IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD BROWN, :

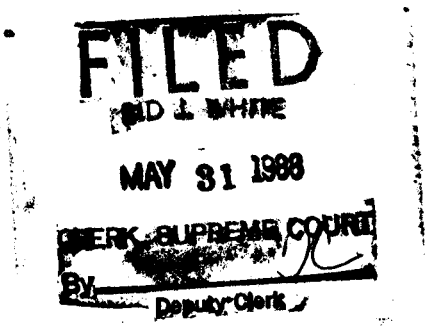
Appellant, :

vs. : Case No. 70,230

STATE OF FLORIDA, :

Appellee. :

_____ :



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

INITIAL BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

Appellant, JAMES RICHARD BROWN, 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 will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

II. STATEMENT OF THE CASE AND FACTS

On September 24, 1986, Richard Brown was charged with first degree murder in the death of John Baxter, and with attempted first degree murder of Brian Merrick and Raymond Stacey. (R818-19). The case proceeded to trial on February 16-20, 1987 before Circuit Judge Harry Lee Coe, III and a jury. The following is a summary of the evidence presented at trial.

A. Trial - State's Case

Brian Merrick testified that he is a computer software designer, presently residing in California (R192-93). From August to December of 1986, he was living with his wife (Barbara), daughter (Laura), stepson (Raymond Stacey) and father-in-law (John Baxter) at 15923 Winding Drive in the Northdale area of Tampa (R193-94). John Baxter lived in a Winnebago motor home which was parked in front of the rented house (R194-95). Because of com-

plaints from neighbors about the motor home, the Merricks were (in September, 1986) looking for another place to live [1/] (R196).

September 8, 1986 was Brian Merrick's first day at work, on a 21-day contract, for a company known as Critikon (R196). His wife had the car, so she picked him up after work (R197). They stopped at a bar and restaurant called Briedy's, where he had two beers and his wife had some soup and a couple of drinks (R198). They left for home at about 6:45 p.m. (R198). On the way, they encountered John Baxter's motor home, which had broken down and was parked alongside the road (R198). Brian Merrick went home, got some antifreeze, and returned with Raymond Stacey to help Baxter start the vehicle (R198-99). Merrick and Baxter each drank another beer (R199). They then returned home, and sat around talking for a while (R199). At about 10 o'clock, Merrick wanted to get some more beer, so he walked to a shopping center about two miles away where there was a 7-Eleven store (R200). He stopped first in Briedy's (which was located in the same shopping center) and had a rum and coke; then picked up a six pack of beer at the 7-Eleven and started walking back home (R200) He put out his thumb to try to hitch a ride, and about halfway there an older, dirty-looking car stopped to pick him up (R201). The driver (whom Merrick identified in court as appellant) told him his name was Richard (R201-02). Richard had longer hair at that time, a scruffy beard, and "maybe an earring"; he was wearing cutoffs and his shirttail was out (R202).

1/ They were eventually evicted (R196).

Merrick asked him for a ride up to Winding Drive (R203). Appellant mentioned that he had a house that was being foreclosed in that neighborhood (R202). Merrick thought there may have been some mention of marijuana at that point, but he wasn't sure (R203).

After appellant dropped him off at his house, Merrick took the six-pack of beer into John Baxter's motor home (R203). He heard a beep, and looked out and it was appellant honking his horn (R203). Merrick went back out to the car, and appellant said he could give him some marijuana if he wanted to come over to his [appellant's] house (R203). They drove to appellant's house, which was five or ten minutes away (R204). Merrick described the house as "real pretty" with "a beautiful Jacuzzi and a lush area, a screened-in porch type thing" in the back (R205). However, the house was empty of furniture, except for a television in the kitchen (R204). Merrick asked appellant about the deeds, the number of bedrooms, and whether he could keep a motor home there (R205). Appellant didn't think it would be a problem (R205). Merrick went back in the kitchen, where there was a baggie of marijuana, and rolled up one cigarette (R205). He and appellant shared that, and appellant poured Merrick some vodka and lemonade (R205).

The prosecutor asked Merrick whether there was any discussion of marijuana on the way to appellant's house (R206). Merrick replied "Not that I remember. I think it was on the

way back that I did, that that was possibly mentioned" [2/] (R206). Asked what they discussed in that possible conversation about marijuana, Merrick testified that he told appellant that he was

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2/ On cross-examination, Merrick testified:

> MR. VECCHIO [defense counsel]: Now, when you picked up Mr. Brown, you stated that you were not sure of the conversation concerning marijuana?
>
> BRIAN MERRICK: That's true.
>
> Q. You don't recall any conversation concerning marijuana?
>
> A. I don't recall the conversation but when he got back and honked the horn and said that he could get me some, there must have been something mentioned about smoking marijuana --
>
> Q. All right.
>
> A. -- prior to that.
>
> Q. Yes. I feel that there must have been something mentioned prior to that also. Isn't it true that you asked Mr. Brown, while he was driving you home, whether he could get you some marijuana?
>
> A. I don't think so. I don't really remember that. I -- he may have mentioned the fact that he smoked and I said I did, too, or something along those lines. Like I say, I don't remember the actual --
>
> Q. You don't recall?
>
> A. -- talk.
>
> Q. But later on in the evening, on a number of occasions, at least two or three, you inquired of him whether he could get you any marijuana; is that correct?
>
> A. Yes.

(R232-33)

not really looking right now because he didn't have any money, but he would like to possibly get some in the future from him (R206). Appellant asked Merrick if he was a cop, and Merrick said no, he was a software computer person (R206). Then, according to Merrick, appellant kind of leaned over in his dash and said "That doesn't matter anyway. I have got Betsy in here just in case you are or if you were a cop" (R207).

When they arrived at Merrick's house, Merrick introduced appellant to his wife, stepson, and father-in-law (R208). They had some normal conversation, about birthdays, dogs, and real estate (R208). Merrick's father-in-law, Baxter, had been a real estate broker in California, "and so he could do creative financing" (R208). Merrick told Baxter about appellant's house which was going into foreclosure, and the house looked like they could fit in it (R208). Baxter had an old Jaguar, which they could possibly sell to get the money to get started on the house (R208). Merrick asked appellant if he could get him some marijuana that night; he didn't have much money, but he'd like to get a little bit (R209). Appellant said he would have to call someone, and Merrick said he could use the phone (R209). Merrick thought appellant tried to make the call but no one was home (R209). Meanwhile, Merrick rolled another marijuana cigarette, which was shared by himself, appellant, John Baxter, and Raymond Stacey (R209).

During the course of the conversation, they were sitting around the dining room table (R212, see R210-12). There was a china hutch in the dining room at the end of the table (R212).

While appellant and John Baxter were talking real estate, Merrick was in and out a couple of times; at one point he went out to the motor home to get another beer, and then went back in the bedroom to talk with Barbara (R212). From his drinking and marijuana smoking, Merrick felt high, but not falling-down drunk (R213). Appellant (who had been drinking out of the jug of vodka and lemonade which he'd brought from his house) seemed to Merrick to be in about the same condition (R213).

When Merrick returned to the dining room, he asked appellant if he would make that call again, to procure a small amount of marijuana (R213). According to Merrick, appellant kind of said "you guys are cops?", and he replied "We are not cops. I've told you that a couple of times. I am a software designer, I am not a policeman." (R214). After that exchange, Merrick testified:

> I think that there was -- I don't recollect anything. There was a conversation, but I don't remember what happened exactly. The next thing I really remember was he pulled a gun out, and from over on this side where he was sitting, shot toward my son sitting on the couch.
>
> * * *
>
> And this is like out of the blue, and I just was totally surprised. I saw the flash of the gun and I stood up. I am sitting here at the table, and I -- I'm going, "What the" -- I'm saying, "What the hell are you doing?" but I got "what the" out, and he turned around with the gun and point blank right in my face, shot me, and hit me right here in the chin and then I fell down to the table.

(R214)

[On cross-examination, Merrick testified that the shooting started five or ten minutes after his last statement about not being

a cop (R275-76). During that five or ten minute period, appellant and John Baxter were conversing about mortgages and real estate (R275-78). According to Merrick, it was "absolutely normal conversation", with no shouting or hollering (R277-78). Then the next thing he saw - suddenly - was appellant with a gun firing toward his stepson Raymond, who was over on the couch eating a sandwich (R277-79)].

After being shot, Merrick blacked out for a few minutes (R214). When he came to, his face was covered in blood (R215). His father-in-law, Baxter, was lying under the table, not moving (R215). Merrick walked back to the bedroom to see if his wife was all right (R215). The door wouldn't open, so he began pounding on it, and screaming (R215). The door opened; Barbara was standing there and she seemed to be okay (R215). Raymond Stacey was lying on his side on the floor (R215). Barbara told Merrick to lie down and try to keep calm (R216). He may have slipped in and out of consciousness, but he remembered the paramedics checking him out to see if the bleeding had stopped (R216). He was taken to the hospital, and remained there for a week with a badly broken jaw (R217).

On cross-examination, Merrick testified that he has been in data processing for about twelve years, and his contracting work requires him to change jobs and residences at least once per year (R220, see R218-20). The move from California to Tampa in August, 1986, cost him $8000 (R221-23). Merrick drove the rental truck, his wife drove their automobile, and his father-in-law

drove the motor home (R221-22). The trip took 20 days, because Baxter couldn't drive very long without stopping to rest (R222-23). Merrick's job in Tampa was a 21-day job, which was to last only to the end of September (R223-24). Therefore, on September 8, he was looking for work; he had interviews scheduled in Tampa and Orlando, but no job offers as yet (R224-25). In addition, he was being evicted from the house on Winding Drive (because of the motor home), but had told his landlord that they were going to stay until the end of the month (R224-25). As of September 8, Merrick was virtually broke [3/] (R234).

Merrick testified that he and his wife smoke marijuana about two or three times per week, and have been smoking it for about twenty years (R233). His stepson, Raymond Stacey, is twenty years old, and has been smoking marijuana since he was sixteen or seventeen (R234). The last time they had smoked marijuana, prior to the day of the shooting incident, was about five or six weeks earlier, before they left California (R235-36). Asked why he would be trying to purchase marijuana when he didn't have any money to pay for it, Merrick replied that he was mainly looking for something in the future, though he also wanted a very small amount for that night (R234,236). Of the $30 he had to his name at that point,

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3/ In summary, then, according to Merrick, he and his family spent their last $8000 to move cross-continent for a 21-day job, with no firm prospects after that. $ 6000 went for expenses (notwithstanding that the Winnebago presumably could have been used to save on motel expenses) and the other $2000 was for the rental truck (R223-24).

he was ready to spend $20 of it on marijuana if he could get it (R236-37). Asked whether he ever tried to buy marijuana in Tampa prior to September 8, he answered "Not that I remember" (R235).

Merrick testified that he was talking with appellant about the possibility of leasing or buying his house (R238-39). Merrick was under the impression that appellant was ninety days behind in his payments, and would have the house taken away from him if he missed another payment (R239-40). Asked how he intended to pay for appellant's house if he was, as he insisted (R240), broke, Merrick replied that they had a Jaguar automobile they'd brought with them from the west coast (R240). "And my father-in-law, we were hoping to get on our feet and fix it up and sell it and make --" (R240). Merrick acknowledged that, at the time he met appellant, they had not fixed up the car at all, and had made no attempt to sell it (R240-41).

Merrick testified that John Baxter had been in the real estate business in California, but his primary way of making a living was by traveling from town to town selling advertising (R242). According to Merrick, Baxter would go to beauty salons, gas stations, and the like, and "[try] to sell them a year's worth of copy that he writes in their local newspaper to advertise their business" (R242-43). Baxter's travels in this line of work had taken him to forty states (R243). In fact, Merrick continued, he had tried to sell during their recent protracted trip from California to Tampa (R243). Defense counsel asked:

Q. Do you know of your own knowledge whether or not he was buying and selling drugs while he was traveling in forty states?

A. No, he did not.

(R243)

While appellant was in the house on Winding Drive, Merrick asked him on about three separate occasions to make a call to try and get some marijuana (R245). As far as he knew, there was no conversation about the purchase of cocaine (R246,263). However, Merrick was out of the room a couple of times, for five or ten minutes at a time, while appellant and John Baxter were discussing real estate (R246-47).

Merrick noticed that appellant was wearing an earring, but he did not notice that he was wearing any other jewelry (R264-68). After the shooting, Merrick's wife told him that appellant was wearing a diamond earring, as well as a bracelet or necklace and other jewelry (R266-68).

According to Merrick, Ray Stacey was at the dining room table during most of the evening (R268-71). Just a few minutes before the shooting started, Stacey went to the kitchen, got a sandwich, and sat down on the couch to eat it (R269-71,273-75).

Merrick described the sequence of events immediately prior to the shooting as follows: He [Merrick] had come into the kitchen area from the bedroom (R271-73). Raymond Stacey was in the kitchen doing something behind him (R273-75). Merrick came into the dining room and asked appellant if he'd try again and make that call (R275-76,see R272-73). Appellant again asked

Merrick if he was a cop (R275-76). This irritated Merrick, and he said something to the effect of "I've already told you we are not cops. Why do you keep asking" (R275). Then, five or ten minutes passed, during which appellant and John Baxter were talking about mortgages and real estate (R275-78). This was, according to Merrick, "absolutely normal conversation" (R277) "And then the next thing I see is he has a gun. I see him firing a gun over toward my son, my stepson, Raymond" (R277). Merrick stated that the shooting began "[f]or no reason that I can see" (R277).

Barbara Weston Merrick is the wife of Brian Merrick and the daughter of the deceased, John Baxter (R285-86). On the evening of September 8, 1986, she had been packing, in anticipation of leaving the residence on Winding Drive (R290, see R286-87). At about 11:30 p.m., she was in the motor home talking with her father, when Brian came in with a six-pack of beer (R289). He told her that he had been picked up hitchhicking by someone who had a house available where they allowed motor homes (R289-90). A horn honked outside, and Brian left (R290). Around midnight, Brian returned and said he had brought Richard back with him to talk with her father about the house (R290-91). [Mrs. Merrick identified appellant in court as Richard, though he looked much different on the night in question; "[he] had a long, scraggly beard and long hair, and he was a lot heavier" (R291-92). He had been wearing a blue hospital shirt, blue cutoffs, and tennis shoes (R292-93). On cross-examination, she added that he was wearing a considerable amount of jewelry; a diamond stud earring,

a gold bracelet, a gold chain or necklace, and a gold ring with stones in it (R338-40)].

When she was first introduced to appellant, he was drinking something straight out of a plastic milk jug he had brought, so she offered him a glass (R292). Some general conversation followed (R293). Either appellant or Brian lit a little marijuana cigarette, and it was passed around (R293). Brian, appellant, and Ray smoked it; John Baxter might have but she didn't see him; and she declined (R294). Apparently there had been some discussion of buying a small amount of marijuana (about three grams, or twenty dollars worth) for future use (R295). Appellant "had asked if we were police, and everybody said no" (R295). She did not know whether anyone asked appellant if he was a cop (R295). They continued to talk about the house (R296). They asked appellant about his family "and he said his dad died when he was about thirteen, and then he turned around about ten minutes later and said his dad was still alive, and I kind of looked at my dad because I was real skeptical of him because he was contradicting himself, you know" (R296).

Asked whether there was any drinking going on at the table, Mrs. Merrick said "Yes. Richard kept filling up his glass, I don't know how many times --- " (R296). She believed appellant was in control, however (R296). John Baxter had about one and a half glasses of the drink (R296).

Mrs. Merrick went into the kitchen to make Brian a steak sandwich (R296). She then went into the bedroom to put her daughter to bed and to continue with her packing (R297).

She saw appellant get up and go outside (R297-98). After about four or five minutes he came back in (R298). She couldn't see the dining room, but she assumed he sat back down at the table (R298). "I wasn't really --- listening to every exact word, but I did hear him ask again if we were cops, and that's what he said, cops, and I thought, wow. And the next thing I knew, I heard this pop and --" (R298). She described the noise as "a pop, like a balloon" (R298). She looked out and saw Raymond on the couch eating a sandwich; he had a smile on his face, so she wasn't too concerned (R298-99). She then heard more popping sounds, and she thought something had exploded in the kitchen (R299). She started toward there, and Raymond was running toward the bedroom saying "Grandpa and Brian are dead" (R299). She heard another pop, and Raymond said "I'm hit" (R299).[4/] Mrs. Merrick grabbed Laura (her daughter) and put her in the closet; she then grabbed the phone and went to the floor (R299). She crawled over and looked around the corner (R299). Appellant was standing over Raymond pointing the gun toward the back of his head (R299). She could see his hand move but the gun didn't go off again (R299). She thought it had jammed (R299). Then, "[h]e swung around and looked me right in the eye, and he looked real shocked to see me there, and with that he made the full circle and headed toward the front door" (R300).

4/ On cross-examination, Mrs. Merrick testified that, altogether, she heard eight shots (R343-48).

