude, and there are a lot of people you can rule in. There is just not enough there to work with" (R405).

D. Dr. Briggle

Dr. Joseph Briggle is a dentist from Coral Gables, Florida, and is a forensic odontologist consultant with the Dade County Medical Examiner's Office (R273-274). He received his dental degree from Case Western Reserve in 1979, and, after a one year residency, became licensed to practice in Florida (R274). In 1981, he was appointed an Associate Medical Examiner (R275). Dr. Briggle is a member of the American Dental Association, the Florida Dental Association, the East Coast District Dental Society of Miami, and the American Academy of Forensic Sciences (R274-275). He has been active in several local dental study groups, and has served as an officer in two of these groups (R275). He has lectured in forensic dentistry to the local dental societies (R277). Dr. Briggle has testified as a expert in the area of forensic odontology approximately five times, all in Dade County (R278-279).

As of the time of trial, Dr. Briggle had recently taken

an examination to become board certified in forensic odontology (R277-278). In order to be eligible to take the exam, it is necessary to accumulate a certain number of points and to be accepted by a credentials committee; "you are given points for every case you are involved with involving forensic dentistry" (R278). Dr. Briggle met the qualifications to sit for the exam, but he had not yet learned the results (R278-279).

In the field of bite mark identification, Dr. Briggle has taken a one week course at the Armed Forces Institute of Pathology in Washington, D.C. (R276-277). He has "been involved in postgraduate courses, lectures on forensic dentistry involving bite mark evidence" (R277), and has for the past few years attended meetings of the American Academy of Forensic Sciences "[at] which they present two days' worth of papers involving all forensic dentistry, but recently a great deal of it has been involving bite mark evidence" (R277). Dr. Briggle estimated that he had "reviewed between ten and fifteen cases involving bite mark evidence, one aspect or another" (R276).

Dr. Briggle testified that when he received the photograph of the bite mark on Walter Shonyo's arm, he first determined, from the arch form of the injury pattern, that it was a human bite (R281-283). According to Dr. Briggle, the photograph represented "a very high quality, good bite, is what we would call it in the field, because it shows particular indentations and characteristics of individual teeth" (R282-283). From the bruising pattern, Dr. Briggle determined that the bite was "para-mortem"; it was inflicted while the victim was still alive, but very near the time of death (R283). Several of the indentations contained a "drag pattern" - "the little narrow injury pattern

first before the tooth actually dug into the tissue" - and this indicated movement (R299,329-330). The bite appeared to Dr. Briggle to have been made through clothing (R284). He determined this from the injury pattern ("[Y]ou have clothing bunching up and it causes these little striations"), and confirmed it from the photographs showing the victim clad in a long-sleeved shirt (R284-285,310-311). Dr. Briggle acknowledged that the clothing can have an effect on the mark, but he didn't know if he would call it a distortive effect (R314). It may at times cause more pronounced bruising (R314).

Dr. Briggle testified that the teeth which made this bite mark were probably in good repair, because of the very distinctive broad marks (R284). Teeth in poor condition, with jagged edges and so forth, generally leave a mark with more dragging patterns, more scrapings (R284).

When he examined the photograph of the bite mark, Dr. Briggle identified "some interesting characteristics" (R288). He explained that particular teeth cause a particular type of injury pattern (R288). He testified:

> The eye tooth or the canine tooth very commonly makes what we consider a diamond shape or a triangular shaped injury pattern in the tissue, and I was able to identify in Exhibit 39 this particular injury pattern that looks almost like half of a diamond if you will, a triangular shape.
>
> * * * * * *
>
> This particular injury pattern which I have pointed to with my pen is triangular shaped, and this is very -- you see that very frequently with the eye tooth, the canine tooth, because it has such a point on the tooth.
>
> I also identified as I mentioned before, as I said, this is a little arch. This large mark here is actually individual marks, and this is very commonly. We see this with the lower incisor teeth, making this type of injury pattern.

*   *   *   *   *   *

> So, I basically have -- I started to identify certain parts of this injury pattern and got that in my mind for my comparison. The lower arch gives us much more characteristics than the upper arch injury pattern except we can also see particular teeth marks in the upper arch also.
>
> I will point to some of them at this point in time. This pattern where I am pointing to right here.

*   *   *   *   *   *

> This particular bruise mark that I am pointing to right here, we also see quite commonly with the eye tooth. You may wonder, "Well, why doesn't it mark as distinctly as this?" You will notice on this photograph, the injury pattern on this side is much deeper than on this side. You see that frequently. But, again, I am trying to identify particular characteristics that we know certain teeth make.
>
> Around the arch here, there is a bruising pattern here and here not quite as distinct in these two teeth marks right here which I will be able to explain a little later. But this particular mark here is quite commonly what we see with the upper lateral incisor which I will point out again in a moment on the models.

(R288-290)

In doing a bite mark comparison, Dr. Briggle first looks for particular distinctive patterns in the photograph of the bite mark; "[a]t this point we don't know who made this bite" (R291). He then tries to compare these points to the known models; "[w]e know whose teeth these are" (R291). In the instant case, the first thing that struck Dr. Briggle was that on either side of the lower arch there was a space between the eyetooth (or canine tooth) and the lateral incisor (R291, see R286-288). According to Dr. Briggle, the spaces in the photograph corresponded to and were consistent with the spaces in the model (R291-292). He testified that not everybody's mouth would have

such spaces (R292). Some people - Dr. Briggle had no statistical information and no guess as to how many - have no spaces at all between their teeth, particularly if they have had a lot of orthodontics (R314,316-317).

Dr. Briggle pointed out another similarity between the bite mark photograph and the models: "I mentioned that injury pattern is consistent with what we see with a sharp, pointed eye tooth. That was also consistent. The individual [appellant] does have a sharp pointed eye tooth" (R292)[28/]

At this point, Dr. Briggle lined up the pointed eye tooth with the particular mark which he had identified as most probably being caused by the pointed eye tooth, and searched for any inconsistent markings which possibly could eliminate the individual (R293-294). Dr. Briggle testified that appellant's eye tooth and his lower front teeth "fit" into the mark (R293)[29/]. Finding no inconsistencies in the lower arch, Dr. Briggle turned to the upper arch (R294). He observed that the upper teeth had left markings in the tissue, which, according to Dr. Briggle, "is not always the case" (R294). He testified "Literature has reported that in many areas the lower teeth mark much better, and

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28/ Note, however, Dr. Briggle's <u>generic</u> description of the eye tooth; it commonly leaves the diamond or triangular shaped injury pattern "because it has such a point on the tooth" (R288-289), or "because the anatomy of the tooth is very sharp" (R289).

29/ According to Dr. Briggle, if appellant's lower eye teeth had been right next to the incisors (i.e., if he had not had spaces between these teeth), then his dentition would have been inconsistent with the injury pattern, and he could possibly have been eliminated (R293-294). Interestingly, Dr. Levine also testified that the spacing between these two pairs of teeth was one of the reasons he could not absolutely rule out appellant as a suspect (R402-404).

the lower teeth did mark much better in this case, but we do have markings from the upper teeth" (R294). So, using the same technique, he lined up the upper eye tooth with the mark which was probably caused by the upper eye tooth (R295). Having done this, Dr. Briggle found that a number of the upper teeth in the model fit into the marks in the injury pattern (R295-300). There was a large, distinctive bruising pattern which, in Dr. Briggle's opinion, was caused by the upper right lateral incisor, and which was slightly different from the lateral on the other side (R298). He asked rhetorically "Why might it be different? Well we would expect it could possibly be different because of the anatomy of the tooth. Perhaps the tooth had a sharp point on it which is being more blunted or rounded" (R298). Dr. Briggle testified that appellant's upper right lateral incisor does have a sharp point on it, and this, in his opinion, was consistent with the bruising pattern in the photograph of the victim's arm (R298-299).