Mrs. Merrick called 911 twice and nothing happened (R300). She then called the operator, who put her through to the police, and she asked them to send three ambulances (R301). Raymond had dragged himself into the bedroom; his feet were up against the door, which was now closed (R301). Mrs. Merrick heard pounding on the door (R301). She thought it was appellant, but when she said "Who is it?", it was Brian (R301). He had a rag on his neck, and when she took it off he was squirting blood (R301). She got him to lie down, and she went over to her father (R301-02). Baxter was not breathing, but she felt a pulse, so she tried unsuccessfully to resuscitate him (R302). When the police arrived, Brian and Raymond were taken to the hospital (R302-03).

On cross-examination, Mrs. Merrick acknowledged that she has been convicted of a felony on one occasion (R306). She testified that, beginning around 1969, John Baxter, her father, traveled throughout the western states in his advertising business (R307-08). Around 1973 or 1974, Baxter and his new wife had bought a motor home and for the next seven or eight years they traveled around the entire country selling advertising (R307). After his wife died in 1981, Baxter sharply limited his traveling, staying within California (R307). To the prosecutor's relevancy objection to this line of questioning, defense counsel said "Judge, I hopefully will put it together in about another two questions" (R308). He then asked Mrs. Merrick, "During that period of time, did your father have any problems with law enforcement?" (R308). The prosecutor again objected on relevancy grounds (R308).

Defense counsel asserted that the line of questioning went to the crux of appellant's defense of self-defense (R308-09). Counsel stated that, on deposition, he had gone over Baxter's rap sheet with Barbara Merrick (R310, see R980):

> THE COURT: How can she be the one to say he has been convicted X number of times.
>
> MR. VECCHIO [defense counsel]: Well, she knows about DWI convictions, and she knows about a conviction --
>
> THE COURT: No, she doesn't.
>
> MR. CARUSO [prosecutor]: No.
>
> THE COURT: Only by hearsay.
>
> MR. VECCHIO: The one conviction she had, he was involved in the same crime.
>
> THE COURT: Can she say, "I was in court when he pled guilty"?
>
> MR. VECCHIO: She said he pled guilty.
>
> THE COURT: She was there?
>
> MR. VECCHIO: I really don't know whether she was exactly there.
>
> THE COURT: How can she testify as to what his convictions are unless she was there?
>
> MR. VECCHIO: They were arrested all at the same time.
>
> THE COURT: It doesn't matter that you were arrested at the same time.
>
> MR. VECCHIO: Well, she testified in deposition that the father was convicted of this particular crime.
>
> THE COURT: Well, the point is what she is basing her answer on. Hearsay?

(R310-11)

The trial court also expressed the view that, in order to bring out the deceased's prior criminal convictions in support of a defense of self-defense, it is necessary that the convictions be for violent crimes, such as aggravated assault or aggravated battery (R314, see R316-17, 325). The court asked "What are you saying he [Baxter] did? In other words, he pulled out a gun, or what?" (R314). Defense counsel explained that appellant did not claim that Baxter personally pulled a gun; but rather that Baxter was the one who instigated the situation which caused him to react in self-defense (R314-15). [Appellant subsequently testified that Baxter wanted to obtain a large amount of cocaine for distribution, and when he [appellant] declined to become involved in the endeavor, Baxter signaled to Raymond Stacey (R574-76). Stacey then drew a pistol and fired a shot at appellant (R576)].

The trial court concluded that John Baxter's convictions of unlawful importation of a controlled substance and unlawful exportation of firearms were not admissible:

> ... [M]y ruling is this. I'm not sure that -- well, I am not sure, obviously, but I don't think there are any cases, but I would rule that you could show under 90.404(1)(B), character of victim, prior convictions, provided those convictions, the nature of them, was such that it would show some sort of hostility or aggressive move that might make the defendant react, and I would so rule and I would let you show that, but there is nothing you've got that meets that test, assuming my test is right, which it may not be, which you object to. You say that importation of firearms is relevant.
>
> MR. VECCHIO: Unlawful exportation.

THE COURT: Make that rap sheet Court Exhibit 1 for purposes of this. So, I am going to sustain the objection to the question about the witness about his prior convictions because under the Evidence Code, I don't see where, given what the crimes are, that it's admissible. (R317)

The trial court ruled that defense counsel could question the witness about her father's reputation in the community for violence (R318-20). Defense counsel asked whether he would be allowed to use Baxter's drug and weapons convictions for impeachment purposes:

MR. VECCHIO: What you are saying, Judge, and correct me if I am wrong, if I ask about her father's reputation in the community, if I ask her about her father's reputation in the community and she says --

THE COURT: Reputation for what?

MR. VECCHIO: For violence.

THE COURT: Violence.

MR. VECCHIO: And she says he is not a violent man --

THE COURT: Well, then you don't want to ask her, obviously.

MR. VECCHIO: You are saying I can't go into that on this rap sheet because you are ruling there is nothing on this rap sheet that would prove to the contrary as far as you are concerned, as far as the Court is concerned.

THE COURT: Well, that is sort of a different question. Now, you want to impeach her answer that her father wasn't a violent man by saying, "Are you aware of these convictions?" It is sort of an interesting question, too. Does the fact you are convicted of these things on the rap sheet mean you are a violent person? That is sort of an interesting question, too.

> On the face of it, you would say no because there is nothing here violent, but I'm not so sure. How many convictions do you see here?

(R320-21)

The trial court stated that he was not precluding the defense from asking "this witness or any witness, about the victim's reputation or specific acts of conduct that would shed light on your self-defense theory" (R322). However, he concluded that the convictions of unlawful imporation of a controlled substance and unlawful exportation of firearms were not relevant for this purpose or for impeachment purposes (R322-25). The court explained:

> My ruling would be different on an aggravated assault conviction. I would say you could ask her that or that could come out because I think that goes to violence. I just think it's the nature of the conviction that gives us the answer. I will note your objection.

(R325)

Mrs. Merrick has been smoking marijuana for approximately twenty years (R326). Her son, Ray Stacey, who is twenty years old, began smoking marijuana at age fifteen or sixteen (R326-27). Mrs. Merrick has used cocaine, but she stated that neither she nor her husband nor her son used it on a regular basis (R327). After their arrival in Florida, but prior to the incident involving appellant, Ray Stacey had tried to purchase marijuana from someone else in Tampa (R327). According to Mrs. Merrick, Brian was not with him at the time, and Brian never attempted to buy marijuana in Tampa (R327-29). She acknowledged that six days earlier, in deposition, she had stated that Brian did attempt to purchase pot while he was in Tampa, but she testified that she was mistaken in the deposition

(R328-29). Mrs. Merrick testified that she does not always smoke marijuana whenever Brian does, and also that Brian drinks alcohol on a steady basis (R329).

On the evening of the shooting incident, Mrs. Merrick was packing to move, but they did not know where they were moving to (R329-30). They had no connection or job prospect in Orlando (R330). The family had a total of $30 or $40 among all of them, since Brian hadn't been paid yet (R330).

Mrs. Merrick testified that, when the shooting occurred, she heard eight shots fired (R343-48). Asked by defense counsel if she had indicated in her deposition that there were nine shots, she was quite insistent that she had heard eight (R344,345,346,347). She explained that she may have repeated one of the shots in her narrative, or the court reporter might have made a mistake, but "I've always said that there were eight shots" (R347, see R344-47). The shots all sounded like balloons popping (R351-52). All the pops occurred within about twelve to fifteen seconds, and they all sounded like they were coming from the dining room area (R353).

Mrs. Merrick testified that, between the time she heard appellant ask everybody if they were cops again, and the time she heard the first shot, a few minutes passed (R349). During these minutes, she could hear voices in conversation (R349). The conversation was in normal tones; nobody was arguing or shouting (R349-50).

Mrs. Merrick testified that after appellant left the house and prior to the arrival of the police, neither she nor Brian went outside the house (R348).

Raymond Stacey testified that appellant made two telephone calls from the Winding Drive residence; the first time there was no answer, and the second time the person he was looking for apparently wasn't home (R361). Appellant asked Stacey if he knew how much pot Brian Merrick wanted to buy (R361-62). Stacey answered that he assumed it would be a small amount because they were in heavy financial difficulties (R362). Appellant and John Baxter then engaged in a conversation about appellant's house that was in foreclosure, and another house he owned by a golf course which might be vacant soon (R362). Baxter said he used to be a real estate agent and knew a lot about how to work different deals with houses (R363). That conversation lasted at least half an hour (R363).

At one point, while everyone was at the dining room table, appellant asked "Are you sure you guys are not cops?", and they all said no, they weren't (R365-66). Barbara Merrick asked appellant if he was a cop, and he said no, he wasn't either (R365). According to Stacey, appellant told John Baxter that he was trying to purchase come marijuana for Brian, and Baxter said he couldn't hear him, he had a hearing problem (R366). Appellant acted like he didn't believe that Baxter had a hearing problem (R366). Appellant then stood up and said "I hope you don't mind this", and proceeded to frisk Baxter (R366). Baxter said "You don't have to worry. I don't have any kind of recording device" (R367).

Appellant sat back down; Stacey went and sat on the couch; and Brian came back in from the motor home, where he'd gone to get another beer (R367). Barbara Merrick came back in the room, and she and appellant were talking about the coincedence that they had the same birth dates (R367). Barbara then went in the kitchen to make

Brian a steak sandwich (R367). Stacey also went into the kitchen to make a steak sandwich for himself; he then returned to the couch to eat it (R389-91). While Stacey was lying on the couch, appellant said to him "You don't look very big to me." (R367) Stacey thought it was weird that appellant would say something like that (R367).

At one point, appellant went outside (R367-68). After about three or four minutes he came back in and sat down in a different chair (R368). Brian said it was getting late, and asked appellant if he would make the phone call again to buy the marijuana (R369). According to Stacey:

> At that point Richard asked him again if he was a cop. Brian said "What does it --". Let me think of his exact words. "What are you going to do if we are." At that point Richard said "What? What?" And he reached with his right hand behind his left side and pulled out a gun. He came around like this and pointed it toward me while I was seated on the couch eating a steak sandwich and took a shot at me --

(R369)

Stacey was surprised, but he didn't think it was a real gun (R369-70). Brian said "What the --", and started to stand up (R370). Appellant turned toward him and fired two shots, and Brian fell face forward over the table (R370). Appellant then pointed the gun toward John Baxter (R370). Baxter tried to block the gun, and might have grabbed ahold of it (R370). As Baxter started to stand up, appellant fired three shots at him (R370). According to Stacey "I watched the glass shatter on the hutch that was seated behind him", and Baxter started to fall to the ground (R370). Stacey started to run toward his mother's room, saying "Brian and grandpa are dead" (R370). A shot hit him in the back, and he said "I'm hit" (R370). He began crawling toward the bedroom (R371). Stacey

testified that he saw appellant leaving the house by the front door, but he never saw appellant standing over him (R371).

Stacey crawled into the bedroom and shut the door (R371). A few minutes later he heard banging on the door; he thought it might be appellant, but it was Brian (R371). Brian was standing there with a blood-covered towel around his neck (R371-72). Brian and Barbara went into the living room to check on John Baxter (R372). Stacey was unable to stand up (R372). He called the ambulance people three times asking how far they were away (R372). After the police arrived, Stacey was taken to the hospital, where he remained for a month and a week (R373).

On cross-examination, Stacey testified that while they were in Tampa, he had tried on three occasions to purchase small amounts of marijuana (R375-76). On two of those occasions, Brian Merrick was with him (R375). Twice they were successful, and the third time they got "ripped off" (R375-76). Stacey was in the habit of smoking marijuana two or three times a week, but this was curtailed during the period they were in Tampa "[b]ecause we could not afford any and we had nowhere to get it" (R377). According to Stacey, Brian Merrick had an alcohol problem as well (R358,377), and John Baxter typically had three to five drinks in the evening, several times a week (R382).

Stacey testified that appellant was wearing an earring and a bracelet on the night in question; that was the only jewelry he noticed (R382-83).

According to Stacey, seven shots were fired; one at himself which missed and hit the wall; two at Brian Merrick; three at John Baxter, and one more at himself which struck him (R294-95).

The shooting began when Brian made the comment to the effect of "what's the difference if we are cops" (R393-94). Asked if there was no time span in between, Stacey replied "Thirty, maybe ten seconds. I don't know. It was spontaneous to when Brian said that. It was spontaneous to when Brian said that" (R394).

Deputy sheriff Debbie Sharp, in response to a radio call, went to the residence at 15923 Winding Drive, arriving at 1:22 a.m. (R400-02,406). Barbara Merrick came to the door and let her in (R404). Three injured white males were in the house (R404-05). At least four paramedics from EMS arrived subsequently, as did more Sheriff's Department personnel (R405,407-08). While at the residence, Deputy Sharp spoke with Barbara Merrick for about a minute (R410-11). On cross-examination, she testified:

> MR. VECCHIO: Deputy Sharp, did Mrs. Merrick relate to you that she saw the suspect run out of the home?
>
> A. Yes, sir.
>
> Q. Did she ever tell you -- did she indicate to you that she did or did not see the suspect point a weapon at anyone as he was running out of the home?
>
> A. Did she indicate that she did?
>
> Q. Yes.
>
> A. She said she didn't.

(R410)

Corporal Lee Baker of the Hillsborough County Sheriff's Department was placed in charge of collecting evidence at the scene of the incident (R412-13). In front of the residence he observed four vehicles; two in the driveway, a Winnebago parked on the street, and a Mercury with an Alabama tag behind the Winnebago (R413-14). The Mercury was locked, and the keys were not in the ignition (R414).

Having been informed that the car apparently belonged to appellant, Corporal Baker had it impounded (R415).

Outside the residence, Corporal Baker observed a lot of blood leading away from the front door to the main sidewalk, and then to the east, where it finally stopped (R415). The inside of the house was in disarray, with boxes stacked around the living room (R416-17). He observed a lot of blood around the dining room table, the sliding glass door, and the bedroom door (R416,418). Corporal Baker started to go out the sliding door, but "it was locked and there was a huge dog out there, so I never did go out that way" (R418).

In the area of the track of the sliding glass door, three spent .380 caliber casings were recovered (State's Exhibit 9) (R420). Other spent .380 caliber casings were found under the dining room table (Exhibit 10), under a chair (Exhibit 11), and in the doorway of the kitchen (Exhibit 12)(R420-22). Baker believed the latter casing must have rolled or been accidentally kicked across the linoleum floor to that location (R422,435).

In the china cabinet or hutch, the glass window was broken, there was a hole through the back part of the cabinet, and a hole in the wall behind it (R423-24). An aluminum jacket (Exhibit 15) was found on the shelf inside the cabinet, directly beneath the hole, and lead fragments (Exhibit 14) were found at the base of the wall, behind the china closet (R423-24). Corporal Baker explained that when a bullet goes through several articles, the jacket has a tendency to separate from the lead interior (R424-25). He surmised that "probably the jacket came off the lead, the lead being heavier, and continued on and the jacket, which was aluminum, dropped down

and didn't travel to the back of the china closet"(R425).

Exhibit 16 was a bullet and jacket (still in one piece) recovered from the floor by Detective Steve Moore (R426). Exhibit 17 was a jacket and lead fragments (separated) found by Baker on the floor of the souteast bedroom (R426-27). He explained that there was a hole in the living room wall above the couch which penetrated (through two exit holes) into the adjacent bedroom; the jacket had apparently fallen onto the floor, and the lead had gone into a box (R427). Altogether, Corporal Baker recovered six casings, and was able to account for three bullets at the scene (R438).[5/] Baker believed that all of these items were sent to the FBI, but he was not positive of this because he did not have the lab report (R432-33).

Corporal Baker testified that, in addition to what he had just described, "[w]e continued our search to try and find any other evidence that would be consistent with this investigation" (R429). They did not find any weapons (R429-30). He acknowledged that they did not look through any of the boxes which were around the house, nor did they feel around the carpeting to see if anything was underneath, nor did they search the two vehicles in the driveway or the motor home (R432).

Crime scene technician Steven Moore, who assisted Corporal Baker in processing the crime scene, identified another empty shell casing (Exhibit 13), which was turned over to him by emergency room

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5/ In addition, Baker identified bullets (Exhibits 18 and 19) which were recovered at St. Joseph's Hospital; he was informed by hospital personnel that one came from Raymond Stacey and the other from Brian Merrick (R428).

personnel at University Hospital (R440-41). The casing had been recovered from the stretcher of the deceased, John Baxter (R441).

By stipulation, bullet fragments which were recovered from the body of John Baxter (Exh. 20 and 28), and the autopsy report prepared by Associate Medical Examiner Charles A. Diggs (R968-71), were introduced into evidence (R442). According to the report, the cause of death was a gunshot wound of the head (R968-69). There were two other gunshot wounds, to the left shoulder and left chest; these were described as non-lethal (R968-69).

Detective Frank Martelli conducted an inventory search of appellant's car on the morning after the shooting incident (R443-45,448). The car is a gold 1969 Mercury Montego with an Alabama tag (R444). The doors were locked, so Martelli had to force entry with a clothes hanger (R448-49). In the glovebox of the vehicle, Det. Martelli found a gun case or gun carpet with a loaded clip in it (R446-47,453-54,456). "They are .380 automatic with seven Winchester western silver-tip hollow-point bullets" (R446). According to Martelli "It was just lying in the glovebox. There were several other papers in there, but I found it immediately. It wasn't a very large glovebox" (R447, see R453-54).

From a small trash receptacle on the floorboard on the front passenger side, Martelli recovered a receipt from Cap'n Clean Carpets, addressed to 16219 Parkside in Tampa (R447,959). On the front seat was a State of Florida identification card belonging to James Richard Brown of 16219 Parkside Dr. (R448,961).

FBI agent Paul Schrecker was called by the state as an expert in the field of firearms identification (R457-60).

Schrecker explained that firearms identification:

> involves the examination of ammunition components such as fired bullets, fired casings, and these items can contain marks which can be compared. So, it's possible to compare bullets with one another or the bullets with a weapon.
>
> It's possible to compare fired casings with one another, or compare them with a weapon, and it's possible to say on certain occasions that, for example, these bullets were fired in the same gun or that these cartridge cases were identified as having been fired by this particular weapon.
>
> So, strictly speaking, that it what firearms identification is.

(R458)(e.s.)

Mr. Schrecker had occasion to examine in his laboratory certain evidence submitted to him by the Hillsborough County Sheriff's Office involving this case (R460). He received the three cartridge cases which comprised State's Exhibit 9 (found near the sliding glass door), as well as the cartridge cases labeled Exhibits 10, 11, 12, and 13 (found, respectively, under the table, under a chair, in the kitchen doorway, and in the stretcher of the deceased). All of these were .380 auto caliber cartidge cases manufactured by the Winchester Corporation (R460-62). Shrecker testified:

> Okay. I was asked to take a look at all seven of these fired casings, these cartridge cases, and to see if they contained any marks of value and if they did contain marks of value, I was asked to compare them, that is, to see if they had been fired by one weapon.
>
> Q. [by Mr. McClain (prosecutor)]: And what conclusion did you come to?
>
> A. Okay. I conducted the examination of these items, compared them with one another; and based on the marks, the matching microscopic marks I found on all seven, I was able to conclude that all seven casings had positively been fired by one weapon.

(R461)(e.s.)

Schrecker next examined State's Exhibit 21, which was comprised of the seven live cartridges which had been in the clip which was found in the glovebox of appellant's car (R462). These were also Winchester .380 auto cartridges (R462-63). The bullets were of a variety which Winchester calls a silver-tip bullet; it has an aluminum jacket which surrounds a lead core (R463). As far as Schrecker is aware, Winchester is the only manufacturer of this style of bullet (R473-74).

Schrecker next examined Exhibit 16, the bullet and jacket (in one piece) recovered from the floor of the residence by crime scene technician Moore (R463). Schrecker described this as a .38 caliber jacketed bullet; and explained that .38 caliber "simply refers to the family of weapons" (R463-64). Many firearms fire bullets which have the same basic diameter, including, for example, a .38 special, a .380 auto, and .357 magnum (R464). Since "there are quire a few different cartridges, live rounds, which all have the same bullet diameter", Schrecker was of the opinion that the .38 caliber bullet could certainly have been loaded into a .380 cartridge (R464). He further stated that the bullet (Exh. 16) was of the same construction as the bullets which were loaded into the live rounds in the clip from the glovebox (R465).

Schrecker examined the bullet (Exh. 16) and found that it contained rifling impressions (R465). "Rifling", he explained, consists of the spiral grooves that go down the barrel of a firearm (R466). The bullet is designed to fit into these grooves, and as it travels down the barrel of the weapon, it begins to spin (R466). It is this spin which keeps the bullet on course (R466) Schrecker testified:

> These spiral grooves can vary in how many grooves there are, which direction they go, clockwise or counterclockwise, and how wide they were.
>
> So, by looking at the rifling impressions and comparing those rifling impressions on a bullet with reference material that is in the FBI laboratory, we can determine what kind of weapon may have fired a bullet based on its rifling impressions.

(R466-67)

This particular bullet (Exh. 16) had rifling impressions of six grooves with a right-hand twist (R467). Checking the laboratory reference materials, Schrecker found these impressions to be consistent with .380 auto caliber, Beretta, Star, Astra, Walther, Llama, and CZ pistols, and possibly others (R467).

Schrecker's testimony then turned to the bullets which were removed from the wounded individuals Raymond Stacey (Exh. 18) and Brian Merrick (Exh. 19), and the deceased John Baxter (Exh. 20 and 28). The projectile from Stacey contained only the lead core (R467-68). Since the core is protected by the jacket from coming in contact with the barrel of the weapon, it did not bear any marks of value for comparison purposes (R468-69). On the other hand, the projectile taken from Brian Merrick (Exh. 19) contained jacket material or fragments (R469). Schrecker determined from the rifling that it had been fired from a weapon having six grooves, right-hand twist (R469). Thus it could have been fired from any of the previously mentioned types of firearm consistent with these impressions (R469, see R467). More specifically, however, Schrecker compared the bullet jacket of Exhibit 19 with that of Exhibit 16, and determined "that they had positively been fired through the barrel of the very same gun" (R470).

Similarly, Exh. 20 (taken from John Baxter) contained a jacket and core, while Exh. 28 (also from Baxter) contained a jacket fragment as well as several lead fragments (R470-72). From the rifling impressions, Schrecker determined that the bullet in Exh. 20 had been fired from the same weapon as the bullet fragments in Exhs. 16 and 19 (R471). With regard to Exh. 28, he testified:

> Again, I looked at this fragment for the presence of any rifling characteristics. I determined that it did have rifling impressions or characteristics on it which matched the other three exhibits.
>
> So then going a step further, I compared this fragment microscopically to the other three bullets and jackets I referred to.
>
> Q. [by Mr. McClain (prosecutor)]: And what conclusion did you come to?
>
> A. I could conclude that the bullet jacket in Exhibit Number 28 had been fired through the same weapon which fired 16, 19 and 20.

(R472).

Asked whether the "six grooves, right twist" rifling impressions necessarily meant that the bullets were fired from the same gun, Schrecker answered:

> Well, because of the comparison, the six grooves, right twist could belong to a number of weapons; but by doing the comparison and comparing with one another and finding a matching of the various fine microscopic marks, I could say that they were, in fact, fired from the very same weapon.

(R472).

The prosecutor then asked Schrecker whether any of the bullet materials which had been submitted to him were fired from a different gun (R472). Schrecker replied that the lead cores contain no marks on them, and cannot be compared at all (R472-73). As to the items which do contain marks of value (i.e., each of the

jackets or jacket fragments which were submitted to him), these "all identified with one another. There were no inconsistencies" (R473).

On cross-examination, Schrecker was shown State Exhibits 14 (lead fragments found behind the china cabinet) and 15 (aluminum jacket taken from the shelf inside the china cabinet) (R474-75, see R423-25). Schrecker testified that these items were not submitted to him for examination (R475). On re-direct the prosecutor asked Schrecker if he could look at those exhibits now "and make any type determination as to what they are or where they came from" (R475). Defense counsel objected on the ground that Schrecker had not performed any of the appropriate tests on those exhibits, and that his opinion, therefore, lacked a proper predicate (R475-78). In support of his objection defense questioned Schrecker as to the basis of his opinion:

> Q. Mr. Schrecker, on the other fragments and casings and bullets that you have testified to, you examined them in your office in the FBI headquarters; is that correct?
>
> A. That's right, yes.
>
> Q. What tests were all of these particular items undergone?
>
> A. The examinations really consisted of microscopic examinations. They were measured under a microscope which is capable of measuring the groove impressions on the bullet.
>
> I examined them under a comparison microscope where I could mount one object on one stage, another object on the other stage, and directly compare them one with another. So, that is the instrumentation that I used basically, well, our reference ammunitions, supplies, which aided me in determining what these were.

> Q. In other words, you mean charts concerning other weapons and other projectiles?
>
> A. Well, we had a list of weapons. We have lists of weapons, what the rifling characteristics are of those weapons, and we also have ammunition specimens back there that we use for comparison purposes.
>
> Q. All right. But you have none of that here today with you?
>
> A. I do not, no.

(R477)

At this point, defense counsel reasserted his objection, contending that any comparison testimony by Schrecker regarding Exhibits 14 and 15 would be completely speculative (R477-78). The trial judge overruled the objection, saying "I think it goes to the weight, not the admissibility" (R478).

Schrecker then proceeded to testify that Exh. 14 (the lead fragments) contained no marks that would be of value for a firearms comparison (R478). Exh. 15, on the other hand, "contains what appears to be a silver colored, possibly aluminum bullet jacket" (R479). Schrecker continued:

> I can tell that it's a bullet jacket because of the base shape. There is a cannelure ring which is kind of a rolled identification ring on the bullet. I also see some rifling impressions on this jacket fragment indicating, of course, it's a fired jacket fragment; but beyond it's basic appearance and what it has, I really can't say much more.
>
> Q. [by Mr. McClain (prosecutor)]: Is there anything really particularly inconsistent as to 14 and 15 and the rest of the items, the bullet fragments that you examined?
>
> A. Well, again, based on a very gross observation, they appear to be similar. 6/

(R478-79)(e.s.)

6/ Schrecker's testimony regarding the bullet jacket found in the china hutch also came up during the penalty proceeding before the trial court. See p. 47-50 of this brief.

On recross, Schrecker stated that the last item (Exh. 15) could be any of the projectiles of the .38 caliber family; i.e., a .357, a .38, or a .9 millimeter, etc. (R479). "Without doing a further test on that, I don't know. It could well be." (R479).

Corporal Gordon Hurley of the Hillsborough County Sheriff's Office testified that he, along with other officers, went to the residence at 16219 Parkside Drive (R480-83). After several minutes of knocking on the front and back doors with no response, a white male (identified by Hurley as appellant) opened the door (R483-85). He had a yellow blanket wrapped around him (R483). The officers ordered him to drop the blanket and lie down on the floor, whereupon he was placed under arrest (R484).

Corporal Hurley advised appellant of his Miranda rights (R485-86). A search of the residence was conducted (R496-87). The house was described by Hurley as a newer L-shaped home of stucco and imitation rock, with gold carpeting throughout, and with a screened enclosure in the back containing a Jacuzzi (R488-89). Hurley observed a pair of cut-off blue jeans and a blue hospital-type shirt outside the back door; these articles of clothing were "[c]ompletely soaking wet" (R488). Hurley also observed and impounded a set of Ford keys which were on a metal ring in the kitchen (R487-88). Later in the day, Hurley went to the Sheriff's Office garage and determined that the keys started the 1969 Mercury which was found at the scene of the shooting incident, and opened the doors and trunk of that vehicle (R489-90).

During the afternoon, Hurley and other officers searched the area between the Winding Drive and Parkside Drive residences to see if they could find a weapon (R490). There were some thickly

wooded areas, and several ponds and streams in the vicinity, which could not be searched thoroughly (R490). To the best of Hurley's knowledge, no weapon involved in this case was ever found (R490).

Detective Paul Davis was also among the officers who responded to the Parkside Drive address (R494-95). Appellant had a blanket around him when he answered the door, and was naked at the time of his arrest (R495-96,507). Davis obtained consent to search the residence (R496-98,963-64), and was present when appellant was read his Miranda warnings (R496-99). After being advised of his rights, but before any direct questioning began, appellant said "Man, see if I ever pick up any hitchhikers again" (R501).

Det. Davis related the interrogation as follows:

> Detective Winsett asked him did he own any guns. Mr. Brown replied that he owned a 30-30 Winchester, a .44-caliber handgun and a .25-caliber automatic.
>
> Detective Winsett then asked him, "Is that all the guns you own?" Mr. Brown replied yes. Detective Winsett stated, "You don't own any other guns?" Mr. Brown stated, "No, that's all." Detective Winsett asked him, "Have you ever owned any other guns?" and Mr. Brown's answer was, "No, never."
>
> Detective Winsett then asked a hypothetical question. "How could you explain it if your fingerprints were found on a clip to a .380 in your car?" To that Mr. Brown's reply was, "Oh, yeah, I forgot all about that. I own a .380. It's in my car. Oh, wait a minute. They were shot with that gun, weren't they?"

(R499-500)

Appellant told Det. Winsett that he had gotten the .380 two years ago from a friend named Steve Black (R500). Det. Davis observed what appeared to be fresh scrape marks on appellant's right hand (R500). He asked him how he'd hurt his hand (R500). Appellant said "Oh, I did that last ni-"; then stopped and said "Yesterday

working on my car" (R500). Winsett said "Richard, you started to say 'last night', didn't you?", and appellant replied "Yeah, I did, but I did it yesterday" (R501).

Appellant then made a statement concerning his activities on the night before; in which he said he'd picked up a hitchhiker named Brian, stopped by his own house to pick a couple of joints, and then gone to Brian's house to smoke the marijuana (R502). There was an old man, another man, a tall skinny lady, and a small child there (R502-03). There was some conversation about their renting a home he owned, and he made a couple of phone calls in an unsuccessfull attempt to locate some more marijuana for them (R503). Brian then said he really needed to use appellant's car, so appellant told Brian to come back with him to his residence, and then he could borrow the car (R503).

Det. Davis testified that the marks on appellant's right hand caught his attention, because he had learned from experience with automatic weapons that if you grip it too high when you fire, it tears up the inside of your hand and thumb (R504-05).

Det. Davis stated that, when he looked through the house, he saw the Jacuzzi running, and some shorts hanging nearby (R507). Other than the marks on his hand, appellant seemed "very normal appearing" to Davis (R507-08), notwithstanding that he was unkempt and naked (R508, see R496). "He appeared to be very coherent, very matter-of-fact about his questioning and jovial at a point,very -- just very normal is the only way I could describe it"(R508).

Detective Harold Winsett testified with regard to his expertise in the field of firearms, and stated that he is familiar

with a Walther .380 (R513,515-16). He was shown the clip which was found in the glovebox of appellant's car, and he identified it as a Walther .380 magazine (R518-19). When appellant was questioned at the time of his arrest, he initially stated that he owned three guns, none of which was a .380 (R519). When directly confronted (with the "hypothetical" question of how he could explain it if his prints were found on a .380 clip in his car (see R499-500)), appellant said yes, he did own a .380 (R520).

Det. Winsett testified that "railroad tracking" occurs when the weapon is fired, and "the slide comes back into this position, striking any part of the hand or fingers, causing lacerations..." (R517). Shown a photograph of appellant's right hand taken at the time of his arrest, Winsett testified that the marks were consistent with "railroad tracking" marks made by an automatic weapon (R517).

B. Trial-Defense Case

Appellant, Richard Brown, 7/ testified that on September 8, 1986, he was cleaning a house he owned at 16219 Parkside (R547). Some

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7/ Before getting into his testimony regarding the shooting incident, appellant testified that he was 36 years old, and had never been convicted of a felony (R539). Whe he was nineteen, he pled guilty to the misdemeanor of giving false information (R539) [He had reported that his car had been stolen, and then learned that a friend of his had borrowed it and been involved in an accident, so he recanted his statement (R539-40)]. As a result of that incident, he paid a $50 fine (R540).

Appellant grew up in Florida from the age of five (R540-41). He completed high school, and had three years of college in Alabama (R541-42). He worked for a civil engineer for several years, then managed his grandmother's cattle ranch in Alabama, and later started a small construction company (R542). In 1978, he moved back to Florida (R542-43). He worked for a contractor in Largo for a year and a half, and then was hired by U.S. Homes as a vice-president in the personnel department (R543). His responsibilities included purchasing of construction materials, negotiating with subcontractors, processing accounts payable, and obtaining building permits (R543-44). In December, 1985, appellant left U.S. Homes on good terms, to start his own construction business (R544).

renters had just moved out, and appellant was in the process of deciding whether to move in or to re-rent it (R547). At that period in time, appellant had longer hair and a long beard (R547-48). He had recently left his position as a vice-president with U.S. Homes in order to start his own construction business (R543-44,548), and he was in the habit of maintaining a well groomed appearance (R548). However, he had just spent the summer on vacation sailing off the Bahamas, and in the mountains of north Alabama, and he had let his hair and beard grow (R548-49).

Appellant had often traveled upwards of 20,000 miles per year in his job with U.S. Homes, and he got in the habit of keeping a gun in the glove compartment of his automobile (R545-46). The gun (one of four he owned) was a Walther .380 which came with two clips (R545-46). Appellant kept one clip loaded in the weapon and the other clip, also loaded, in the rug which the weapon was kept in (R546-47). Appellant had gone to get some ice and gatorade for the next day of house cleaning, and on his way home he picked up a hitchhicker (R549). He was in the custom of picking up hitchhikers, and he was also in the custom of making his gun available in case he picked up a bad hitchhiker (R550). He reached in the glovebox for the gun, emptied a round into the chamber[8/], and put it in his back pocket (R550-51). The hitchhiker approached the car and got in, and introduced himself as Brian (R550-51). He said he was from California, and said he was going to Winding Drive, where he'd rented a house (R550-51). During the short ride, Brian asked appellant if he knew

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8/ Appellant testified that the Walther clip holds seven rounds; by emptying one from the clip into the chamber, that left six shells in the clip (R550-51).

where he could obtain some marijuana, and appellant said he didn't (R551-52). As he dropped Brian off at the motor home, appellant remembered that he did have a small baggie of marijuana at his house, which he'd brought back from Alabama (R552). He honked the horn and Brian came out of the motor home; appellant told him about the marijuana, and they headed over to appellant's house to get it (R552). On the way, appellant became nervous about giving marijuana to a stranger, so he asked Brian if he was affiliated with any law enforcement agency (R553). Brian said he wasn't (R553).