The injury pattern was very faint in the area where the upper front teeth (central incisors) would have fallen (R296). According to Dr. Briggle, that is "very consistent" with appellant's teeth, because, as indicated by the models, they are a little bit higher than his lateral incisors (R296-297). [Usually, Dr. Briggle testified, it is the lateral incisors which are slightly higher than the front teeth (R297)]. Appellant's front teeth, according to Dr. Briggle, would not leave a mark because they would not reach as deep into the skin as

the other teeth around them (R298).[30]

The prosecutor pointed out a deep incision or laceration in the photograph, and Dr. Briggle stated that this large mark was not made by a tooth, although he had reason to believe there might be a bruise underneath the laceration (R290-291). He believed that the bite was probably inflicted prior to the puncture wound, but was not 100% sure (R325). Dr. Briggle provided a photograph of the bite mark in this case to Dr. Souviron, and it was used in the board certification exam which Briggle recently took (R317-320). The question was "What made this mark?", and the answer was "A puncture wound, not a tooth mark" (R319-320).

Dr. Briggle stated his ultimate conclusion as follows: "My opinion within a reasonable degree of medical certainty is that this is indeed a match. The bite mark on the individual's arm was made by the teeth that belonged to the individual that had those models taken" (R300-301). He estimated conservatively that he found, altogether, eighteen points of consistency (R306,313-314). Fifteen of these points represent teeth which "matched up" or corresponded to the bruising pattern (R306,313). The remaining three points were the two spaces in the lower teeth, and one tooth (apparently a bicuspid, which, by definition, has two cusps, see R295-296) which made two little red dots on the bite (R313, see R306). He acknowledged that he could not

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30/ According to Dr. Levine, the absence of marking or light marking does not necessarily mean that the teeth are higher in the arch or missing (R400). Sometimes teeth do not mark, and for this reason "we never interpret negative evidence" (R400-401)[Note also Dr. Briggle's testimony that sometimes the entire upper arch leaves no mark (R294)]. Dr. Levine characterized Dr. Briggle's interpretation as a reasonable assumption "for an amateur, for somebody that hasn't seen a lot of bite mark evidence" (R401); but one which is "absolutely not true" (R400).

exclude everyone else in the world as having made the mark[31], but stated "I am very confident in my comparison" (R306). Dr. Briggle also acknowledged that bite mark identification is not an exact science (R306,326-327). "We are trying to develop it more into an exact science but it's rather new, only been around for, in courts of law ... for, I am going to estimate, five years perhaps." (R306).

E. The Unreliability Of The Bite Mark Identification In This Case

Bite mark identification is a new scientific technique - one which is still in the process of being developed. It is not an exact science, and it does not yield its results with mathematical certainty. The interpretation of a bite mark depends to a great extent on the training and the experience of the interpreter. And, as can clearly be seen from the foregoing discussion of Dr. Levine's testimony and that of Dr. Briggle, wildly disparate interpretations are possible.

In the present case, the situation is not merely the relatively common one where two experts in an established field disagree as to their opinions. What gives grave cause for concern in the present case is that in such an embryonic field, the world renowned expert who has examined bite mark cases numbering in the hundreds and has published many articles on the subject was unable to glean enough meaningful information from the bite mark to work with, while the

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31/ Asked, for example, whether a mark like this could have been made by someone wearing dentures, Dr. Briggle replied that he doubted it, but that it was possible (R326). In general, dentures do not have as many sharp points on the biting edges of the teeth, and therefore they usually make a broader mark (R326).

odontologist who has seen some 10-15 bite mark cases and taken a one week course in the subject experienced no such difficulty. Ordinarily, one would expect that the more experience you had interpreting bite marks, the more you could tell from a bite mark. Yet here, what Dr. Levine saw as "so diffuse and dried and dessicated that there is really no characteristic there and everything runs together" (R387), Dr. Briggle saw as "a very high quality, good bite, is what we would call it in the field, because it shows particular indentations and characteristics of individual teeth" (R282-283). The apparent paradox can be explained only by the difference in what the two odontologists were looking for; Levine was looking for unique and individual characteristics, while Briggle was looking for points of consistency. When Dr. Briggle's testimony is considered in terms of the class characteristics/individual characteristics dichotomy explained by Dr. Levine (R377-378,379-380), it can be seen that virtually everything Dr. Briggle was able to discern from the bite mark was in the nature of a class characteristic. Dr. Briggle repeatedly referred to markings which he believed were made by a particular tooth - a canine, an incisor, a bicuspid, etc. - based on the generic qualities of that type of tooth. His testimony is punctuated throughout with references to markings being "very frequently" or "very commonly" associated with particular teeth. He then lined up the model of appellant's teeth with the photograph of the bite mark, and found, basically, that the bruising pattern was consistent with the location and spacing of appellant's teeth. Dr. Briggle found eighteen "points of consistency", but fifteen of these simply consisted of teeth which fit on the bruising pattern. Two more were the spaces between the incisor and the eyetooth on each

side of the lower arch, but Dr. Briggle had no idea as to how common such spacing might be.[32/] Lastly, he identified as a point of similarity the two little red dots he believed to have been made by a bicuspid; but, again, there is nothing to indicate that it would be in any way unusual for anyone's bicuspid to leave such a mark.

Dr. Levine, on the other hand, was looking for unique or individual characteristics - individual not in the sense of "this mark shows the characteristics of a canine tooth", but in the sense of "this mark shows the characteristics of Willie Mitchell's canine tooth", or else "this mark shows characteristics which could not have been made by Willie Mitchell's canine tooth." According to Dr. Levine, there is no standard number of points of similarity which enable an identification to be made, and in fact there is really nothing in the field of bite mark comparison that defines what a "point" is (R379). Rather, what is needed to make an identification is enough unique or individual characteristics (see R378-380,385-386,389,392,404); if a marking is truly "one-of-a-kind", even one characteristic may be enough (see R379-380).

32/ Contrast, for example, <u>People v. Prante</u>, 498 N.E.2d 889,897 (Ill. App.1986), in which the defendant's dental impressions revealed spaces between each one of the six upper front teeth, and this spacing was consistent with the victim's wound. The defendant's dentist (a state witness) testified that in 17 years of practice and after treating 6000-7000 patients, he had seen such spacing fewer than 15 times, and estimated that spaces between all six upper teeth occurs less than 1% of the time. In the present case, Dr. Briggle quite clearly had no idea how common or uncommon it would be to have spaces on each side of the lower arch between the eyetooth and the lateral incisor (see R316-317). All he could really say was that "not everybody's mouth" would have those spaces (R292), and that lots of people have spaces between their teeth, and then again some people don't, especially if they have had a lot of orthodontics (R316-317).

Thus, the real difference between the opinion of Dr. Levine and that of Dr. Briggle lay not so much in what they found, but in what they felt they needed to find in order to make a reliable identification. The basic premise underlying the general rule of admissibility is that "because of the wide variation in the characteristics of human teeth, individuals are highly unique so that the technique of bite mark comparison can provide identification of a high degree of reliability." Bundy v. State, supra, at 337, see 348 ,349. It follows, then, that an identification of an accused by bite mark comparison is reliable only if it is made on the basis of unique and individual characteristics discernible from the mark. Class characteristics, or "points of similarity" (which, according to Dr. Levine, are not even recognized or defined in the field), do not provide a basis for a reliable identification.

Perhaps if Dr. Briggle had testified only that, in his opinion, the bite mark was consistent with appellant's teeth, such testimony might not have risen to the level of fundamental error. But when Dr. Briggle told the jury that, in his opinion, to a reasonable degree of medical certainty, it was appellant who inflicted the bite wound on Walter Shonyo, this changed the posture of the evidence from "It could have been him" to "It was him". See State v. Peek, supra, slip opinion, p.3 (Appendix A). As in Peek (p.8), if the jury accepted Dr. Briggle's identification, it had a devastating effect upon the defense, and the state's circumstantial case became (or appeared to become) much stronger.[33/]

33/ Even with Briggle's identification, the jury recommended death by only a 7-5 vote, under circumstances which strongly suggest that the basis for the five life votes was residual doubt as to guilt.