Brian mentioned to appellant that he was having problems with his landlord over the motor home, and asked whether that would be a problem in appellant's neighborhood (R554). Appellant told him there were deed restrictions prohibiting them, but it really depended on whether the neighbors complained (R554). Brian looked around the house, and then they went into the kitchen (R554). Appellant dug the baggie of marijuana out of his briefcase, and told Brian to help himself (R554). As Brian was rolling a joint, appellant poured them each a drink of vodka and bitter lemon (R554). They talked for a few minutes, drinking and sharing the marijuana cigarette (R555). Brian said he would like to share the marijuana with his family, and appellant said he could have it (R555). Brian rolled almost what was left in the bag into another joint (R555). He asked appellant if he knew where he could get some more (R555). Appellant said he knew somebody who possibly could help him, and offered to give them a call, but he had no phone in the house (R555). They then left for Brian's house (R555-56).

When they arrived, Brian introduced appellant to Ray Stacey (R556). Appellant called the person he thought could obtain some

marijuana; who indicated that he could not, but gave appellant the number of a mutual acquaintance (R557-58). Appellant called the second number; there was no answer (R558). Brian came back into the house, with a woman and a man, whom he introduced as Mrs. Merrick and John Baxter (R558,560). They sat down at the table, and a discussion followed about the possibility of their renting appellant's house (R560). Brian lit the second marijuana cigarette and passed it around; everybody smoked it except Mrs. Merrick (R561). The jug of vodka and bitter lemon was in the middle of the table, available to anyone who wanted it (R561). John Baxter had a drink, and he and appellant conversed about real estate and appellant's various rental properties (R561-64).

While they were talking, appellant noticed that Mrs. Merrick kept staring at his earring (R566). He said to her "You like that, don't you?", and she replied "Yes, very much" (R566). He told her it had been a gift from a girlfriend (R566). In addition to the diamond stud earring, appellant was wearing a gold bracelet, a gold chain or necklace, a three-diamond ring, and a stainless steel diving watch (R566-68). Altogether, he was wearing jewelry valued in excess of $5000 (R568). Appellant also had a mobile telephone in the back seat of his car, valued at $1800 or $1900 (R568-69).

During the conversation about real estate, Ray Stacey got up from the table and went to the couch, and Mrs. Merrick went into the kitchen to make Brian a steak sandwich (R565). This left only appellant, Brian, and John Baxter at the table (R565). When Mrs. Merrick brought in the sandwich and sat back down at the table, Baxter suggested that she go in the bedroom and finish packing, since he wanted to discuss some business (R566). Brian then asked appellant

again about the marijuana, and he also asked about obtaining a small quantity of cocaine (R569-70). Appellant said he had made two phone calls which were unsuccessful (R569). As far as the cocaine, "I told him that he would possibly be able to talk to whoever I obtained the marijuana from, that he could only ask. That is all I knew" (R570). Brian urged appellant to make the call again, and then went out to the motor home to get another beer (R570).

Appellant again asked if there was anyone there affiliated with a law enforcement agency, because Brian was the only one he'd posed that question to before (R570). Baxter said no, he wasn't, and Ray Stacey (who had returned to the table) said "No, why? Are you?" (R570). Appellant said "No, I'm not" (R570). Baxter invited appellant to search him, and stood up (R570). Appellant patted him down; then returned to his seat and made the phone call (R570-71). Again there was no answer (R571).

Appellant then started to go out to his car to get a pack of his regular brand of cigarettes (R571). However, his keys were not on the table when he went to look for them (R571). Shortly thereafter, Brian came back in, twirling the keys on his finger (R571). He said he picked them up as a nervous habit, and gave them back to appellant (R571). Appellant then went out, got a pack of cigarettes, checked in the back seat to make sure everything was still there, and returned to the house (R571).

When appellant came back in, Ray Stacey was in the kitchen making himself a sandwich (R571,573). Appellant sat in the seat at the table which Stacey had just vacated, by the sliding glass doors (R571-72). The conversation resumed between appellant and Baxter; Brian was still there but he was not directly involved in the dis-

cussion much (R573). The subjects were real estate and cocaine (R573). Baxter now indicated that he was interested in buying a large amount of cocaine; an ounce to test it, and possibly later as much as a kilo (R573). Appellant told him he knew nothing about it; he was not in the cocaine business, never had been and never wished to be (R573-74). Baxter said that he liked to travel around the country a lot; he knew various people along the way that he could distribute the cocaine to, and he could do quite handsomely on it (R574-75). Appellant said that was all fine, but he couldn't help him (R575). Baxter made the comment to appellant "You look a lot more like a drug dealer than you do a builder" (R575). Appellant explained his appearance, but Baxter kept pressing him about the cocaine to the point where appellant was getting tired of it (R575). He said "Are you sure you guys aren't cops", at which point Brian Merrick stood up and yelled "Who cares about cops" (R576). Appellant looked at Baxter to see what his reaction was (R576). Baxter was not looking at either of them, but was looking into the living room (R576). Appellant saw Baxter nod his head (R576). Ray Stacey got up off the couch, stepped around the coffee table, and pointed a pistol at appellant (R576). Appellant leaned forward to grab his own pistol from his back pocket, and stood up, knocking over his chair (R576). Stacey fired a shot at him, which missed (R576). Appellant was about to lose his balance; he could not turn all the way around without tripping over the chair (R576-77). He turned as far as he could and fired a shot at Stacey (R577,594). Brian Merrick was reaching across the table, and Baxter was moving toward him (R577). Appellant fired a shot at Merrick's shoulder, which hit him in the lower part of the face (R577). Merrick fell face down on the table

(R577). By this time, Baxter had grabbed appellant's hand with the gun in it, and was pushing it down and away (R577). The gun went off (R577). Appellant jerked away from Baxter's grip (R577). Baxter was still coming at appellant with both arms (R577). Appellant fired a round at his left shoulder, but he continued to come forward (R577-78). Appellant thought Baxter could fight him to the death (R578) [9/] He fired another shot at Baxter's side (R578). Baxter threw a block into appellant with his right shoulder, and appellant fired another shot (R578). By the time Baxter was stopped, Ray Stacey was trying to get cover behind a wall in the living room (R578,598). Appellant was scared to death; he thought if Stacey was able to get back there, he would never get out of the house alive (R578-79). He fired a shot and Stacey went down (R579). Appellant ran to the front door (R579). "I had to jump over Mr. Stacey. I was afraid he was going to shoot me on the way out of the house, but I got out of the house" (R579).

Appellant ran to his car, but could not find his car keys again, nor were they in the ignition (R579). He was afraid that they would come out of the house after him (R579). Realizing he could not run through the neighborhood with a gun in his hand, he threw the gun as hard as he could toward the back of the houses, and took off running down the street (R579). Since he knew they were not familiar with the neighborhood, he avoided the direct route to his home, and instead took a circuitous route, running and walking for over three miles until he reached his house (R580).

9/ Appellant described Baxter as at least six feet tall and weighing well over 200 pounds (R578). Appellant is 5'9 (R578).

Exhausted and shaking, he got into his Jacuzzi without taking off his clothes (R580). After regaining his nerves to some extent, he undressed and lay down to try to go to sleep (R580-81).

Appellant had decided the best thing to do was to call his attorney in the morning to find out how to handle the situation (R580-81). However, the police arrived at his house at about eight in the morning (R581):

> I was still frightened. I guess the whole thing, when I was a little kid, I was hoping it would go away but it wouldn't. Of course, I was frightened. There had been a dozen police there with guns pointing at me, and I was naked when I was arrested. I was humiliated and scared to death still. I did not know what to do.

(R581).

When the police asked him about the shooting incident, he denied any knowledge of it (R581).

Appellant testified that he had not intended to kill anyone; he felt that his life was in danger, and that he could not get out of the situation any other way (R582).

On cross-examination, appellant acknowledged that he had not told the truth to the police at the time of his arrest (R589-92,595-97). He stated that he was still frightened and in shock (R595-97). Several hours after his arrest, he was able to call his attorney (R583,598-99). She same to see him at the jail the next day, and advised him to tell the truth (R583,599). The series of events appellant related to his attorney was the same as he testified to at trial (R583,599).

C. Deliberations and Verdict

In the midst of the jury's deliberations, while the trial judge was absent from the courthouse, the bailiff was notified that there was a question from the jury (R807). As later explained by the prosecutor:[10/]

> The Court was telephonically contacted and instructed myself and Mr. Vecchio [defense counsel] and the bailiff to attend to the jury and determine what their question was. I recall specifically we did that.
>
> In fact, I spoke, asked what the question was and instructed the jurors that the Court said they need to write their question down on a piece of paper, that the question would then be taken to the Court and they would receive a written answer to it.

(R807-08)

According to the prosecutor, the written question was received and brought back to the judge's office, whereupon the judge's secretary again contacted the judge by phone (R808). The prosecutor's recollection was that the jury wanted the testimony of two particular witnesses presented to them (R808).[11/] He related the request to the judge over the phone, and told him that he and defense counsel agreed "that the proper instruction under the circumstances was the Court would instruct them they could not have that testimony but rely on their memories" (R808). The court asked if defense counsel concurred with that, and Mr. Vecchio said he did (R808-09). An answer to that effect was typed up by the judge's

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10/ The circumstances set forth herein were adduced at a post-trial colloquy between the trial judge, the prosecutor, and defense counsel held on April 15, 1987. Appellant was not present at this proceeding, having already been sent to the Florida State Prison.

11/ The written request, at p.982 of the record, actually asks for transcripts of the testimony of three witnesses - one of the Merricks (which appears from the handwriting to be Brian, not Barbara), Corporal Lee Baker, and Raymond Stacey.

secretary (R809). The trial judge offered to come in and handle it himself, but both counsel agreed that that would not be necessary (R809). As explained by the prosecutor, "We both agreed it would require a written answer anyway and might just as well be sent back on a slip of paper inasmuch as there was not going to be any severe [?] instruction, it would be 'No, you may not have it. You must rely ...' " (R810).

At the April 15, 1987 inquiry, the judge then inquired of one Deanna Easterling (apparently his secretary), who stated that that was the way she remembered it too (R810). Defense counsel stated that his recollection would be basically the same as the prosecutor's, but that he wished to add the following:

> It was about approximately ten minutes to 3:00 in the afternoon when I did receive a call at my office -- I am only a block away -- to return, that the jury did have a question. At that point in time when I arrived here, I don't recall whether it was already written on a yellow sheet or not. I do know that --
>
> THE COURT: It probably was. I don't think the jury would --
>
> MR. VECCHIO [defense counsel]: I believe at that time --
>
> THE COURT: I don't believe the bailiff would come without it.
>
> MR. VECCHIO: I think the bailiff had the yellow sheet as per your instruction to obtain the question. Mr. Brown, my client, was in the lock-up at the time. We were called, I believe, by the judicial assistant, and we were given the yellow sheet which had the question on it.
>
> I believe they wanted the testimony of about two of the witnesses. I don't recall. I believe Mrs. Merrick was one of them.

> As per your instructions, Mr. Caruso and I, along with the bailiff, entered the jury room and knocked first, of course, and Mr. Caruso asked the jurors exactly what they meant by this question they were referring to, and one of the jurors said, "Well, we would like the testimony of two people." I believe Mrs. Merrick was one of them.
>
> MR. CARUSO: And the other one, Your Honor, was a detective, I recall specifically, Detective Baker.
>
> MR. VECCHIO: All right. Another juror at that point said, "Well, at this time. Then, we will probably ask for more at a later time." Mr. Caruso said, "I don't want any other questions. All I want is an answer to the question that you have on the yellow sheet," and then they responded, Detective Baker, as I recall, and Mrs. Merrick.
>
> We then left the jury room. We related this information to you. Mr. Caruso and I decided that they were going to probably try the entire case over again if we continued, so we agreed that we would relate to you what Mr. Caruso has stated, that they should rely on their memory.

(R812)

The April 15, 1987 inquiry then closed with the following statement by the prosecutor:

> As a matter of fact, Your Honor, that is the absolutely correct facts, and I do recall saying to Mr. Vecchio at the time that we didn't wish to enter into any discussions with any jurors or listen to any of their instructions, simply to ascertain the question, and then we left the room.

(R812)

At the completion of their deliberations, the jury returned verdicts finding appellant guilty as charged of one count of first-degree murder and two counts of attempted first-degree murder (R713-14,870-72).

D. Penalty Phase and Sentencing

The penalty phase of the trial began shortly after receipt of the verdict. Neither side presented any additional evidence (R738-39, see R714-16). Defense counsel made an oral motion that the death penalty not be considered on the facts of this particular case (R716). The trial judge concluded that it would be error not to conduct a second phase (R733), but he did express some uncertainty about whether he would impose a death sentence in this case, even if the jury were to recommend it (R733). Following the summations of counsel and the court's instructions on the law, the jury returned a recommendation of death (R753-54,873).

Defense counsel moved that the trial court override the jury's recommendation and impose a sentence of life imprisonment, on the ground that the death penalty was not proportionally warranted under the totality of the circumstances of the offense (R754-55). The trial court asked counsel whether there was any possibility of another gun being present, and other shots being fired, apart from the shots fired by appellant (R755):

> MR. CARUSO: No, sir, not in my opinion there was not, and this jury has clearly found that this is not the case.
>
> THE COURT: I know what they have found but I am saying is --
>
> MR. CARUSO: I can only tell you what I know of the evidence, Your Honor, that there were no other fragments found. There were no other holes found. There were no other weapons found. They were looked for as Mr. Vecchio so carefully pointed out in finding that there was a smelling of a rat, that the police did look for them. They did not find them.
>
> THE COURT: All the fragments and all the casings, et cetera, matched to the death weapon?

MR. CARUSO: Again, I reviewed the evidence that the expert put on and the fact of the matter was there were seven casings. There were fragments from seven bullets. As we counted them out, we found no fragments of any others, and we certainly found no casings from any other gun.

As a matter of fact as every expert said, everything was consistent with what he tested, including what he used here, although he couldn't use a microscope as conclusive that it came from one weapon.

THE COURT: That weapon being a what?

MR. CARUSO: A .380 automatic pistol, a Walther PPK.

(R755-56)

Defense counsel pointed out that one of the state's witnesses, Barbara Merrick, had stated on deposition that she heard nine shots, and had testified insistently at trial that there were eight shots (R757, see R343-47). [Either way, this would be inconsistent with the state's theory that appellant emptied his seven-shot clip, and that those were the only shots fired (see R665,743,757-58)]. After some discussion about the various bullet jackets and fragments which were found in the residence, the subject turned to the shot which went through the china cabinet:

MR. CARUSO [prosecutor]: ... There is another hole on the opposite side of the room that went through the hutch, the one that Mr. Vecchio has maintained came from a different weapon. That went through the hutch. It also fragmented. It also was recovered. There was one complete --

THE COURT: Wait, wait. You didn't mean to say it came from another weapon, did you?

MR. CARUSO: No. Mr. Vecchio said it did. I'm saying that it did not.

THE COURT: And the expert testimony was that --

MR. CARUSO: That it was consistent with having come from the one weapon.

MR. VECCHIO: Judge, he didn't say that it come from the one weapon. He said --

(R760-61)

Defense counsel subsequently pointed out that the bullet that went into the hutch was the bullet which was not sent to the FBI (R770). He suggested that there was no viable motive for appellant to shoot these people without provocation, but there was a motive for them to attack him; they were broke and ready to move on, and appellant was wearing $5000 worth of jewelry (R770-71). The trial court had asked whether any of the people in the house was able to walk around after the shooting (and thus, possibly, able to dispose of a weapon before the arrival of the police or EMS)(R763-66). The answer was that Barbara Merrick was uninjured, and Brian Merrick was ambulatory for at least some period of the time (R764-65,771-72).

The trial court expressed the view that, before a death sentence should be imposed, there should "be no real possibility of a mistake having been made" (R773). He then stated:

> I don't see that it was made here in terms of self-defense, and it would just be mind-boggling to believe that anyone, particularly Mrs. Merrick, under these circumstances, given this time frame, would have had the presence of mind to conjure up in her mind that "We have got to get rid of that gun and we have got to go hide it."
>
> Well, that is best supported by the fact that there is no physical evidence to support other shots. As I stated, not to speak of just looking at the overall situation and the terror that she was faced with, it would just be mindboggling to believe that she could have had the presence of mind to have done that or anybody wounded.
>
> How old was the son?

MR. CARUSO: Nineteen.