The state will undoubtedly contend that Dr. Briggle's identification of appellant was properly submitted to the jury to be accorded whatever weight they felt it was worth, and, after all, didn't the defense have the benefit of Dr. Levine's testimony to attack the credibility and reliability of Briggle's identification? The problem with this reasoning is twofold. First of all, unreliable evidence is not admissible for "whatever weight it's worth"; such evidence is entitled to no weight [see Farmer v. City of Fort Lauderdale, supra, at 190], and its introduction before the jury is prejudicial error and may be fundamental error. State v. Peek, supra; Wright v. State, supra. This is particularly true in a trial which may result in the death penalty, and where the unreliable evidence goes directly to the heart of the case - the issue of identity.[34/] See State v. Peek, supra, p.1,8-10; cf. Clark v. State, 363 So.2d 331,333 (Fla.1978); Peterson v. State, 376 So.2d 1230,1234-1235 (Fla.4th DCA 1979)(" 'Fundamental error', which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action").

Secondly, the prosecutor's use of Dr. Levine's testimony in his closing argument to the jury actually had the effect of compounding the error of admitting Dr. Briggle's positive identification. Levine

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34/ The trial court in Peek, in granting a new trial pursuant to Rule 3.850, said "the Court finds that the error in submitting the evidence [the hair analyst's probability testimony] to the jury was of great magnitude; that since identity was a major issue in the case the error goes to the foundation and to the merits of the cause; and that the defendant was not afforded a fair trial. The Court, therefore, finds that the error was fundamental and may be collaterally attacked in a 3.850 motion even though objection was not made at trial." State v. Peek, supra, p.9-10.

testified that, even though he had found a number of inconsistencies which would need to be explained away in order for appellant to have made the bite mark, he could not absolutely rule appellant out. One of the reasons he could not exclude appellant was because of the spacing similarities between two pairs of teeth on the lower arch. But the main reason he could not exclude appellant was the same reason he could not identify appellant - the bite mark simply did not contain enough information. "There are other people you can exclude, and there are a lot a people you can rule in. There is just not enough there to work with" (R405).

In his closing statement to the jury, the prosecutor argued the bite mark evidence in a manner which, at first glance, seems surprising; making no real attempt to attack Dr. Levine's credibility or his expertise. Quite the contrary, the prosecutor argued Dr. Levine's testimony as if it tended to corroborate Dr. Briggle's identification of appellant.

> Okay. The bite mark. The bite mark. You got the models. You've got the photographs. They bring an expert in here, Doctor Levine, and he was straightforward. I stipulated to his expertise. What did he tell you, their own defense witness, Doctor Levine. This man could have made that bite mark. I can't rule him out. All right.

(R522)

* * * * * *

> This is just not a bite mark case only. All right. You have got to take the consistency of that bite mark with everything else. That bite mark just adds fuel to the fire, ladies and gentlemen, and their only expert, Doctor Levine, told you, and I repeat, Mr. Lufriu can't come up here and deny this.

Levine said, "Hey, I cannot rule that man out. He may have made the bite mark." Doctor Briggle said, "Hey, in my opinion, look at those photographs. Look at that model. They matched." You take them back there. You play with them back there. You put them against that photo and use your common sense.

(R525)

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Mr. Lufriu says Mr. Benito wants you to forget the experts. I don't want you to forget the experts. I want you to remember what Doctor Briggle told you. It's a match. I want you to remember what Doctor Levine told you. I can't rule this guy out. He could have made the bite mark. 35/

(R560)

35/ In addition to treating Dr. Levine's testimony as if it were corroborative of Dr. Briggle's, the prosecutor also grossly mischaracterized Levine's testimony regarding the kinds of cases in which bite marks are usually seen. Levine testified that he has examined hundreds of bite mark cases, and, in homicides, bite marks are generally found in two categories of cases: those involving sexual activity and those involving children (R374-375,401-402). On cross, he was asked:

> Q. [by Mr. Benito]: You cannot rule out that a bite mark could occur, could you not, doctor, in, let's say, a struggle between two men during the course of a robbery?
>
> A. That's correct.
>
> Q. That could happen, couldn't it?
>
> A. Yes, sir.

(R402)

Somehow, in the prosecutor's closing argument, this testimony got transmogrified into the following:

> All this man can do, because this man is being used for balance, and this hand is attacking this man with a knife, all he can do to control Mr. Shonyo's left arm, all he can do to control it is what? He's got to bite.
>
> All right. He's got to bite the arm right there. Where did I stick my arm in Doctor Levine's face? You recall Doctor Levine sitting there. I stuck my arm like this. Is that how it would have happened, and their own expert said yes. That's why he bit him, not because they were having anal intercourse in the front seat.

(R509)

What is crucial to remember is why Dr. Levine could not rule appellant out. It was not because he found any great degree of consistency (short of that needed for an i.d.) between the bite mark and the models. His testimony was that he found some consistencies "basically in one area" (R395-396); apparently referring to the two spaces (see R.396,402-404). He also found a number of inconsistencies, and his acknowledgement that he could not conclusively rule appellant out was with the qualification "If I could explain away a lot of things, yes, it would be possible." It was because the bite mark did not reflect unique or individual characteristics - the very reason which makes Briggle's identification unreliable - that Levine could not exclude appellant, any more than he could exclude "a lot of [other] people" (R405, see R404). As was true of the blood semen and hair evidence in Peek, the bite mark evidence in the present case is illusory; it "seem[s] to be proving guilt, when actually [it] merely fail[s] to prove him innocent." State v. Peek, supra, p.2.

The Eighth Amendment mandates a heightened standard of reliability in death penalty cases. See e.g. Beck v. Alabama, 447 U.S.625 (1980); Caldwell v. Mississippi, 472 U.S.__, 105 S.Ct.__, 86 L.Ed.2d 231 (1985). The bite mark evidence in this case was unreliable, and it may well have played a substantial role in the jury's decision to convict appellant of first degree murder. See State v. Peek, supra, p.8; State v. DiGuilio, 491 So.2d 1129 (Fla.1986). In the interest of justice[36/], and because the admission of the bite mark identification

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[36/] See Fla.R.App.P. 9.140(f); Tibbs v. State, 397 So.2d 1120,1126 (Fla.1981); Barnes v. State, 406 So.2d 539 (Fla.1st DCA 1981); Dukes v. State, 356 So.2d 873 (Fla.4th DCA 1978); Ferber v. State, 353 So.2d 1256 (Fla.2d DCA 1978); Wright v. State, supra, at 31.

rendered appellant's trial fundamentally unfair,[37/] this Court should reverse the convictions and death sentence and remand for a new trial.

ISSUE IV.

THE PROSECUTOR'S CONCLUDING REMARKS IN HIS GUILT-OR-INNOCENCE PHASE ARGUMENT TO THE JURY INJECTED IRRELEVANT AND HIGHLY PREJUDICIAL CONSIDERATIONS INTO THE JURY'S DECISION, AND IRREPARABLY DAMAGED APPELLANT'S RIGHT TO A FAIR TRIAL.

The evidence in this trial was entirely circumstantial. The state's theory of the case was that appellant killed Walter Shonyo in the course of a robbery, possibly when he met with more resistance than he anticipated. According to the state's hypothesis, appellant bit Shonyo during the struggle. Appellant denied robbing or killing anyone, but admitted that he burglarized Shonyo's abandoned truck. The defense theory of the case was that Shonyo was murdered by someone else, under circumstances (among them the bite mark) indicating a homosexual rage killing.[38/]

The state had the first and last closing arguments, with defense counsel arguing in between. The prosecutor concluded his

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37/ See Wright v. State, supra, at 31 (fundamental error); State v. Peek, supra, at 8-10 (fundamental error).

38/ It is worth noting, parenthetically, that the evidence indicating homosexual activity did not come from appellant's testimony. Contrast Fowler v. State, 492 So.2d 1344 (Fla.1st DCA 1986). Appellant testified that he never saw Walter Shonyo and had no idea what happened to him (R473-475); when he came upon the truck and decided to burglarize it, there was nobody in it (R473). It was Dr. Michael Baden who testified that in his opinion the circumstances of the crime were characteristic of a homosexual rage killing, and were inconsistent with a casual stranger robbery (R412-440). Dr. Baden also made it clear that he was not necessarily saying that the homosexual activity was voluntary on the part of the victim (431).

final closing argument with the following remarks:

> Ladies and gentlemen, during the course of this trial, three people -- three people -- have sat at that defense table. I have sat over there. I've not sat there alone. I have sat there with Walter Shonyo. Every time there is a mention about homosexual activity, every time there is a mention about anal intercourse, and every time there is a mention about oral intercourse, every time there is a mention about semen in the anus, Mr. Shonyo winced and Mr. Shonyo angered and Mr. Shonyo gripped the edge of the table.
>
> He is not here to tell you what happened in that truck that night, but the evidence has told you what happened, and now you can tell him you know what happened, and you can tell him that by coming back in this courtroom, looking him straight in the eye and saying, "You're guilty, Mr. Mitchell. You're guilty as charged in the two-count Indictment of the armed robbery and the first-degree murder of Walter Shonyo."
>
> Tell him you know what happened in that truck. Thank you, ladies and gentlemen.

(R570-571)

This argument was plainly and outrageously improper[39/], but, once again, there was no objection to it[40/], so appellant is entitled

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39/ See Bertolotti v. State, 476 So.2d 130,134 (Fla.1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law"); Grant v. State, 194 So.2d 612 (Fla. 1967); Harris v. State, 414 So.2d 557,558 (Fla.3d DCA 1982)(and cases cited therein in n.1)(condemning prosecutorial "appeals to sympathy, bias, passion, or prejudice"). See also Hawthorne v. United States, 476 A.2d 164,169-174 (D.C.App.1984); Commonwealth v. Mikesell, 381 A.2d 430,432-434 (Pa.1977); Nevius v. State, 699 P.2d 1053,1059 (Nev.1985).

40/ The question of whether counsel's failure to object, by itself or in conjunction with other factors, amounts to ineffective assistance of counsel is not cognizable on appeal, but may be raised collaterally. See Vela v. Estelle, 708 F.2d 954,961-966 (5th Cir.1983); Blanco v. Wainwright, supra.

to no relief unless the prosecutor's injection of irrelevant and prejudicial considerations into the jury's guilt phase deliberations was so destructive of appellant's right to a fair trial as to constitute fundamental error. See e.g. Pait v. State, 112 So.2d 380,385-386 (Fla.1959); Peterson v. State, 376 So.2d 1230 (Fla.4th DCA 1979); Jones v. State, 449 So.2d 313 (Fla.5th DCA 1984); Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984); Rosso v. State, __So.2d__ (Fla.3d DCA 1987)(12 F.L.W.1024); Tuff v. State, __So.2d__(Fla.4th DCA 1987)(12 F.L.W. 1335), in each of which the appellate court determined that the prosecutor's improper argument deprived the defendant of a fair trial; and amounted to fundamental error, cognizable even in the absence of an objection.[41/] Contrast, e.g. Brown v. State, 473 So.2d 1260,1264 (Fla. 1985)(in light of standard set forth in Donnelly v. DeChristoforo, 416 U.S.637 (1974), prosecutor's remarks did not deprive defendant of a fair trial, and therefore any error was waived by failure to object below).

The standard established in Donnelly v. DeChristoforo, supra, is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." The challenged remark in Donnelly was held not to have reached that level of prejudice. In Caldwell v. Mississippi, 472 U.S.__,105 S.Ct. 2633,2645 (1985), the Supreme Court distinguished that holding, based on "[t]wo important factors, both emphasized in Donnelly". First, the Donnelly court, while recognizing that some prosecutorial comments

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41/ See also State v. Williams, 346 S.E.2d 405,410-411 (NC 1986); People v. Thomas, 497 N.E.2d 803 (Ill.App.1986).

"may be too clearly prejudicial for a curative instruction to mitigate their effect", found that the comment in that case was "hardly of such character." The trial court in Donnelly had given the jury a strong curative instruction. Secondly, the prosecutor's comment in Donnelly was characterized as "admittedly an ambiguous one", while the prosecutor's remarks in Caldwell were described as "quite focused, unambiguous, and strong":

> They were pointedly directed at the issue that this Court has described as "the principal concern" of our jurisprudence regarding the death penalty, the "procedure by which the State imposes the death sentence." California v. Ramos, 463 U.S, at 999, 103 S.Ct., at 3451. In this case, the prosecutor's argument sought to givethe jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct. at 2991 (plurality opinion). Such comments, if left uncorrected, might so affect the fundamental fairness of sentencing proceeding as to violate the Eighth Amendment.

Caldwell v. Mississippi, supra, 105 S.Ct. at 2645.

In Beck v. Alabama, 447 U.S. 625,637 (1980) the Supreme Court expressly recognized that the "risk of an unwarranted conviction cannot be tolerated in a case in which the defendant's life is at stake." Emphasizing that "there is a significant constitutional difference between the death penalty and lesser punishments" (447 U.S. at 637), the Court stated:

> To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

Beck v. Alabama, supra, 447 U.S. at 638.

In Caldwell, the Court held that improper prosecutorial argument which diminishes the reliability of the sentencing determination in a death penalty case violates the Eighth Amendment and the due process standard of Donnelly v. DeChristoforo. It follows, then, from the principles recognized in Beck v. Alabama, supra, that improper prosecutorial argument in the guilt-or-innocence phase of a death penalty trial violates the Eighth Amendment and the Donnelly due process standard, if the argument is of such a nature as to diminish the reliability of the guilt determination.

The prosecutor's final remarks in the present case were clearly of that nature. The evidence was all circumstantial. If the jury believed the testimony of the state's witnesses, particularly Dr. Briggle[42/] and Annie and Gloria Harden, the evidence was sufficient to support a conviction.[43/] On the other hand, if the jury believed the testimony of the defense witnesses, particularly appellant, Dr. Levine, and Dr. Baden (or if the jury was unsure which witnesses to believe, and thus had a reasonable doubt), the evidence established a reasonable basis for an acquittal. The pernicious effect of the prosecutor's argument was to divert the jury's attention from a reasoned and dispassionate evaluation of the evidence and the credibility of the various witnesses (especially that of Dr. Baden, who expressed

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42/ Assuming arguendo that Dr. Briggle's testimony was properly admitted. See Issue III.

43/ Appellant has not raised insufficiency of the evidence as an issue on appeal. However, Fla.R.App.P. 9.140(f) directs that in capital cases this Court "shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." See Tibbs v. State 397 So.2d 1120,1126 (Fla.1981).

the opinion that this was a homosexual rage killing and not a stranger robbery), and to invite the jury instead to convict appellant based on caprice and emotion, sympathy for the victim and his family, and concern for the victim's posthumous sensibilities and reputation. To put it more bluntly, what the prosecutor was communicating to the jury is "If you fail to convict this defendant, you will be calling Walter Shonyo a homosexual".

The technique of placing the victim (in the imagination of the jury) at counsel table, as a kind of spiritual advisor to the prosecution[44/], is prejudicial enough in itself. See Hawthorne v. United States, supra, at 172 ("The first person singular rhetorical device had the dual effect of placing the prosecutor in the victim's shoes and turning the prosecutor into Mr. Alameda's [the victim's] personal representative. A prosecutor may no more represent the victim in this fashion than he may urge the jurors to place themselves in the victim's shoes"). Cf. Hill v. State, 477 So.2d 553,556-557 (Fla.1985) (prosecutor acted improperly by asking jury to consider him a "thirteenth juror" when it retired to deliberate; error was harmless under circumstances of case, but "[h]ad this case involved substantial factual disputes, this 'inexcusable prosecutorial overkill' would have ... requir[ed] reversal of each of appellant's convictions").