THE COURT: Nineteen. You have got to have this picture of them sitting there wounded or her sitting there with all these people around her discussing what would happen three or six months down the road. "We better get rid of that other gun. Go grab it. Don't worry about stopping my bleeding or don't worry about tending to dad or calling EMS. Let's worry about this gun. Let's hide it."

It's just too farfetched, particularly when you throw in the lack of any evidence whatsoever of the additional shell casings or bullet fragments. They were not present. (R773-74)

During the same discussion, the trial court asked whether the shooting took place immediately after the statement to the effect of "So what if we are police" (R766-67). The prosecutor replied that the state's witnesses conflicted on this point; Brian Merrick said a period of five to ten minutes had elapsed (during which there was a conversation about mortgages and real estate (R275-78)), while Ray Stacey "stated that he thought it was a very short period of time, thirty seconds to a minute" (R767). [Actually, when asked if there was any time lapse, Stacey had testified "Thirty, maybe ten seconds. I don't know. It was spontaneous to when Brian said that. It was spontaneous to when Brian said that" (R394)]. The trial judge asked the prosecutor, "[w]hat is your theory about when the defendant armed himself with this" (R767). In reply the prosecutor explained his hypothesis as to "heightened premeditation":

> My argument to the jury, my theory, and my belief, Your Honor, is the fact that when he said he went out to get a pack of cigarettes, he did not go out to get a pack of cigarettes. At that point, he had several times asked whether they were police. They had several times denied it.

He went out to the car at that point and armed himself, jacked a round into that chamber and came back in; and when he came back in, he fully intended to kill the people that were in that house. That is what I argued and that is what I believe.

MR. VECCHIO: Of course my theory is, Your Honor, that he had his gun with him at all times from the very moment when he picked him up. If you base it on what Mr. Caruso's theory is, what is the motive for him to come back and go out and get a gun and come back, for the sole purpose he is going to kill everybody. For what reason, what purpose?

THE COURT: Well, that was my next question.

MR. CARUSO: For the purpose, Your Honor, that he has now become convinced that these people are associated with the police --

THE COURT: So what?

MR. CARUSO: -- as informants or police officers, and he has already distributed drugs to them, and he is not going to do time for them, and so the only way to get out is to destroy them.

MR. VECCHIO: He distributed two marijuana cigarettes.

MR. CARUSO: I am not saying he is smart, Judge.

(R767-68)

The trial court set sentencing for February 26, 1987, and stated that he was particularly interested at that time in what standard he must meet if he were to override the jury's recommendation of death (R774).

At the February 26 hearing, defense counsel argued (1) that the evidence did not support a finding of the aggravating circumstance of "cold, calculated, and premeditated": (2) that at

least two mitigating circumstances should be found, in that appellant had no significant history of criminal activity, and in that he had an excellent record of gainful employment throughout his adult life; and (3) that life imprisonment, not death, is the appropriate penalty in this case (R779-84,785-89,792-93). The prosecutor argued that the "cold, calculated and premeditated" circumstance did apply, and that death should be imposed in accordance with the jury's recommendation (R789-92, see 902-05). The prosecutor conceded that appellant's only prior record consisted of one DUI and the incident (at age 19) of giving a false statement on a police report (R792).

The trial court then pronounced sentence:

> I find two aggravating and one mitigating, and my hesitation in the case dealt with guilt or innocence. Having considered it further and carefully gone through the facts and the trial testimony, in my mind, at least, I feel that guilt was the appropriate finding here and that there was no self-defense, and the determining factor to me is we have strong evidence here -- there is no question of it -- of drug use.
>
> What has happened here, and it has the ring of truth to me, and it's what I believe happened, is as a result of this drug use, we have paranoia.
>
> Paranoia is not an unusual circumstance that arises out of drug use, and that is what we have here, a killing out of paranoia, a fear that the police are onto him and he was going to be arrested, so I am comfortable with the jury verdict and comfortable with their recommendation.

(R793-94)

The court imposed the death penalty on Count I, with concurrent thirty year prison terms on Counts II and III (R794,

907-14). He said "Ask the prosecutor to get me a written order next week, two to one. Get a written order on the death case .... Two aggravating and one mitigating" (R795).

On March 9, 1987 (at the hearing in which appellant's motion for new trial was denied, and defense trial counsel was permitted to withdraw), the judge asked whether the written order was in (R801). Assistant State Attorney McClain said "I believe so. I understand Mr. Caruso did it" (R801). The judge replied "We don't have it so get it, a written order on aggravation. It's got to be a written order of death setting out the aggravating circumstances" (R801-02).

On March 19, 1987, a written sentencing order was filed (R944-47). The aggravating circumstances set forth were (1) that appellant was previously convicted of a felony involving the use or threat of violence (based on the concurrent convictions of attempted murder of Brian Merrick and Ray Stacey), and (2) that the homicide of John Baxter was committed in a cold, calculated and premeditated manner (R944-46). The narrative (written by the prosecutor, although signed by the trial court) contains no hint of the judge's oral finding that the killing arose out of drug induced paranoia (see R944-46,793-94).[12/] The sole mitigating circumstance set forth was that appellant has no significant history of prior criminal activity (R946).

12/ The sentencing order also specifies that the reason for the guidelines departure on Counts II and III is the concurrent conviction of first degree murder, an offense which cannot be scored (R947).

SUMMARY OF ARGUMENT

This trial came down to a credibility contest on the issue of self-defense. A critical question was whether appellant's gun was the only weapon involved in the incident (the Merrick/Stacey version) or whether there was a second gun, fired by Raymond Stacey (appellant's version). The police had collected a number of bullets or bullet fragments at the scene, and from the deceased and the injured persons, and had submitted all but two of these (those two being State Exhibits 14 and 15) to the FBI firearms identification expert, Schrecker. Schrecker proceeded to examine these items microscopically, and determined that each of the bullet fragments which contained (rifling) marks of value had class characteristics of "six grooves, right-hand twist". Upon further microscopic examination of the individual characteristics of the rifling impressions on the bullets, Schrecker was able to form, and state to the jury, the expert opinion that each of these bullets had been fired from the barrel of the very same gun. On cross-examination, defense counsel brought out the fact that State Exhibits 14 and 15 (the bullet fragments found behind the china cabinet, and the bullet jacket found on the shelf inside the china cabinet) had <u>not</u> been submitted to Schrecker for examination. [Note that the shot that struck the china cabinet was the one which the defense contended was fired by Ray Stacey]. On re-direct, over strenuous defense objection that any expert testimony by Schrecker concerning the unexamined exhibits was sheer speculation and lacked a proper predicate, the trial court permitted Schrecker to testify, from mere "naked eye" observation, that the unexamined exhibits appeared to be similar to the exhibits which he <u>had</u> examined. [Ironically, Schrecker was

able to see some rifling impressions on the jacket fragment (Exh. 15), but, because he had not examined it microscopically, he did not know then (and we do not know now) whether it had class characteristics of "six grooves, right-hand twist", much less whether its individual characteristics matched those of the other bullet fragments]. Under the established caselaw, the admission of Schrecker's expert testimony on this critical point was clearly an abuse of discretion, and one which severely and unfairly prejudiced appellant's defense. See e.g. Roberts v. State, infra; Huff v. State, infra; Southern Utilities Co. v. Murdock, infra; Mills v. Redwing Carriers, Inc., infra; Johnson v. State, infra; Durrance v. Sanders, infra; Sea Fresh Frozen Products, Inc. v. Abdin, infra; Husky Industries, Inc. v. Black, infra; Spradley v. State, infra. [Issue I].

The trial court ruled that testimony concerning John Baxter's [the deceased] convictions of unlawful importation of a controlled substance and unlawful exportation of firearms was inadmissible. The main basis of the court's ruling was his determination that these are not crimes of violence; he made it clear that his ruling would be different if the conviction had been (for example) for aggravated assault. Appellant submits that, under the particular circumstances of this case, Baxter's convictions for drug and firearms related offenses are, if anything, more relevant to show which of the competing versions of the events was true, which of the witnesses were credible, and to give the jury the complete picture of the circumstances as they existed, than a conviction of aggravated assault would be. See e.g. Garner v. State, infra; Cole v. State, infra;

People v. Bell, infra. Note that it was not appellant's testimony that he was initially attacked by John Baxter. Rather, according to appellant, it was Baxter who was pressuring him to find him a quantity of cocaine he could distribute (while, in contrast, the Merricks and Stacey testified that cocaine was never mentioned, and that Baxter was not directly involved in the discussion of marijuana), and it was Baxter who gave the signal to Raymond Stacey. It was, according to appellant's version, Stacey who then pulled a gun and fired at appellant. [Issue II].

On five independent, but related, grounds arising from the manner in which the jury's request (during deliberations) for transcripts of the testimony of three witnesses was handled, appellant is entitled to a new trial. First, and most obviously, there was a plain violation of Fla.R.Cr.P. 3.410, in the trial court's failure to respond in open court to the jury's request. This Court has emphatically and repeatedly held that failure to comply with this rule is per se reversible error. Ivory v. State, infra; Curtis v. State, infra; Williams v. State, infra; Bradley v. State, infra. Secondly, the trial court's absence from a critical stage of the trial proceedings requires reversal, unless the state can show that the defendant knowingly and intelligently waived his right to the trial judge's presence. Peri v. State, infra; Carter v. State, infra; see Johnson v. Zerbst, infra; Patton v. United States, infra; Tucker v. State, infra; Francis v. State, infra; McCollum v. State, infra. A purported waiver by counsel only, without consultation with or consent of the defendant, is clearly insufficient to meet the standard of Johnson v. Zerbst and its progeny. See. especially,

Carter v. State, infra. Third, the deprivation of appellant's own right to be present violated Fla.R.Cr.P. 3.180(a)(5). Appellant did not waive his right to be present [see Amazon v. State, infra]. Had he been present and informed of what was occurring, he could either have objected to the absence of the trial judge and the failure to comply with Rule 3.410, or else he could have made a valid waiver of those rights (had that been his intention). Fourth, the entry of the prosecutor and the defense attorney into the jury room during deliberations was highly unorthodox and improper. Fifth, the prosecutor's statement (not authorized by the trial court) to the jurors that he only wanted the question they had on the yellow sheet, and that he did not want any other questions, was an improper and prejudicial intrusion upon the jury's deliberative process; one which illustrates why compliance with the procedures mandated by Rule 3.410 is so important. [Issue III]

Appellant's final guilt-phase issue is that the evidence of premeditation is insufficient to support a conviction of first degree murder [Issue V].

Appellant's arguments as to penalty are (1) that the "cold, calculated, and premeditated" aggravating factor was improperly found [Issue IV]; (2) that the death penalty is proportionally unwarranted in this case [Issues IV and VI]; (3) that the trial court improperly delegated his statutorily and constitutionally mandated sentencing responsibilities - to identify, explain, and weigh the aggravating and mitigating circumstances - to the prosecutor [see Patterson v. State, infra] [Issue VII]; (4) that the trial court's failure to consider or weigh a proffered non-statutory mitigating factor violated the constitutional principle of Lockett v. Ohio

and its progeny; and (5) that comments made by the trial judge and prosecutor denigrated the importance of the jury's penalty verdict [see Caldwell v. Mississippi, infra; Adams v. Wainwright, infra.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE FBI FIREARMS IDENTIFICATION ANALYST TO GIVE HIS EXPERT OPINION THAT STATE'S EXHIBITS 14 AND 15 (THE BULLET FRAGMENTS FOUND BEHIND THE CHINA CABINET, AND THE BULLET JACKET FOUND ON THE SHELF IN THE CHINA CABINET) APPEARED TO BE CONSISTENT WITH THE OTHER BULLET FRAGMENTS HE HAD EXAMINED.

This trial came down to a credibility contest between the version of the incident as told by Brian Merrick and his wife and stepson, and the version given by appellant. A critical issue was whether appellant's gun was the only weapon involved in the incident (the Merrick/Stacey version) or whether there was a second gun, fired by Raymond Stacey (appellant's version). The possibility that a second firearm may have been involved was given additional circumstantial support by the testimony of Barbara Merrick (a state witness) at trial that she heard eight shots,[13/] since appellant's .380 automatic had a seven-shot clip.[14/] No gun was recovered, but a number of cartridge cases, bullet jackets, and bullet fragments were found inside the residence.[14a/]

The state called FBI agent Paul Schrecker as an expert in the field of firearms identification. In establishing his credentials, Schrecker explained that firearms identification:

> ... involves the examination of ammunition components such as fired bullets, fired

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13/ Asked on cross whether she hadn't, in her deposition, indicated nine shots, Barbara Merrick was quite insistent that she heard eight.

14/ The prosecutor argued, in both guilt phase and penalty phase, that "[t]here were seven shots fired that night" (R665) (see R743, "[T]hank God ... Walthers only come with seven rounds").

14a/ Police officers' testimony indicated that the house was in disarray, boxes were stacked about, emergency medics were at work, and the search of the premises was not done with a fine-tooth comb. One of the cartridge cases rolled or was accidentally kicked across the floor into the kitchen doorway, and another was ultimately found by hospital personnel in the stretcher of the deceased.

> casings, and these items can contain marks which can be compared. So, it's possible to compare bullets with one another or the bullets with a weapon.
>
> It's possible to compare fired casings with one another, or compare them with a weapon, and it's possible to say on certain occasions that, for example, these bullets were fired in the same gun or that these cartridge cases were identified as having been fired by this particular weapon.
>
> So, strictly speaking, that is what firearms identification is.

(R458)

Seven cartridge cases which had been recovered in the residence (State's Exhibits 9 (three cartridge cases), 10,11,12, and 13) were sent to Schrecker's laboratory by the Hillsborough County Sheriff's Office. All of these were .380 auto caliber cartridges manufactured by Winchester. Schrecker testified:

> I was asked to take a look at all seven of these fired casings, these cartridge cases, and to see if they contained any marks of value and if they did contain marks of value, I was asked to compare them, that is, to see if they had been fired by one weapon.
>
> * * * * * *
>
> I conducted the examination of these items, compared them with one another; and based on the marks, the matching microscopic marks I found on all seven, I was able to conclude that all seven casings had positively been fired by one weapon.

(R461)

Schrecker also examined Exhibit 16, which was a bullet and jacket (still in one piece) recovered from the floor of the residence, and found that it contained rifling impressions of six grooves with a right-hand twist. Checking laboratory reference materials, Schrecker found these class characteristics to be consistent

with, among others, .380 auto caliber weapons manufactured by Beretta, Star, Astra, Walther, Llama, and CZ.[15/] [See Appendix A, Rifling

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15/ The difference between class characteristics and individual characteristics in bullet identification is discussed in the De Maio text, infra, at p.30-31:

> When a bullet is fired down a rifled barrel, the rifling imparts a number of markings to the bullet that are called "class characteristics." These markings may indicate the make and model of the gun from which the bullet had been fired. They result from the specifications of the rifling as laid down by the individual manufacturer. These characteristics are:
>
> 1. Number of lands and grooves
> 2. Diameter of lands and grooves
> 3. Width of lands and grooves
> 4. Depth of grooves
> 5. Direction of rifling twist
> 6. Degree of twist
>
> In addition to these class characteristics, imperfections on the surfaces of the lands and grooves score the bullets, producing individual characteristics. For lead bullets these individual characteristics are more pronounced where the grooves score the bullet. In contrast, for jacketed bullets, the land markings are the most pronounced. These individual characteristics are peculiar to the particular firearm that fired the bullet and not to any others. They are as individual as fingerprints. No two barrels, even those made consecutively by the same tools, will produce the same markings on a bullet. Thus, while the class characteristics may be identical on bullets fired by two different weapons, the individual characteristics will be different. In addition to markings on the bullets, the magazine, firing pin, extractor, ejector, and breech face of a weapon may all impart class and individual markings to a cartridge case or primer.

Thus, "six grooves with a right-hand twist" is a class characteristic, common to a number of makes and styles of firearm [See Appendix A]. The rifling impressions which allowed Schrecker to conclude that Exhibits 16,19,20, and 28 had "positively been fired through the barrel of the very same gun" were, necessarily, individual characteristics of the markings on those bullets, compared microscopically. Schrecker's testimony was consistent with this distinction. Asked whether the "six grooves, right twist" rifling impressions necessarily meant that all of the bullets were fired from the same gun, he answered:

> Well, because of the comparison, the six grooves, right twist could belong to a number of weapons; but by doing the comparison and comparing with one another and finding a matching of the various fine microscopic marks, I could say that they were, in fact, fired from the very same weapon.

(R472)

Characteristics of Rifles and Handguns, from De Maio, Gunshot Wounds, Practical Aspects of Firearms, Ballistics, and Forensic Techniques (1985)].