But then the prosecutor's imagery went from spectral to graphic. "I have sat there with Walter Shonyo. Every time there is a mention about homosexual activity, every time there is a mention about anal intercourse, and every time there is a mention about oral

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44/ And as a counterpoint to the "three people -- three people -- [who] have sat at that defense table" (R570).

intercourse, every time there is a mention about semen in the anus, Mr. Shonyo winced and Mr. Shonyo angered and Mr. Shonyo gripped the edge of the table."

Not only was this argument an emotionally charged appeal for sympathy, it also amounted to an attempt by the prosecutor to testify for the victim. See Hawthorne v. United States, supra, at 172 ("Moreover, a prosecutor's inflammatory appeal to a jury may constitute misconduct central to the ultimate issue of guilt or innocence"). In Commonwealth v. Mikesell, supra, at 434, the appellate court said:

> ... Mikesell admitted at trial that he committed the shootings but attempted to excuse his acts by saying he did so "in a fit of anger and passion" following an intense argument. The commonwealth challenged this account largely through circumstantial evidence. Thus, the jury had to assess Mikesell's credibility. [Citation omitted]. In this context, the assistant district attorney attempted to discredit Mikesell and lend credence to the circumstantial evidence by implying the victims, if available, would testify contrary to Mikesell's account. Such a consideration is clearly improper.

In the instant case, similarly, the prosecutor utilized the imagery of the victim sitting with him at counsel table to bolster his circumstantial case, by purporting to relate to the jury Walter Shonyo's posthumous position as to what did and did not happen in the truck. The problem is that Mr. Benito had no personal knowledge of what happened in the truck, nor did he have any personal knowledge of what Walter Shonyo would have said happened. All Mr. Benito had was circumstantial evidence which, if believed by the jury, would show that Shonyo was killed by appellant in the course of a

robbery[45/], and his argument should have been confined to the evidence. If he wanted to try to discredit the defense theory of the case, he should have attacked the credibility or the expertise of Dr. Baden, or marshalled facts to show that the circumstances were inconsistent with Dr. Baden's conclusion. Instead, the prosecutor played upon the jury's identification with and sympathy for the victim [see Harris v. State, supra; Hawthorne v. United States, supra; Commonwealth v. Mikesell, supra], and upon the negative emotional responses associated with homosexuality and homosexual acts [see Logan v. State, 679 S.W.2d 55,57 (Tex.App.1984); Tobler v. State, 688 P.2d 350,354 (Okla.Cr.1984)], to urge the jury to disbelieve appellant's testimony and to reject the defense's theory.

It should also be remembered that the jury had seen and heard the testimony of Walter Shonyo's son Bruce, a Tampa police officer. Bruce Shonyo testified that his father had been married to his mother, Shirley, for 32 or 33 years; the couple had three sons (R114-115,120). The prosecutor elicited this testimony for the purpose of showing that Walter Shonyo was a "family man" and, purportedly, to rebut the allegations of homosexual activity (R119). See Tobler v. State, supra, at 354. The message to the jury conveyed by the prosecutor's remarks was

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45/ The defense, on the other hand, had evidence (appellant's testimony) which, if believed by the jury, would show that appellant did not rob or kill Shonyo but only looted his abandoned truck; and circumstantial evidence which, if believed, would show that Shonyo's death came as a result of a homosexual "rage reaction" assault, and not a casual stranger robbery. The prosecutor used his improper rhetorical device to impress upon the jury that the victim would want them to disbelieve both appellant and the defense experts.

that any verdict other than a conviction would be a stigma upon the victim's memory and an embarrassment to his family.

The jury in this case was encouraged to return a verdict based on inflamed emotions and sympathy for the victim, rather than on a "logical analysis of the evidence in light of the applicable law." Bertolotti v. State, supra at 134. In a death penalty case, this is constitutionally intolerable. Caldwell v. Mississippi, supra; Beck v. Alabama, supra. The prosecutor's misconduct was of such magnitude as to violate due process, since it compromised the reliability of the guilt determination [see Caldwell; Beck], and was fundamental error [see Pait v. State, supra; Peterson v. State, supra; Jones v. State, supra; Ryan v. State, supra; Rosso v. State, supra; Tuff v. State, supra]. Appellant's convictions and death sentence must be reversed and the case remanded for a new trial.

ISSUE V.

THIS COURT SHOULD GRANT APPELLANT A NEW TRIAL, IN THE INTEREST OF JUSTICE, BECAUSE A JUROR WHO BELIEVED APPELLANT WAS NOT GUILTY OF MURDER OR ROBBERY ACQUIESCED TO THE VERDICT ONLY BECAUSE SHE FAILED TO ADHERE TO HER OATH AND THE TRIAL COURT'S INSTRUCTIONS.

Appellant is aware that the issue he presents here is not ordinarily recognized as a ground for reversal, since the juror's misconduct (if, indeed, it can even be characterized as misconduct) is of the kind which inheres in the verdict. See e.g. Russ v. State, 95 So.2d 594 (Fla.1957); State ex rel D'Andrea v. Smith, 183 So.2d 34 (Fla.2d DCA 1966); State v. Blasi, 411 So.2d 1320,1322 (Fla.2d DCA 1981)(and cases cited therein at n.1). Nevertheless, this Court

has an obligation pursuant to Fla.R.App.P. 9.140(f) to determine, in capital cases, whether the interest of justice requires a new trial. See Tibbs v. State, 397 So.2d 1120,1126 (Fla.1981)(function of interest of justice review is to correct fundamental injustices, unrelated to evidentiary shortcomings, which occurred at trial)(emphasis in opinion). This Court also has a constitutional obligation to ensure that both the guilt and penalty determinations in death penalty cases are reliable. Caldwell; Beck.

The sworn statement of juror Woodward, made voluntarily[46/] by her a week after trial, demonstrates that but for her failure to adhere to her oath and the trial court's instructions, the jury could not have returned a unanimous verdict of guilty. Ms. Woodward stated that she did not believe that appellant was guilty of murder or robbery, although she did believe he was guilty of burglary (SR832,835,838,844, 861). She felt that the other jurors were not following the court's instructions on proof beyond a reasonable doubt, and on the presumption of innocence; and that, instead, they were placing the burden on appellant to prove his innocence[47/] (SR836-839). Ms. Woodward stated

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46/ Nor was her statement solicited by counsel. It was Ms. Woodward who initiated the contact with defense counsel, through a mutual acquaintance (SR832-835).

47/ In addition, Ms. Woodward stated that the jurors never reached an agreement, or even took a vote, as to what specific offense or offenses appellant was guilty of (R856-860). There was confusion over what verdict forms to sign; according to Ms. Woodward "they were just passing these slips around and discussing which one they should sign and they said if we make a mistake, the judge will tell us. If we have to sign another one, we will. Let's sign this one and that's what he proceeded to do. Didn't take any vote or anything. You know, except on the punishment" (R859, see R.856-860). Compare State ex rel D'Andrea v. Smith, supra with Routhier v. City of Detroit, 338 Mich.449,61 N.W. 2d 593, 40 A.L.R.2d 1114, also Annot. 40 A.L.R.2d 1119.

that she capitulated from her position, not because she was persuaded by the other jurors' view of the evidence, but because she believed that she had no choice (SR843,849,860-861). She felt she had no choice because the foreman of the jury said that they were not going back to the judge with a hung jury (SR 835,843-844,848-849,861), and because she felt pressured by another juror who, she said, "more or less took charge" of the proceedings[48/] (SR836,838,841,843-844,848-849, 861). Ms. Woodward stated that if she had known that she could, she would have held out for a not guilty verdict, even if she was the only one left, and even if it meant a hung jury (R843-844,851).