Schrecker then examined Exhibits 18 (removed from Raymond Stacey), 19 (from Brian Merrick), 20 (from John Baxter), and 28 (also from Baxter). Exh. 18, as it consisted only of the lead core, bore no marks of value for comparison purposes. The other projectiles, however, revealed the class characteristic of having been fired from a weapon having six grooves, right-hand twist. More specifically, they also showed individual characteristics which allowed Schrecker to determine "that they had positively been fired through the barrel of the very same gun" (R470). For example, with regard to Exh. 28, Schrecker testified:

> Again, I looked at this fragment for the presence of any rifling characteristics. I determined that it did have rifling impressions or characteristics on it which matched the other three exhibits.
>
> So then going a step further, I compared this fragment microscopically to the other three bullets and jackets I referred to.
>
> Q. [By Mr. McClain (prosecutor)]: And what conclusion did you come to?
>
> A. I could conclude that the bullet jacket in Exhibit Number 28 had been fired through the same weapon which fired 16, 19 and 20.

(R472)

Asked by the prosecutor whether any of the bullet materials which had been submitted to him had been fired by a different gun, Schrecker replied that the lead cores contain no marks on them and cannot be compared at all. As to the items which do contain marks of value (i.e., each of the jackets or jacket fragments which he examined) these "all identified with one another. There were no inconsistencies" (R473).

Thus, the state on direct had elicited expert testimony in support of its theory that there was only one gun - appellant's - involved in this shooting incident. On cross, however, a serious flaw in the state's use of the expert to support its hypothesis was revealed. When shown State Exhibit 14 (lead fragments found behind the china cabinet) and 15 (aluminum jacket found on the shelf inside the china cabinet), Schrecker testified that these items were not submitted to him for examination. Since the shot that went into the china hutch was the shot which the defense maintained was fired by Raymond Stacey, it was obviously of critical importance whether the rifling marks on that bullet were the same as, or different from, the marks on Exhibits 16,19,20, and 28. Therefore, the state's failure to submit the bullet jacket and lead fragment from the china hutch to Schrecker for examination essentially negated its ability to rely on the expert's testimony to show that all of the shots were fired from one weapon.

On re-direct, the state attempted to remedy its oversight, by asking Schrecker if he could look at Exhibits 14 and 15 <u>now</u> "and make any type determination as to what they are or where they came from" (R475). Over defense counsel's vehement objection that such testimony lacked a proper predicate (due to the absence of any microscopic examination or comparison of the rifling impressions on the bullet) and would be completely speculative (R475-78), Schrecker was permitted to give his "expert" opinion regarding those exhibits. He testified that the lead fragments (Exh. 14) contained no marks of value for a firearms comparison. Exh. 15, on the other hand,"contains what appears to be a silver colored, possibly aluminum bullet jacket" (R479). Schrecker continued:

> I can tell that it's a bullet jacket because of the base shape. There is a cannelure ring which is kind of a rolled identification ring on the bullet. I also see some rifling impressions on this jacket fragment indicating, of course, it's a fired jacket fragment; but beyond its basic appearance and what it has, I really can't say much more.
>
> Q. [by Mr. McClain (prosecutor)]: Is there anything really particularly inconsistent as to 14 and 15 and the rest of the items, the bullet fragments that you examined?
>
> A. Well, again, based on a very gross observation, they appear to be similar.

(R478-79)

On re-cross, Schrecker stated that the last item (Exh. 15) could be any of the projectiles of the .38 caliber family; i.e., a .357, a .38, or a .9 millimeter. "Without doing a further test on that, I don't know. It could well be" (R479).

An expert's 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 Florida law, the trial court's discretion in determining the admissibility of expert testimony is not an unfettered discretion [see e.g. Johnson v. State, 314 So.2d 248,251 (Fla.1st DCA 1975); GIW Southern Valve Co. v. Smith, 471 So.2d 81,82 (Fla.2d DCA 1985)], and is subject to the following limitations. "It is axiomatic that an opinion from an expert witness should not be admitted unless a sufficient predicate has been laid therefor." Johnson v. State, supra, at 252;

see also Spradley v. State, 442 So.2d 1039, 1043 (Fla.2d DCA 1983).[16] "It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data." Husky Industries, Inc. v. Black, 434 So.2d 988, 992 (Fla.4th DCA 1983). Purported expert testimony consisting of guesses, conjectures, or speculation is "clearly inadmissible". Durrance v. Sanders, 329 So.2d 26,30 (Fla.1st DCA 1976); see also Southern Utilities Co. v. Murdock, 128 So.2d 430,432 (Fla. 1930) (judgment of an expert must be more than a guess); Husky Industries, Inc. v. Black, supra, 434 So.2d at 995 (expert opinion based on "pure speculation and guess-work", or on description in manuals of dissimilar experiments, was "worthless", non-probative, and inadmissible); cf. D'Avila, Inc. v. Mesa, 381 So.2d 1172, 1173 (Fla.1st DCA 1980) (opinions of Dr. Garcia and Franco, which were not based on any test results, but merely on assumption that concentration of particles at factory was hazardous to claimant's asthma condition, were non-probative and did not constitute "competent, substantial evidence"). cf. Fisher v. State, 361 So.2d 203, 204 (Fla.1st DCA 1978) (where medical examiner admitted he had no knowledge of a scientific nature to

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16/ In Huff v. State, 495 So.2d 145,148 (Fla. 1986), this Court observed:

> A general rule of law concerning the admissibility of expert witness testimony is that the expert, once qualified by the trial court as such, normally decides for himself whether he has sufficient facts on which to base an opinion. The exception to this rule is when the factual predicate submitted by the expert omits facts which are obviously necessary to the formation of an opinion. When the factual predicate is so lacking, the trial court may properly refuse to allow the testimony. Spradley v. State, 442 So. 2d 248 (Fla.1st DCA 1975); Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 (Fla.4th DCA 1971).

justify the opinion he offered, his testimony should have been excluded).

In addition to the requirement that an expert's opinion be based on an adequate factual or scientific predicate, and that it not be the product of guesswork, there is also a requirement that expert testimony, in order to be admissible, must be beyond the common understanding of the average layman, and must be of such a nature as to aid the jury in its search for truth. Mills v. Redwing Carriers, Inc., 127 So.2d 453, 456 (Fla.2d DCA 1961); Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218,219 (Fla.5th DCA 1982); cf. Johnson v. State, 438 So.2d 774,777 (Fla. 1983) ("Expert testimony should be excluded when the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form its conclusion"). In the often cited case of Mills v. Redwing Carriers, Inc., supra, at 457, the court said:

> An observer is qualified to testify usually because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert, however, has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of testimony from a qualified expert, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of facts in its search for truth.

See e.g. Huff v. State, supra, 495 So.2d at 148; Ortagus v. State, 500 So.2d 1367,1371 (Fla.1st DCA 1987)(testimony of firearms

expert concerning the close proximity of defendant to victim at time of shooting was properly excluded, as it was not beyond the understanding of the average layman, and would not have aided the jury); Florida Power Corp. v. Barron, 481 So.2d 1309,1310-11 (Fla. 2d DCA 1986)("Because the importance and validity of the testimony of an expert witness are increased in the mind of the jury, allowing an expert witness to testify to matters of common understanding creates the possibility that the jury will forego independent analysis of the facts when it does not need assistance in making that analysis").

This principle was applied, for example, in Sea Fresh Frozen Products, Inc. v. Abdin, supra, 411 So.2d at 219:

> Appellant contends the trial court erred in allowing plaintiff's expert witness to testify. Before an expert can testify, the subject matter must be beyond the common understanding of the average layman. Buchman v. Seaboard Coast Line Railroad Co., 381 So.2d 229 (Fla.1980); Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla.2d DCA 1961). Here, the subject matter the plaintiff's expert testified about was the slipperiness of algae on a boat ramp, a subject easily comprehendible by an average juror. Even if the subject matter could have been considered outside the realm of a layman's experience, a person offered as an expert must be demonstrated to have some expertise in that particular field. Buchman; Mills. Plaintiff's witness was offered as an expert in marine chemistry, with a doctorate and a research background in that field. However, he admitted he had never done any studies whatsoever concerning marine algae growth or its control, the very subject about which he was being offered to testify. For both these reasons, the trial court erred in allowing the witness to testify as an expert.

In the present case, the scientific field in which FBI Agent Schrecker was qualified as an expert was the field of firearms

identification. Schrecker himself defined his field as the "examination of ammunition components such as fired bullets, fired casings, and these items can contain marks which can be compared" (R458). Schrecker further testified, in establishing his qualifications, that it is because of these markings, known as "rifling", that it is possible to compare bullets with one another or the bullets with a weapon (R458). According to Schrecker's own explanation, projectiles which contain no rifling marks (such as a lead bullet core separated from its jacket) "of course, cannot be compared. They contain no marks of value for comparison purposes" (R473, see R468-69,472-73). On the other hand, microscopic comparison of projectiles which do contain rifling impressions may allow the firearms examiner to determine generally what types of weapon could have fired the bullet (i.e., class characteristics, as in "six grooves, right hand twist"). The kinds of weapon which are consistent with the particular rifling impressions are determined by consulting reference material that is in the FBI laboratory (R467). Beyond this, Schrecker testified, further examination involving "a matching of the various fine microscopic marks" (R472)(i.e., individual characteristics), may allow the examiner to determine that a particular bullet was fired from a particular weapon, or that several bullets were fired from the same weapon (R472).

Needless to say, Schrecker never claimed any expertise in performing bullet comparisons by the naked eye, nor did he indicate that comparison could ever be done that way in the field of firearms identification. To the contrary, his testimony (at least up until the point, on re-direct, when the prosecutor asked him if he could look at the unexamined

exhibits "and make any type determination as to what they are or where they came from") rather clearly indicated that, in his field of expertise, examination of rifling marks is indispensible to any meaningful comparison. See, generally, Moenssens, Inbau, and Starnes, Scientific Evidence in Criminal Cases (1986), §§4.08 (Bullet Identification) and 4.09 (Identification of Bullet Fragments), p.220-24; Di Maio, Gunshot Wounds, Practical Aspects of Firearms, Ballistics, and Forensic Techniques, Chapter 2 (The Forensic Aspects of Ballistics), p.25-33.

It is the firearms examiner's training and expertise in interpreting and comparing the microscopic markings on fired bullets and cartridge cases which qualifies him as an expert witness, and allows him to give opinion testimony which is beyond the common understanding of the jurors, and which is designed to assist them in their search for truth. Cf. Pizzo v. State, 289 So.2d 26,27 (Fla. 2d DCA 1974), which states:

> A ballistics expert in Roberts v. State, supra, testified that a test bullet fired from the defendant's gun matched the bullet taken from the victim's body. The latter bullet and the gun were in evidence but the test bullet was not. The Supreme Court rejected the defendant's contention that the test bullet should also have been put in evidence so that the jury could examine it. The court pointed out that an examination of the bullet would have been meaningful only to an expert, and in any event, such examination could not be accomplished with the naked eye.

In Roberts v. State, 164 So.2d 817,820 (Fla.1964)(the decision referred to in Pizzo), the state had called a ballistics expert:

> ... who testified that he had test-fired the pistol and had compared the markings on the test bullet with those from the evidence

bullet removed from the victim. This he did under a comparison microscope. On the basis of this experiment he submitted the opinion that the bullet which resulted in Campbell's death had been fired from the gun belonging to Roberts. The test bullet was not placed in evidence. Both Adderley and Roberts contend that the test bullet should also have been filed in evidence so that the jury could compare it with the evidence bullet which had caused the death. It is clear that the markings on the bullets could not be identified with the naked eye. Additionally, they could be interpreted only by one trained in the science or experience of ballistics.

This Court held as follows:

> It is now well established that a witness, who qualifies as an expert in the science of ballistics, may identify a gun from which a particular bullet was fired by comparing the markings on that bullet with those on a test bullet fired by the witness through the suspect gun. An expert will be permitted to submit his opinion based on such an experiment conducted by him.
>
> * * * * * *
>
> In cases such as these the opinion of the witness is allowed under the rules which govern other forms of expert testimony. He will be permitted to submit his conclusions where it is shown that by training and experience he is qualified to give an expert opinion on the basis of the ballistic tests which he himself conducted. It is not necessary that the test be conducted in the presence of the jury nor is it required that the expert submit to the jury the actual test material.

Roberts v. State, supra, at 820.

In the instant case, Schrecker's testimony on direct - concerning the exhibits which he examined - was entirely proper. He testified that, while the lead cores contained no marks of value and cannot be compared, each of the bullet materials which did contain rifling impressions had the characteristics of "six grooves, right-hand twist", and, upon further microscopic examination, each item had individual characteristics which showed that they all had been fired from the same gun. Schrecker stated that the items which were submitted to him and which contained marks of value "all identified with one another. There were no inconsistencies" (R472-73). On cross, the defense, also properly, brought out the fact that Exhibits 14 and 15, the bullet jacket and fragments found inside and behind the china cabinet, were not submitted to Schrecker for examination. In an attempt to repair the situation, the prosecutor on re-direct asked Schrecker if he could look at the unexamined exhibits on the stand, without the aid of a microscope, "and make any type determination as to what they are or where they came from" (R475). Interestingly, while Schrecker's eyeball observation of Exhibit 15 revealed to him only that it appeared to be "a silver colored, possibly aluminum bullet jacket" ("I can tell that it's a bullet jacket because of the base shape" (R478)), he was able to see some rifling impressions on it, indicating that it was a fired jacket fragment (R478-79). Since he had not examined this exhibit microscopically, there was no determination of whether those rifling impressions did or did not have the class characteristics of "six grooves, right-hand twist." Nor was Schrecker able to compare the individual characteristics of those rifling marks with those he found on the bullet materials

which were submitted to him for examination, to determine whether Exhibit 15 was (or was not, or may or may not have been) fired from the same weapon. Yet the prosecutor was permitted to ask his expert witness in the field of firearms identification:

> Q. Is there anything really particularly inconsistent as to 14 and 15 and the rest of the items, the bullet fragments that you examined?
>
> A. Well, again, based on a very gross observation, they appear to be similar.

(R479)

The harmful error in admitting this "expert" testimony is apparent. Since meaningful comparison of fired projectiles is possible only on the basis of microscopic examination of their markings, and since the state never submitted Exhibit 15 (which did contain rifling impressions) to Schrecker for examination, there was clearly no predicate laid for his expert opinion. Huff v. State, supra; Johnson v. State, supra; Spradley v. State, supra. [As for exhibit 14, it was merely a lead fragment, and, as Schrecker himself said, these contain no marks of value and cannot be compared (R468-69,472-73,478)]. "It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data." Husky Industries, Inc. v. Black, supra, 434 So. 2d at 992. Schrecker's opinion - based on his admittedly "very gross" naked eye observation of a lead fragment which "was part of a bullet at one time" (R478), and "what appear[ed] to be a silver colored, possibly aluminum bullet jacket" (R478) - that these unexamined exhibits appeared to be similar to the bullet materials which he did examine microscopically, was worthless, non-probative, misleading, and inadmissible. See Husky Industries, Inc. v. Black, supra, at 995. To the extent that the jury might have accorded any

special weight (or any weight at all) to Schrecker's eyeball comparison of the bullet materials, because of his status or his credentials as a firearms identification expert, such deference was unwarranted and prejudicial. There is nothing in the record, or in Schrecker's testimony regarding his own qualifications (or his definition of his own field of expertise (R458)), or in the literature on ballistics identification, to indicate that Schrecker had any more ability than a layman to compare fired bullet fragments by the naked eye. If Schrecker's testimony were to be interpreted as nothing more than "this looks like a lead fragment, and this over here looks like a metal jacket", then that is something the jury could have easily seen for itself. Since such "expert" testimony is neither "so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman", nor "of such a nature as to aid the jury in its search for truth", it should not have been admitted. See Mills v. Redwing Carriers, Inc., supra; Sea Fresh Frozen Products v. Abdin, supra; Huff v. State, supra; Ortagus v. State, supra. If, on the other hand, the jury were to interpret Schrecker's opinion as something more than "this looks like a lead fragment and that looks like a metal jacket" - i.e., if the jury were to believe (as the prosecutor intended for it to believe) that all of the bullet materials found in the residence on Winding Drive had been determined by an expert to be consistent with one another - then the improper introduction of Schrecker's testimony on this point was so insidiously prejudicial as to have destroyed the fundamental fairness of the trial itself, by appearing (misleadingly) to refute the defense contention that the bullet which went into the hutch was fired by Raymond Stacey.

The unfairness of allowing Schrecker to testify that the unexamined bullet fragments appeared to be consistent with the examined ones is compounded by the fact that Exhibit 15 did contain rifling impressions, which (if this state exhibit had been submitted for examination along with the others) might very well have allowed a meaningful comparison to be made. For example, if the rifling impressions on Exh. 15 had revealed class characteristics other than "six-grooves, right-hand twist", then that bullet could not have been fired through the same barrel as the other bullets, and could not have been fired by a Walther .380 [see Appendix A]. Such a result would have been nearly conclusive proof that the Merrick/ Stacey version of the shooting incident was false, and would have strongly tended to corroborate appellant's defense. If, on the other hand, the marks had the characteristics of "six grooves, right hand twist", then (according to Schrecker's own description of his laboratory procedure (R472)), further examination "of the various fine microscopic marks" might well have allowed him to determine that Exhibit 15 was, or was not, fired from the same weapon as the other exhibits which he had compared. Or, perhaps, the examination might have been inconclusive.