In his guilt phase charge to the jury, the trial court instructed them:

> ...A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.
>
> On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not a abiding conviction of guilt or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

(R583-584)

In her statement, Ms. Woodward said at one point that she did not recall that instruction (SR849,see SR850). However, she stated that she had reasonable doubts - a lot of doubts - at the time

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48/ According to Ms. Woodward, this juror told her [apparently after the deliberations were over (SR837, but see SR846)] that she used to be a detective (SR837-839,845-847).

she acquiesced to the verdict, and she still had those doubts at the time of her statement (SR848-849,860-861).

Ironically, the transcript of the voir dire in this case shows that the very last words spoken in that proceeding (prior to the selection of the alternate) were these:

> MR. LUFRIU [defense counsel] ... I have asked everyone else pretty much about reasonable doubt, presumption of innocence. Mr. Benito asked you about circumstantial evidence. Do you pretty much have that down?
>
> JUROR WOODWARD: Yes, sir.
>
> Q. I am going to ask you the same question. If you were in the minority and the minority was sitting there, about four or five people, and you four or five had reasonable doubts as to the guilt of Mr. Willie Mitchell and you felt that he was innocent because you had a reasonable doubt due to the evidence, the lack of the evidence, or the conflict in the evidence, could you hold to your position?
>
> A. Absolutely.
>
> Q. If you had a reasonable doubt. We are not asking anything else other that that. We are asking you to follow the law.
>
> A. Yes.
>
> Q. You would be able to hold?
>
> A. Yes.
>
> Q. If you reasonably believed that he was innocent due to the conflict in the evidence, the evidence or the lack of evidence?
>
> A. Yes, I could.

(SR1012)

A capital defendant, no less than the state, has a right to have the question of his guilt or innocence decided by jurors who will adhere to their oaths and follow the trial court's instructions.

Cf. Wainwright v. Witt, supra. Ms. Woodward, after hearing all the evidence, was of the opinion that appellant was not guilty of the murder and robbery of Walter Shonyo. She abandoned her position, not because of the strength of the other jurors' arguments, but because of a weakness in her own temperment. She should not necessarily be faulted too much for this; not everyone has the type of personality which will allow them to stand firm against the tide of popular opinion. [Moreover, she demonstrated a different kind of integrity, in that her conscience compelled her to come forward and explain what had happened]. But in a capital case such as this one, where the evidence of guilt is not conclusive, strict adherence to the rule which allows no relief for juror misconduct inhering in the verdict carries too great a risk of a miscarriage of justice. The interest of justice requires a new trial.

ISSUE VI.

THE TRIAL COURT ERRED IN FINDING, AND IN INSTRUCTING THE JURY ON, THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

In the penalty phase charge conference, the prosecutor requested jury instructions on three aggravating circumstances. He stated "I don't think I can go with the last one, cold, calculated and premeditated since they [the jury] came back with felony murder" (R608). The trial judge decided, over defense objection (R608-609, 610), to give the instruction anyway (R608-610), and the prosecutor revised his opinion for the record to agree with the court's ruling (R609-610).

The jury, by a 7-5 vote, returned a recommendation of death.

The trial court followed the jury's recommendation, finding four aggravating and no mitigating circumstances. As to the "cold, calculated, and premeditated" circumstance, the trial court made the following finding:

> Although the jury found the defendant guilty of First Degree Felony Murder, there was ample evidence presented to establish the aforesaid aggravating circumstance. The victim was attacked in the middle of the night while working alone as a night security guard. The defendant was able to attack and rob the victim at an area where the victim would have been extremely vulnerable and unable to call for help. The defendant was then able to drive the victim's truck to an area closer to the defendant's residence where he would not arouse suspicion as he walked to his residence with the victim's property. The evidence has clearly established a cold-blooded, deliberate, brutal attack without any pretense of moral or legal justification.

(R716-717)

The trial court's finding of the "cold, calculated and premeditated" circumstance, and his instruction to the jury on this factor, was prejudicial error. Not only was this aggravating circumstance inconsistent with the felony murder verdict, not only was it inconsistent with the state's own theory of the case (as expressed in the prosecutor's closing argument in the guilt phase)[49/], but, most importantly, there

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49/ The prosecutor's hypothesis as to what occurred in the truck was as follows:

> ... He [appellant] was looking to burglarize the truck, ladies and gentlemen. He went to the Fogarty Van Lines area, that warehouse area, without him, okay, because he was looking for something at that warehouse, and what does he see? He sees an elderly man sitting in his car in that parking lot, nobody around. He sees an easy mark.

(Continued on page 94)

was absolutely no evidence to support either the finding or the instruction. The rather selective set of facts and inferences set forth in the trial court's finding have nothing to do with premeditation (much less heightened premeditation) of the murder. Rather, they refer either to actions taken by appellant [50/] after the robbery and murder to

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49/ (Cont'd)

> He needs some money, he tells you, for crack cocaine. He was looking for anything for crack cocaine that night, all right, and he sees an elderly security guard sitting by himself in the parking lot, an easy mark.
>
> He goes up to that cab. He is going to stick his pocketknife, which he admitted to you that he carried and which Doctor Diggs has told you is consistent with the murder weapon. He thinks he can stick that pocketknife in this old man's face and the old man is going to give him his money, and he is going to have some money to buy some crack.
>
> Okay. Albert was probably right there waiting for him to pull this off, but things got out of hand and Albert took off, okay, because Albert wasn't sticking around. What happened was this guy goes up to the door. He puts the knife in his face. He opens the door up. Shonyo looks at him, and he ain't going to give in.
>
> Maybe Mr. Shonyo is a little bit tougher than this guy thought. All right. Maybe Mr. Shonyo went for the nightstick that is in State's Exhibit 21 under the front seat of his truck. There is a nightstick down there right under the front seat.
>
> Maybe Shonyo said, "This pocketknife ain't going to stop me. I will go for my nightstick," and when this man saw that, he got mad and he pushed and started stabbing him in the left side.

(R506-507)

50/ For purposes of the arguments regarding aggravating circumstances [Issues VI,VII, and VIII], it will be assumed arguendo that appellant is the person who robbed and killed Walter Shonyo. This should not be construed as an admission in fact.

facilitate removal of the stolen property[51/], or else to the vulnerability of the victim in working alone as a nighttime security guard. According to the prosecutor's own scenario, appellant was just sort of looking around aimlessly for a way to get money for cocaine when he came upon the truck. There was no evidence that appellant knew Walter Shonyo; or that he knew in advance that there would be a truck manned by a single elderly security guard at Fogarty Van Lines; or that he had any reason to believe there would be anything worth stealing in the truck. The evidence does not indicate (much less prove beyond a reasonable doubt) that even the robbery was planned in advance. To the contrary, it appears to have been more or less a spur of the moment decision, even under the prosecutor's hypothesis. As this Court has recognized in Gorham v. State, 454 So.2d 556,559 (Fla.1984) and Hardwick v. State, 461 So.2d 79,81 (Fla.1984), even where a robbery is fully planned in advance - i.e., committed with a heightened degree of premeditation - the premeditation of the robbery cannot automatically be transferred to a murder committed in the course of that robbery. In the present case, there is no evidence that even the robbery, much less the murder, was preceeded by a "heightened degree of premeditation, calculation, or planning." See Richardson v. State, 437 So.2d 1091, 1094 (Fla.1983).

The burden of proving every aggravating circumstance beyond a reasonable doubt is on the state. Clark v. State, 443 So.2d 973, 976

[51/] Note that actions taken by a defendant, after a murder, to depart from the scene undetected do not constitute the (5)(e) aggravating circumstance of a homicide committed to avoid lawful arrest. That circumstance applies only when intent to avoid arrest is the sole or the dominant motive for the murder. See e.g. Menendez v. State, 368 So.2d 1278,1282 (Fla.1979).