Arguably, <u>if</u> Schrecker had properly examined the exhibit according to the accepted procedures in his field of expertise, and <u>if</u> the results had revealed that the rifling marks had similar class characteristics as the other bullet fragments (i.e. six grooves, right twist) but comparison of the individual characteristics was inconclusive, then (and only then) he might have been permitted to give an expert opinion that Exhibit 15 was "consistent" with the others, or that it "could have been" fired from the same weapon.

For example, in State v. Courtney, 495 N.E.2d 472, 475-76 (Ohio App. 1985) and in State v.Hamel, 466 A.2d 555,556,559 (NH 1983), the appellate courts held that expert testimony as to ballistics comparisons were admissible, notwithstanding that the expert could not conclusively state that the particular bullet was fired by the defendant's gun. However, a comparison of the circumstances of Courtney and Hamel with those of the instant case only serves to underscore the total lack of a factual or scientific predicate for the "expert" testimony of Agent Schrecker. In Courtney, the disputed testimony concerned whether the bullet which killed the victim [Dean] was fired by a .22 caliber pistol which was found at the scene and identified as belonging to the defendant.

> Dye [the state's firearms identification expert] testified that the lands and grooves found in the bullet that caused Dean's death matched the land and groove characteristics of the .22 caliber gun. He further stated that the bullet and the gun both exhibited a "right twist" characteristic, which is the direction of the spin imparted upon the bullet by the lands and grooves inside the gun barrel. However, Dye also advised the jury that he could not find enough other matching characteristics to positively match the bullet back to the gun. Dye therefore concluded that while it was not possible, based on the tests performed, to positively say whether or not the particular bullet was fired from the particular gun, it was possible to conclude, based upon the corresponding land and groove widths and the direction of the "twist," that the bullet could have come from the appellant's gun.

State v. Courtney, supra, 495 NE.2d at 475 (emphasis in opinion)

In holding the testimony admissible, the Court of Appeals noted that, while the expert could not positively match the fatal bullet with the gun, "he could, based on his comparison of the lands and grooves, say with reasonable scientific certainty that the bullet could have been fired from [the defendant's gun]. This

opinion was based on accepted scientific identification procedures and was certainly circumstantially relevant for the purpose of proving whether appellant's gun was involved with Dean's death." State v. Courtney, supra, 495 N.E.2d at 475.[17/]

Thus, in Courtney, the bullet in question was examined microscopically, and its markings revealed class characteristics, but not enough individual characteristics to permit a conclusive matching. In the instant case, rifling impressions were present on Exhibit 15, but the exhibit was never examined; no characteristics (class or individual) of these markings were apparent to Schrecker from his naked eye observation on the stand; the accepted scientific procedures of firearms identification (as described by Schrecker himself) were not followed; and the "expert" opinion given by Schrecker that the unexamined projectile appeared similar to the ones he examined was worthless, non-probative, misleading and inadmissible.[18/]

17/ State v. Hamel, supra, 466 A.2d at 556 and 559, is similar to Courtney. The firearms examiner in that case did perform the appropriate tests, and found that the class characteristics of the bullet recovered from the victim's body were consistent with the class characteristics of the test bullet fired from the defendant's gun. Because of the condition of the bullet taken from the victim the firearms examiner was unable to match individual characteristics, and therefore could not conclusively state that the bullet was fired from the defendant's gun. As in Courtney, the expert testimony was held to be admissible under these circumstances.

18/ By way of analogy, consider bite mark evidence. Ordinarily, an expert in forensic odontology will make or receive cast models of a suspect's teeth; he will then make bite impressions in wax with the models; and, finally, he will compare the wax impressions with scaled-to-size photographs of the bite mark in the victim's skin. See e.g. Bundy v. State, 455 So.2d 330,348-49 (Fla. 1984). Now what if the state called a forensic odontologist as an expert witness, who had never been asked to do any of these basic procedures, and asked him whether the defendant's teeth were "consistent with" or "similar to" the bite mark? Could the odontologist have the defendant "open wide and say aaah", and from naked eye observation give an expert
FOOTNOTE CONTINUED ON NEXT PAGE

As previously discussed, this trial amounted to a credibility contest, and the improper introduction of Schrecker's testimony regarding the purported consistency of Exhibits 14 and 15 with the other bullet fragments found in the residence, or taken from the deceased and the injured persons, had the prejudicial effect of seeming to corroborate the "one gun" hypothesis urged by the state (based on the testimony of Merrick and Stacey), and seeming to refute the "second gun" contention advanced by the defense and appellant. This, in fact, is why the prosecution insisted on presenting Schrecker's testimony on this point on re-direct, notwithstanding its own failure to submit the exhibits for examination. Cf. Gunn v. State, 83 So. 511,512, 78 Fla. 599 (1919) ("Who can say that the testimony that the court, on the offer of the state's attorney over the objection of the defendant, permitted to go to the jury for consideration in determining the guilt of the defendant did not and could not have the effect that the state's attorney intended?"). The state cannot demonstrate beyond a reasonable doubt that Schrecker's testimony did not influence the jury to reject appellant's claim that there was a second gun, fired at him by Raymond Stacey, which precipitated the shooting incident and which caused him [appellant] to react in self-defense. Therefore, the error clearly cannot be written off as "harmless". State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

opinion on bite mark comparison? Appellant submits that the answer is obviously no; such testimony would be sheer guesswork with no scientific predicate. That is no less true in the circumstances of the instant case.

In addition, the prosecutor relied on Schrecker's misleading testimony in his (successful) attempt to dispel the trial court's serious concern, in determining penalty, that the evidence of guilt was not sufficiently conclusive to warrant imposition of a death sentence. When the court asked counsel whether there was any possibility of another gun being present, or other shots having been fired, apart from the shots fired by appellant, the prosecutor replied:

> ... No, sir, not in my opinion there was not, and this jury has clearly found that this is not the case.
>
> THE COURT: I know what they have found but I am saying is --
>
> MR. CARUSO: I can only tell you what I know of the evidence, Your Honor, that there were no other fragments found. There were no other holes found. There were no other weapons found. They were looked for as Mr. Vecchio so carefully pointed out in finding that there was a smelling of a rat, that the police did look for them. They did not find them.
>
> THE COURT: All the fragments and all the casings, et cetera, matched to the death weapon?
>
> MR. CARUSO: Again, I reviewed the evidence that the expert put on and the fact of the matter was there were seven casing. There were fragments from seven bullets. As we counted them out, we found no fragments of any others, and we certainly found no casings from any other gun.
>
> As a matter of fact as every expert said, everything was consistent with what he tested, including what he used here, although he couldn't use a microscope as conclusive that it came from one weapon. 19/

19/ Appellant would note here, parenthetically, that the reason Schrecker "couldn't use a microscope" on Exhibit 15 was because the state never submitted it to him. Had an examination of the rifling marks on that exhibit been conducted, there is no more reason to think it would have matched the others than there is to think it would have been exculpatory.

THE COURT: That weapon being a what?

MR. CARUSO: A .380 automatic pistol, a Walther PPK.

(R755-56)

Similarly, when the subject turned specifically to the shot which went through the china cabinet, the prosecutor argued:

> ... There is another hole on the opposite side of the room that went through the hutch, the one that Mr. Vecchio has maintained came from a different weapon. That went through the hutch. It also fragmented. It also was recovered. There was one complete --
>
> THE COURT: Wait, wait. You didn't mean to say it came from another weapon, did you?
>
> MR. CARUSO: No. Mr. Vecchio said it did. I'm saying that it did not.
>
> THE COURT: And the expert testimony was that --
>
> MR. CARUSO: That it was consistent with having come from the one weapon.
>
> MR. VECCHIO: Judge, he didn't say that it came from the one weapon. He said --

(R760-61)

The trial judge expressed the view that, before a death sentence should be imposed, there should "be no real possibility of a mistake having been made" (R773). He then said:

> I don't see that it was made here in terms of self-defense, and it would just be mind-boggling to believe that anyone, particularly Mrs. Merrick, under these circumstances, given this time frame, would have had the presence of mind to conjure up in her mind that "We have go to get rid of that gun and we have got to go hide it."
>
> Well, that is best supported by the fact that there is no physical evidence to support other shots. As I stated, not to speak of just looking at the overall situation and the terror that she was faced with, it would just be mindboggling to believe that she could have

had the presence of mind to have done that or anybody wounded.

How old was the son?

MR. CARUSO: Nineteen.

THE COURT: Nineteen. You have got to have this picture of them sitting there wounded or her sitting there with all these people around her discussing what would happen three or six months down the road. "We better get rid of that other gun. Go grab it. Don't worry about stopping my bleeding or don't worry about tending to dad or calling EMS. Let's worry about this gun. Let's hide it."

It's just too farfetched, particularly when you throw in the lack of any evidence whatsoever of the additional shell casings or bullet fragments. They were not present.

(R773-74)

It is all too obvious, from the above dialogue, how the prosecutor used Schrecker's testimony to suggest that there was scientific evidence that all of the bullet materials were consistent with one another, and that all of the shots were fired from appellant's gun; when that in fact was not necessarily the case, and when there was absolutely no scientific predicate for Schrecker's "expert" opinion regarding the supposed similarity between the examined and the unexamined projectiles. It cannot be assumed that Schrecker's testimony did not have the same effect, or an even greater effect, on the jury.[20/] See DiGuilio.

20/ As recognized in Mills v. Redwing Carriers, Inc., supra, 127 So.2d at 456 and Florida Power Corp. v. Barron, supra, 481 So.2d at 1310-11, the testimony of an expert witness is often accorded special importance and validity by the jury, and creates the possibility that they will defer too readily and forego independent analysis of the facts.

The state had two valid options. It could have submitted Exhibits 14 and 15 to Schrecker for examination along with the other bullet materials it sent, and then his expert testimony (whether inculpatory or exculpatory)[21/] would have been admissible. Or it could forego submitting those exhibits, and forego presentation of expert firearms identification testimony concerning them. If it chose the latter course (as it did), the defense had every right to bring out on cross-examination this gap in the state's scientific evidence supporting its "one gun" theory. (As it did). What the state had no right to do was to fill in the gap in its evidence - a deficiency created by its own failure to submit a critical item (Exh. 15) for examination - by eliciting the expert's opinion that, from a naked eye observation, that exhibit appeared to be consistent with the bullet fragments which he did examine. Schrecker's field of expertise is based on the training and ability to interpret and compare rifling impressions on fired projectiles; Exhibit 15 had rifling impressions, but Schrecker, having had no opportunity to examine it microscopically, had no idea whether the class characteristics, much less the individual characteristics, were the same as on the other exhibits. His testimony was, at best, worthless; in all probability, misleading; and, at worst, wrong. If, in fact, Exhibit 15 has class characteristics which are not "six grooves, right twist", or if it has individual characteristics

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21/ Or even, perhaps, if examination had shown it to be consistent in its class characteristics, but did not reveal enough individual characteristics to permit a conclusive matching. See Courtney; Hamel.

inconsistent with the rifling on the other exhibits, Schrecker had no way of knowing it.

Appellant's convictions must be reversed for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE PRIOR CRIMINAL CONVICTIONS OF THE DECEASED, JOHN BAXTER, FOR DRUG AND FIREARMS OFFENSES.

The trial court ruled that testimony concerning John Baxter's convictions of unlawful importation of a controlled substance and unlawful exportation of firearms were inadmissible.[22] The main basis of the court's ruling was his determination that these are not crimes of violence; he made it clear that his ruling would be different if the conviction had been for (for example) aggravated assault:

> I would say you could ask her [Barbara Merrick] that or that could come out because I think that goes to violence. I just think it's the nature of the conviction that gives us the answer. I will note your [defense counsel's] objection.

(R325)

Appellant submits that, under the particular circumstances of this case, Baxter's convictions for drug and firearm related offenses were extremely relevant to appellant's defense of self-defense, and to the credibility of the various witnesses, notwithstanding that these are crimes which do not, per se, involve

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22/ The argument in the trial court regarding the state's objection to this line of questioning is set forth at p.14-18 of the Statement of Facts.

the use of physical violence. According to the Merrick/Stacey version of the incident, they were only interested in obtaining a small quantity of marijuana for personal use; cocaine was never discussed; and John Baxter's involvement in the conversation basically arose from his knowledge of real estate, mortgages, and creative financing. As portrayed by Brian and Barbara Merrick, Baxter was simply an aging father, who used to travel around the country selling advertising, but who now kept a more sedate life-style. According to appellant on the other hand, it was Baxter (not Brian Merrick) who was most actively involved in the discussion about drugs; and that Baxter expressed the desire to buy a large amount of cocaine (an ounce to test it, and possibly later as much as a kilo). Baxter told appellant that he liked to travel around the country a lot; he knew various people along the way he could distribute the cocaine to, and he could do quite handsomely on it. According to appellant's version, Baxter kept pressing him about cocaine and telling him he looked more like a drug dealer than a builder, to the point where appellant got tired of it and said again "Are you sure you guys aren't cops?" Brian Merrick stood up and yelled, "Who cares about cops", and at that point, Baxter signaled to Raymond Stacey with a nod of his head. Stacey then stepped around the coffee table, pointed a gun at appellant, and fired.

It is important to note that, according to appellant's version of the incident, it was Stacey, not Baxter, who performed the physical violence.[23/] If appellant's testimony is accurate,

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23/ Baxter did wrestle with appellant, but that was after appellant had pulled his own gun, shot at Stacey, and shot the advancing Brian Merrick.

Baxter was the "brains" of the family; the person who called the shots; the one who sent Barbara into the bedroom to pack because they were discussing "business" (R566), and the one who asked Brian to leave the table because he kept interrupting the conversation about cocaine (R575). If, on the other hand, the Merricks' testimony is accurate, then Baxter was merely an older man who was not even directly involved in Brian's effort to obtain 20 or 30 dollars worth of pot.

"In a homicide prosecution a defendant should be permitted the widest of latitude when introducing evidence in support of a self-defense theory." Borders v. State, 433 So.2d 1325,1326 (Fla.3d DCA 1983), citing Palm v. State, 135 Fla. 258, 184 So. 881 (1938); Garner v. State, 28 Fla. 113, 9 So. 835 (1891); Campos v. State, 366 So.2d 782 (Fla.3d DCA 1978); Cole v. State, 193 So.2d 47 (Fla.1st DCA 1966).

In Cole v. State, supra, at 48-49, quoting this Court's decision in Garner v. State, supra, the following principles were stated:

> Evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that a defendant has acted in self-defense, or, in other words, under such circumstances as would have naturally caused a man of ordinary reason to believe that he was at the time of the killing in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased; but it is not admissible for this purpose, except where it explains, or will give meaning, significance, or point to the conduct of the deceased at the time of the killing [emphasis in opinion] or will tend to do so; and such conduct of the deceased, at the time of the killing, which it is proposed thus to

> explain, must be shown before the auxiliary evidence of such character can be introduced [citations omitted] ... If there is at the killing any demonstration upon the part of the deceased which his dangerous character would reasonably and naturally aid, explain, or give point or significance to, as tending to make out a case of self-defense upon the part of the accused, evidence of such character should be admitted. The philosophy of the introduction of this kind of evidence is founded in human nature. Though in the eyes of the law it is no less a crime to kill a brutal, dangerous, or otherwise bad man, without apparent cause for reasonable belief upon the part of the slayer of imminent danger to his life, or of serious bodily harm, creating an immediate necessity for the killing, yet the same menacing demonstration which, made by a man of peaceable and law-abiding character, would suggest no sense of danger would, when made by one of a violent and dangerous nature, reasonably and naturally arouse genuine feelings of imminent danger to life or of great bodily harm. Men who are assailed act in defending themselves with promptness and force in proportion to the violent and dangerous character of the assailant. The law, in deciding whether or not a person has in slaying another acted under a reasonable belief that he was in imminent danger of life or great bodily harm, considers all the circumstances, and, among others, the dangerous character of the deceased, when it is by the circumstances of the killing rendered admissible in evidence, or becomes a part of the res gestae, as it is and does where it illustrates the conduct of the deceased. The accused is entitled to have the jury see all the circumstances as they existed, and to judge him accordingly. This they could not do if, in such cases, the dangerous character of the deceased was kept from them [emphasis supplied][citations omitted].

A deceased's violent and dangerous character can support a theory of self-defense in two ways. "First, the defendant's

awareness of the victim's violent tendencies may make the use of deadly force a reasonable response to threatening behavior in an altercation. Second, evidence of the victim's propensity for violence lends support to the defendant's version of the facts where there are conflicting versions of the events" People v. Bell, 505 N.E.2d 365,368 (Ill.App. 1987). While appellant did not testify that Baxter specifically told him that he had been convicted of drug and firearm offenses[24/], appellant did testify that Baxter told him he had contacts, from his travels around the country, to whom he could distribute the cocaine and make a handsome profit (while the state witnesses, in contrast, claimed that Baxter was not directly involved even in the marijuana talks, and that the subject of cocaine never even came up). The fact that Baxter had convictions for drug and firearm offenses tended circumstantially (1) to show that appellant's version of the events leading up to the shooting was accurate, and (2) to corroborate that Baxter did in fact make the statements to appellant which indicated that he was a cocaine dealer. See Martinez v. Wainwright, 621 F.2d 184,188 (5th Cir. 1980). In this capital case, where the defense of self-defense was raised and the evidence was incomplete and conflicting[25/] [see People v. Bell, supra, 505 N.E.2d at 368-69],

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24/ The trial court sustained the prosecutor's objections to defense counsel's questioning of appellant concerning whether Baxter had made statements during the cocaine discussion about his past work and travels (R574).