(Fla.1983); Williams v. State, 386 So.2d 538,542 (Fla.1980); State v. Dixon, 283 So.2d 1,9 (Fla.1973). "Not even 'logical inferences' drawn by the trial court will suffice to support a finding of a particular aggravating circumstance where the state's burden has not been met." Clark v. State, supra, at 976. The (5)(i) aggravating circumstance cannot be established merely by proof of premeditation; rather, it requires a heightened degree of calculation or planning beyond that necessary to sustain a conviction of premeditated first degree murder. See e.g. Richardson v. State, supra, at 1094; Washington v. State, 432 So.2d 44,48 (Fla.1983); Preston v. State, 444 So.2d 939, 946 (Fla.1984).

> This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g. Jent v. State (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State 422 So.2d 833 (Fla.1982), cert. denied, 103 S.Ct. 2111 (1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

Preston v. State, supra, at 946.

In Peavy v. State, 442 So.2d 200,202-203 (Fla.1983), this Court disapproved the trial court's finding of the (5)(i) aggravating circumstance, and said:

> While some may view this homicide as cold, calculated, and premeditated, it does not meet the standard for finding this aggravating circumstance [citations omitted]. This murder occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner. The trial court improperly found the existance of this aggravating circumstance because the evidence does not establish it beyond a reasonable doubt.

Similarly, the murder in the instant case occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner. One such other conclusion is the one argued by the prosecutor in the guilt phase - that appellant came upon the truck, decided to rob the security guard, and only began to stab the victim when the latter offered unanticipated resistance. It was the prosecutor who suggested that Mr. Shonyo may have gone for his nightstick (R507). Cf. Cannady v. State, 427 So.2d 723,730-731 (Fla.1983). Moreover, the massive number of stab wounds in this case is suggestive of just the opposite of calculation; it strongly indicates that the person who inflicted the wounds was out of control, in a frenzy or a rage. See Hansbrough v. State, __So.2d__(Fla.1987)(case no 67,463, opinion filed June 18, 1987)(slip opinion, p.7.)(rather than a cold, calculated, and premeditated murder, crime appeared to be simply a robbery which got out of hand, as evidenced by Hansbrough's stabbing the victim more than thirty times while in an apparent frenzy). Even the state's expert, Dr. Diggs, testified that the large number of stab wounds suggested "anger-type overtones" which would be consistent with "homosexual-type killings" and would also be consistent with "a vicious attack occurring during a robbery" (R210-211). While Diggs (unlike Dr. Baden for the defense) saw no evidence of homosexual activity, and thus implicitly endorsed the state's robbery hypothesis, even he agreed, emphatically, that the killing was done in a rage (R233). Even taken in the light most favorable to the prosecution, the evidence showed a murder committed in hot blood, with little if any forethought.

Clearly, the state failed to meet its burden of proving beyond a reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner. The trial court's finding of this aggravating circumstance was therefore improper. Moreover, it was error to instruct the jury, over defense objection, on this unproven aggravating

circumstance. See State v. Dixon, supra, at 9 (aggravating circumstances "must be proved beyond a reasonable doubt before being considered by judge or jury."). For several reasons, this Court should not be too quick to write these errors off as "harmless".

First of all, as this Court implicitly recognized in Nibert v. State, __So.2d__ (Fla.1987)(case no. 67,072, opinion filed May 7, 1987), the presence of one or more aggravating circumstances, coupled with the absence of mitigating circumstances, does not necessarily require the imposition of the death penalty. Since a death sentence in this situation is permissive, but not mandatory, the trial court's erroneous consideration of an invalid or unproven aggravating factor cannot be deemed harmless unless it can be shown beyond a reasonable doubt that that factor did not contribute to the judge's decision to impose the death sentence. That is the standard which this Court has recognized in sentencing guidelines cases, Albritton v. State, 476 So.2d 158,160 (Fla.1985), and application of a more lenient standard in death penalty cases would not only be illogical, it would violate the Eighth Amendment. The recognition by the U.S. Supreme Court in such cases as Caldwell v. Mississippi, supra; Beck v. Alabama, supra; and Lockett v. Ohio, 438 U.S.586 (1978) that "death is different" - that there is a significant constitutional difference between the death penalty and lesser punishments - means that the decision to impose a death sentence must be accorded stricter scrutiny, not lesser scrutiny, than would be given other sentencing decisions, such as guidelines departures. [To the extent that the so-called "Elledge rule"[52/] is inconsistent with

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52/ Elledge v. State, 346 So.2d 998 (Fla.1977).

the constitutional harmless error test set forth in Chapman v. California, 386 U.S.18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); and Albritton v. State, supra, appellant respectfully requests that this Court recede from the line of cases[53/] which interpret Elledge as authorizing the affirmance of a death sentence, notwithstanding the trial court's improper consideration of one or more aggravating circumstances, on the theory that the absence of mitigating circumstances necessarily renders the error "harmless". Indeed, this Court may have already receded from that interpretation - implicitly - in Nibert].

In the present case, the trial court's erroneous conclusion that the "cold, calculated, and premeditated" aggravating factor applied may also have impacted upon the jury's penalty recommendation. The court insisted on instructing the jury on this circumstance, over defense objection, even though the prosecutor expressly did not request it.[54/] Then, during the prosecutor's closing argument, an exchange between the judge and the prosecutor occurred which could easily have conveyed to the jury that the trial court had made a preliminary determination as to which aggravating factors applied.

53/ See e.g. Shriner v. State, 386 So.2d 525,534 (Fla.1980); Demps v. State, 395 So.2d 501,506 (Fla.1981); James v. State, 453 So.2d 786,792 (Fla.1984); Hardwick v. State, 461 So.2d 79,81 (Fla.1984).

54/ The prosecutor subsequently changed his mind for the record (R609-610).

MR. BENITO [prosecutor]: The first order of business, then will be to determine out of these nine aggravating circumstances that the state is bound by.

THE COURT: Excuse me. Excuse me. Four, isn't it?

MR. BENITO: Yes, that's correct.

THE COURT: I thought you said nine.

MR. BENITO: The first order of business I was going to tell the jury, Judge, is to determine which of the aggravating circumstances apply in this case.

<u>THE COURT: I am only going to read them four</u>.

MR. BENITO: And I am going to argue four.

THE COURT: Okay.

MR. BENITO: It's the State's contention in this case that four aggravating circumstances out of the nine apply. That is our contention. You can reject that or accept it as you see fit. Maybe four don't. The State's contention is that the evidence has shown without any doubt that four out of the nine aggravating circumstances apply.

(R624)

It has long been a matter of controversy in Florida death penalty litigation whether the trial court should instruct the jury on all statutory aggravating circumstances, or only on those which have evidentiary support. See <u>Cooper v. State</u>, 336 So.2d 1133,1139-1140 (Fla.1976); <u>Straight v. Wainwright</u>, 422 So.2d 827,830 (Fla.1982). It seems obvious, however, that if the trial court chooses to instruct the jury only on those aggravating circumstances which he believes are supported by the evidence, the jury should not be informed - directly or indirectly - that such a determination has been made. In <u>Cooper v. State</u>, <u>supra</u>, this Court held that, in the absence of trial counsel's acquiescence to the omission of one or more circumstances, it was not

error for the trial court to have instructed the jury on every aggravating and mitigating circumstance listed in the statute.

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jury's deliberations....

Cooper v. State, supra, at 1140.

See also Straight v. Wainwright, supra, at 830 ("It was proper for the judge to instruct on all the statutory aggravating circumstances. For the judge to have instructed only on those factors which she found supported by evidence would have improperly invaded the province of the jury").

In the present case, the trial court (with counsel's acquiescence, see Cooper at 1140) opted to omit instructions on aggravating circumstances for which there was no evidence. That decision was not improper. However, the court's decision to instruct on the "cold, calculated, and premeditated" circumstance, over defense objection, was error. Once the trial court made the decision to instruct only on those aggravating factors for which there was evidentiary support, it was his responsibility (upon the defense's objection) to rule correctly as to whether the evidence supported an instruction on the "cold, calculated, and premeditated" factor. His error in giving the instruction was compounded by the exchange between himself and the

prosecutor, which essentially told the jury that the court had made at least a preliminary determination that four of the nine statutory aggravating circumstances were applicable. See Cooper v. State, supra.

In view of the foregoing, and in view of the narrow margin (7-5) by which the jury recommended death, appellant submits that neither the court's invalid finding of the "cold, calculated, and premeditated" circumstance, nor his improper instruction to the jury on this circumstance, can be written off as "harmless error". Appellant's death sentence should be vacated, and the case remanded for resentencing. Nibert v. State, supra. Because the jury's penalty recommendation may well have been affected by the instructional error and the comments during closing argument, a new advisory jury should be impaneled. Cf. State v. DiGuilio, supra.

ISSUE VII.

THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN THE COURSE OF A ROBBERY, AS THAT FACTOR IS INHERENT IN THE OFFENSE OF FIRST DEGREE FELONY MURDER.

In Collins v. Lockhart, 754 F.2d 258,268 (8th Cir.1985), the Eighth Circuit Court of Appeals granted the capital defendant's petition for habeas corpus and ordered the District Court to reduce his death sentence to life imprisonment unless the State of Arkansas commenced proceedings to re-try the question of punishment. The Court held that consideration of an aggravating circumstance (in that case, that the murder was committed for pecuniary gain) which duplicates one of the elements of the crime itself (capital felony murder, with robbery as the predicate felony) violates the Eighth and Fourteenth

Amendments, because the aggravating circumstance, in this situation, "fails to narrow the class of persons already guilty of felony murder." Collins v. Lockhart, supra, at 259, see 261-268. See also Wiley v. Mississippi, __U.S.__,107 S.Ct. 304,305 and n.1 (1986)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari), in which Justice Marshall expressed the belief that "the use of aggravating factors which repeat an element of the underlying capital offense create a substantial risk that death will be inflicted in an arbitrary and capricious manner", and noted there is conflict among the circuits on this issue.

In the present case, appellant was convicted of first degree felony murder and armed robbery (R602,705-706). The instruction to the jury on felony murder included only one possible predicate felony, i.e., that "[t]he death occurred as a consequence of and while the defendant was engaged in the commission of a robbery" (or an attempted robbery, or in an escape from a robbery)(R575). Then in the penalty phase, the jury was instructed that it could consider as an aggravating circumstance that "the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a robbery" (R632). The trial court, in his sentencing order, not only found this aggravating circumstance, but specifically stated that he gave it "strong consideration" (R715). Thus, even more clearly than in Collins, an element of the capital offense was repeated as an aggravating circumstance, and as a strong consideration in the trial court's decision to impose death. The use of the felony murder aggravating factor, under these circumstances, violated the Eighth and Fourteenth Amendments.

Although for different reasons than in Collins (at 265-267),

the constitutional error in the instant case was not "harmless" under the standard of Chapman v. California, supra, and State v. DiGuilio, supra. In view of the fact that the jury's death recommendation was by a margin of only one vote, the state cannot show that the constitutionally invalid aggravating factor did not contribute to the decision of one or more jurors to vote for a death sentence. See Chapman; DiGuilio. In view of the trial court's express statement that he strongly considered this aggravating factor, the state cannot show that it did not contribute to the court's decision to impose a death sentence. See Albritton. For these reasons, and for the reasons set forth in Issue VI, supra, appellant's death sentence should be reversed and the case remanded for resentencing before the trial court and a newly impaneled jury.

ISSUE VIII.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

An aggravating circumstance, in order to be considered in the decision whether to impose a death sentence, must be proven beyond a reasonable doubt. Clark v. State, supra; Williams v. State, supra; State v. Dixon, supra. The trial court's finding of the "especially heinous, atrocious, or cruel" circumstance does not meet that constitutional standard. The court found:

> State witness, Associate Medical Examiner Dr. Charles Diggs, concluded that the victim had suffered one hundred and ten (110) stab wounds and had been bitten on his left upper arm. He indicated also that the stab wounds were consistent with having been inflicted with a small-bladed knife such as a pocketknife. Furthermore, it was his opinion that the victim could have been conscious and suffered the pain of all one

> hundred and ten (110) stab wounds and the pain of the bite wound. Dr. Diggs also felt that the victim could have struggled with his attacker while suffering these wounds. It is therefore abundantly clear from the evidence that the last minutes of the victim's life suffering the pain and fear of impending death were a horrifying nightmare. Without question the totality of the circumstances surrounding the victim's death leads to the inescapable conclusion that the defendant committed a conscienceless, pitiless and unnecessarily tortuous crime that sets it apart from the norm of capital felonies.

(R716)

An aggravating circumstance cannot be based on speculation. Cf. Barclay v. State, 470 So.2d 691,694-695 (Fla.1985). While it is true that Dr. Diggs expressed the opinion (contrary to that of Dr. Baden) that the victim was alive throughout the time he was being stabbed (R205), and that it was possible that he may have struggled with his attacker (R207-208,239-240), Dr. Diggs also made it clear that he was unable to say how long the victim was conscious, or when he would have passed out or gone into shock (R208-209,237-240). He explained that while most of the wounds were lethal, the question is "How soon were they lethal?" (R238), and when did they become incapacitating? (R240) "Two kinds of wounds can be lethal. You can stab a person in the heart and he can drop immediately. The other instance is that you can stab a person in the heart and ... he can run sometimes a football field before he drops" (R238). Dr. Diggs did not know how rapidly the stabbing took place, and he did not know when the victim became incapacitated or when he lost consciousness (R208,240).

A finding of the "especially heinous, atrocious, or cruel" aggravating circumstance cannot be based on the possibility that the victim may have experienced a degree of pain or fear beyond that which would ordinarily be present in a murder case. Bundy v. State, 471 So.2d

9,21-22 (Fla.1985); see also Herzog v. State, 439 So.2d 1372,1379 (Fla.1983). The evidence relied on by the trial court does not prove this aggravating circumstance beyond a reasonable doubt. It was error for the trial court to consider it as a reason for imposing the death sentence.

Since only one aggravating circumstance - that appellant has previously been convicted of a felony involving the use or threat of violence[55/] - was properly found in this case, it cannot be said that the trial court's consideration of all or any of the invalid aggravating factors did not contribute to his decision to impose the death penalty. See Chapman; Albritton, DiGuilio. Nor can it be said that death is necessarily the appropriate penalty. See Nibert v. State. Therefore, this Court should reverse appellant's death sentence and remand for resentencing.

ISSUE IX.

THE QUALITY OF THE EVIDENCE IS INSUFFICIENT TO SUPPORT IMPOSITION OF THE DEATH PENALTY.

For the reasons stated in Issue III, regarding the unreliability of Dr. Briggle's identification of appellant by the technique of bite mark comparison, appellant submits that the circumstantial evidence against him is not sufficiently conclusive to warrant imposition of the death penalty. See Melendez v. State, __So.2d__(Fla.1986)(case no. 66,244, opinion filed December 11, 1986)(Barkett, J., concurring specially); see also Model Penal Code §210.6(1)(f)(sentence of death shall not be imposed where evidence, although sufficient to sustain the verdict, does not foreclose all doubt respecting the defendant's guilt).

55/ Appellant was convicted of robbery in Hillsborough County on April 5, 1971 (R613,714,808-809).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests this Court to grant the following relief:

As to Issues III, IV, and V: Reverse the convictions and death sentence and remand for a new trial.

As to Issues I, II, VI, VII, and VIII: Reverse the death sentence and remand for a new penalty proceeding, including a newly impaneled penalty jury.

As to Issues VI, VII, and VIII (alternative relief): Reverse the death sentence and remand for resentencing by the trial court.

As to Issue IX: Reverse the death sentence and remand for imposition of a life sentence, without possibility of parole for twenty-five years.

Respectfully submitted,

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