25/ Not only was there the conflict between appellant's version and the state witnesses' version, there were material conflicts between the state witnesses themselves. The most obvious of these was that Ray Stacey claimed that appellant began shooting spontaneously to Brian's comment "What's the difference if we are cops?", while Brian Merrick (who made the comment) testified that five or ten minutes of "absolutely normal" conversation about mortgages and real estate took place after the "cop" remark, before the shooting.

the jury had a right to see all of the circumstances as they existed, and to be fully apprised of the dangerous character of the deceased and his associates. See Garner v. State, supra; Cole v. State, supra. The state's witnesses portrayed themselves as an itinerant computer software designer and his family, who liked to smoke a little pot for relaxation, but otherwise were just the folks next door. If this was a distorted picture, appellant had a right to introduce evidence tending to show the jury that it was a distorted picture.[26/] And, given the totality of the evidence in this trial, Baxter's convictions of drug and firearm related crimes are more relevant to determining whose version of the incident is the truth than a conviction of aggravated assault would have been (see R325). The exclusion of this evidence was prejudicial error.

26/ For this reason, appellant contends that, even assuming arguendo that the rules of evidence would permit the exclusion of the evidence of Baxter's criminal convictions, mechanistic application of those rules cannot overcome appellant's constitutional right to present evidence critical to his defense in this capital case. See Chambers v. Mississippi, 410 U.S. 284 (1973).

ISSUE III

APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF (1) VIOLATION OF FLA.R.CR.P. 3.410 (FAILURE TO RESPOND IN OPEN COURT TO A JURY REQUEST TO REVIEW TESTIMONY); (2) ABSENCE OF THE TRIAL JUDGE FROM A CRITICAL STAGE OF THE TRIAL; (3) APPELLANT'S OWN ABSENCE FROM A CRITICAL STAGE OF THE TRIAL; (4) ENTRY OF THE PROSECUTOR AND DEFENSE COUNSEL INTO THE JURY ROOM DURING DELIBERATIONS; AND (5) THE PROSECUTOR'S STATEMENT TO THE JURORS THAT HE DID NOT WANT ANY OTHER QUESTIONS 27/

A. Violation of Rule 3.410

Florida Rule of Criminal Procedure 3.410 (Jury Request to Review Evidence or for Additional Instructions) provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

This Court has squarely and repeatedly held that violation of Rule 3.410 is per se reversible error, and can never be written off as "harmless". Ivory v. State, 351 So.2d 26 (Fla. 1977); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Bradley v. State, 513 So.2d 112 (Fla. 1987); see also Williams v. State, 488 So.2d 62, 64 (Fla. 1986) ("We reaffirm Ivory by holding that violation of Rule 3.410 is per se reversible error"). While the issue has usually arisen in the context where the judge answers (or declines to answer) a jury request without notice to counsel, this Court

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27/ The circumstances surrounding this point on appeal are set forth at p. 44-46 of the Statement of Facts.

has expressly held that "Notice is not dispositive. The failure to respond in open court is alone sufficient to find error." Curtis v. State, supra, 480 So.2d at 1278, n.2; Bradley v. State, supra, 513 So.2d at 114.

Thus, the established precedent of Ivory, Curtis, Williams, and Bradley plainly requires reversal of appellant's convictions and the granting of a new trial, and it is tempting to simply let it go at that. However, the unorthodox and unacceptable manner in which the jury's request to review testimony was handled in this case also violated a number of other significant rights of the accused, designed to safeguard the fairness of the proceedings. These problems are related to, but independent of, the violation of Rule 3.410.

B. Absence of the Trial Judge

The presence of the judge at every stage of the trial is "a constitutional imperative". Peri v. State, 426 So.2d 1021, 1023 (Fla.3d DCA 1983). See also McCollum v. State, 74 So.2d 74 (Fla. 1954); Dodd v. State, 209 So.2d 666 (Fla. 1968); Carter v. State, 512 So.2d 284 (Fla.3d DCA 1987).

> Article I, Section 16 of the Florida Constitution and the Sixth Amendment of the United States Constitution secure to one accused of a crime a trial by an impartial jury. The presence of the trial judge is at the very core of this constitutional guarantee.

Peri v. State, supra, at 1023

As recognized in Peri (at 1023-24):

> ...[C]ourts throughout this nation have been virtually unanimous in holding
>
> > "that it is the duty of the presiding judge at criminal trials ... to be visibly

> present every moment of their actual progress, so that he can both see and hear all that is being done. This is a right secured to the accused by the law of the land, of which he cannot be deprived. All the formalities of the trial should be scrupulously observed, so that the people present may see and know that everything is properly and rightfully done." State v. Smith, 49 Conn. 376, 383-84 (1881).
>
> These same courts, have, correspondingly, consistently condemned the act of a trial judge absenting himself during any stage of the trial proceedings. [Citations omitted]. Neither the stage of the proceeding, the length of or reason for the departure, nor the judge's proximity to the courtroom has been viewed as a factor which mitigates the harm created by the judge's absence. 28/

The issue in Peri involved the absence of the judge during a portion of the voir dire of prospective jurors. In holding that this was "a stage [of trial] like any other" (426 So.2d at 1024), the court cited, inter alia, Moore v. State, 29 Ga.App. 274, 115 SE.2d 25 (noting in dicta that presence of trial judge is required during "the impaneling of a jury, the taking of evidence, the argument of the case, or any other thing which must take place in open court). 29/ The clear import of the Ivory; Curtis; Williams; Bradley line of decisions is that any communication with

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28/ The Peri court quoted Meredeth v. People, 84 Ill. 479,482 (1877): "It makes no difference [that] the judge was in another part of the same building. It is no less error than if he had been in another county."

29/ Under firmly established Florida law, any response (or refusal to respond) to a question from the jury or to a request by them to review testimony must be done in open court. Fla.R.Cr.P. 3.410; Ivory; Curtis; Bradley. [See Part A of this Point on Appeal].

the jury, pursuant to a request by them (during the highly sensitive period of their deliberations, see e.g. Livingston v. State, 458 So.2d 235,238-39 (Fla. 1984)) for information or instructions, is not only "a stage [of trial] like any other"; it is a critical and sensitive stage of the trial, which must be conducted in strict compliance with the procedures set forth in Rule 3.410. This means that the proceedings must be conducted in open court (not behind the closed doors of the jury room), with the trial judge present and in control.

Peri next addresses the question of whether, and, if so, under what circumstances, the trial judge's presence can be waived. The early view, the court noted, was that the absence of the trial judge from a portion of the trial "was to render the entirety of the proceedings coram non judice". Peri v. State, supra, at 1025. Since the judge's absence created "an irreparable jurisdictional defect" (id, at 1026), that line of decisions held that the court's presence could never be waived. The more recent view, though (and the one which was adopted in Peri), is that the rule requiring the judge's presence during all proceedings in a criminal case, since primarily for the benefit of the accused, can be waived. Peri, supra, at 1026 and 1027. Any waiver of this fundamental right, however, must be knowingly and intelligently made by the defendant. Carter v. State, 512 So.2d 284, 285-86 (Fla.3d DCA 1987). Mere stipulation by counsel to waive the judge's presence is not sufficient to demonstrate a knowing and intelligent

waiver. Carter v. State, supra, at 286.[30/] The standard for a valid waiver recognized in Peri is the one established in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver is an intentional relinquishment or abandonment of a known right or privilege; courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and will not presume a defendant's acquiescence in the loss of those rights). See also the following decisions, (each of which is cited in Peri, at 1026): Patton v. United States, 281 U.S. 276, 312 (1930) (waiver of right to jury trial requires express and intelligent consent of defendant); Tucker v. State, 417 So.2d 1006, 1013 (Fla.3d DCA 1982) (waiver of statute of limitations must be express and certain, not implied or equivocal; there must be, at the least, a written or express oral waiver made in open court and on the record by the defendant personally or by

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30/ The court in Carter (at 286) flatly rejected the state's suggestion that counsel's stipulation to the judge's absence created a "presumption" of a knowing and intelligent waiver:

> This we decline to do, especially in light of the fact that the instant waiver is one which was merely stipulated to by counsel.
>
> Courts must continue to apply strict standards in determining whether there has been an effective waiver of a fundamental right. In all cases, the waiver must be "express and certain, not implied or equivocal." Tucker v. State, 417 So.2d 1006, 1013 (Fla.3d DCA 1982).
>
> Adhering to the principles enunciated above, we conclude that the record before us fails, in any manner, to clearly establish that defendant knowingly and intelligently waived his right to the trial judge's presence during voir dire.

his counsel in his presence); Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982) (waiver of defendant's right to be present during exercise of peremptory challenges must be knowing and intelligent, citing Johnson v. Zerbst, supra and Schneckloth v. Bustamonte, 412 U.S. 218 (1973); waiver could not be inferred from counsel's willingness to exercise peremptory challenges in defendant's absence, where counsel had not obtained defendant's express consent to do so; likewise, waiver could not be inferred from defendant's silence when counsel and others returned after the selection process was completed).

In the present case, appellant clearly never waived his right to the presence of the trial judge, guaranteed to him not only by Article I, Section 16 of the Florida Constitution and the Sixth Amendment of the United States Constitution [Peri; Carter], but also by the express terms of Fla.R.Cr.P. 3.410 [Ivory; Curtis; Bradley]. While counsel (in appellant's absence, and without his consent or even his knowledge) agreed to dispense with the judge's presence, that is grossly insufficient to constitute a voluntary and intelligent abandonment by appellant of a known right or privilege. See Johnson v. Zerbst, supra; Peri; Carter; Francis; Tucker; Patton v. United States.

This Court has addressed the question of the trial judge's absence in the context of jury views. In McCollum v. State, 74 So.2d 74 (1954), after the close of the state's case in chief, the jury was taken (on motion of counsel for the state and defense) to view the scene of the shooting. The trial court was present, if at all, only during the latter part of the view. The defendant also was not present. Because of the defendant's absence at the

first view, a second view was held the following morning, with the defendant present. The record failed to reflect that the judge was present at the second view. As no objection was registered at trial, this Court on appeal addressed the issue of waiver:

> But over and above the question of whether or not the defendant may waive his own presence at a view, there is the larger question directly presented in the ground of appeal as to whether or not the defendant, being absent on the occasion of the view, can be held to have waived the presence of the trial judge when, as we glean from the record, the latter voluntarily absented himself from the view in the face of a statute which required his presence there.
>
> On this question, it is held by many courts that the doctrine of waiver by failure to make timely objection cannot be applied to the absence of the judge from any stage of a criminal proceeding when under the law he is required to be present. [Citations omitted].

McCollum v. State, supra, at 77

The McCollum court concluded that "the question whether a defendant, in a capital case, can waive the presence of the trial judge at a view by failing to make seasonable objections must be controlled by the general rule that the voluntary absence of the trial judge at a step in the proceedings when his presence is required by law will constitute reversible error". McCollum v. State, supra, at 78.

In Dodd v. State, 209 So.2d 666 (Fla.1968), this Court reaffirmed its decision in McCollum, saying: "The failure of the trial judge to follow the requirements of [that] decision leaves no alternative in this Court except to reverse the sentence and judgment of conviction and remand the cause for a new trial".

A different result was reached in Roberts v. State, 510 So.2d 885, 889-90 (Fla. 1987). As in McCollum, neither the trial judge nor the defendant were present at the jury view. However, in Roberts, unlike McCollum, there was an express waiver made by counsel in the presence of the defendant and after consultation with the defendant (510 So.2d at 890). Under these particular circumstances, this Court found a valid waiver. Arguably, the facts of Roberts are sufficient to meet the constitutional requirements of Johnson v. Zerbst and its progeny, of intentional relinquishment by the defendant of a known right or privilege. See Tucker v. State, supra, 417 So.2d at 1013 (recognizing in dicta the validity of an express oral waiver "made in open court on the record by the defendant personally or by his counsel in his presence"). Thus Roberts and McCollum are plainly distinguishable.

In the instant case, defense counsel's agreement to the proposal to respond to the jury's request outside of open court, and his agreement to the trial judge's absence, occurred while appellant was in the lock-up and had no idea what was going on. Unlike Roberts, there was no consultation with appellant, and he did not consent, implicitly or expressly, to the judge's absenting himself, or to the unorthodox and unacceptable manner in which the entire proceeding was handled. Therefore, on the issue of waiver, this case is like McCollum and Dodd; and unlike Roberts. See also Carter v. State, supra, at 286 (rejecting the state's argument that a knowing and intelligent waiver should be "presumed", where stipulation to waive the judge's presence was made by counsel only).[31/]

31/ In addition to the main point of lack of a knowing and intelligent waiver, Roberts can be distinguished on the further ground that that case did not involve a violation of Rule 3.410. The instant case does involve a violation of that rule, and thus the error cannot be written off as "harmless". Ivory; Curtis.

C. Absence of the Defendant

While appellant submits that the law regarding the trial judge's absence plainly requires reversal in this case, he acknowledges that the law regarding his own absence is less settled. In Meek v. State, 487 So.2d 1058 (Fla. 1986), this Court held that neither Rule 3.410 nor the Ivory decision requires the presence of the defendant when the trial court responds to a jury request. [Note that, in Meek, the jury's question was answered in open court, in accordance with the procedures mandated by Rule 3.410. Contrast Bradley v. State, supra, 513 So.2d at 114, which distinguishes Meek on this point]. In response to Meek's further contention that his absence violated Fla.R.Cr.P. 3.180(a)(5) (which calls for the defendant's presence "[a]t all proceedings before the court when the jury is present"), this Court said:

> The record shows that the trial counsel informed petitioner of the jury question and the answer before the jury finished its deliberations. Subsequently, petitioner offered no objection to his absence either during the remainder of the trial proceedings or in two motions for a new trial, one filed immediately after the verdict was published and another filed within ten days of the verdict. Thus, it is clear that petitioner subsequently ratified his absence and there was no error.

Meek v. State, supra, at 1060.

Moreover, since no violation of Rule 3.410 had occurred, the Court was free to find, and did find, Meek's absence to be harmless error.

The standard for determining the validity of a purported waiver of a defendant's own presence was discussed in Amazon v. State, 487 So.2d 8,10-11 (Fla. 1986), a case decided around the

same time as Meek. In Amazon, the defendant argued on appeal that his absence from a jury view of the crime scene was reversible error. Following oral argument, this Court relinquished jurisdiction for an evidentiary hearing on the circumstances surrounding the purported waiver. After the hearing, the trial judge concluded that Amazon had "knowingly and intelligently" waived his presence. This Court subsequently affirmed the trial court's ruling on this point, saying:

> A capital defendant is free to waive his presence at a crucial stage of the trial. Peede v. State, 474 So.2d 808 (Fla. 1985). Waiver must be knowing, intelligent, and voluntary. Francis v. State, 413 So.2d 1175 (Fla. 1982). Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver. See State v. Melendez, 244 So.2d 137 (Fla. 1971). Here, trial counsel clearly waived Amazon's presence knowingly, intelligently and voluntarily. Amazon knew of the waiver, because he had been consulted by his attorneys on the point and advised to waive his presence. He authorized his attorneys to make the waiver. His authorization was knowing and intelligent and as voluntary as any decision made by a client who relies upon and accepts advice of counsel. Amazon subsequently acquiesced to the waiver, with actual notice, and now cannot be heard to complain.

Amazon v. State, supra, at 11

In a footnote, the Amazon Court observed:

> When a waiver is required of the defendant as to any aspect or proceeding of the trial, experience clearly teaches that it is the better procedure for the trial court to make inquiry of the defendant and to have such waiver appear of record. The matter would thus be laid to rest.

In the present case, in stark contrast, the trial judge did not make inquiry of appellant, because the judge wasn't there either. Appellant was not consulted by his attorney, and he did not authorize his attorney to waive his presence. As there was no authorization at all, a fortiori, there was no knowing or intelligent or voluntary authorization. In addition, there is no indication in the record of any ratification by appellant "either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver". See Amazon, supra, at 11. Unlike Meek (where there was no objection raised even in the defendant's motions for new trial), here there was an objection to appellant's absence in the motion for new trial (R915); which is at least an indication that, far from "ratifying" counsel's purported waiver of his presence, appellant may well have complained bitterly about it when he learned what happened (assuming that he ever did learn what happened). It is also important to note that, at the post-trial hearing on April 15, 1987, in which the circumstances of the incident were elicited via the representations of the judge and both counsel, appellant was not present at that proceeding either, having already been sent to the state prison.[32/]

The state may argue that the response to the jury request (in this particular case, at least) was not a "proceeding before the court when the jury is present", and thus Rule 3.180(a)(5) should not apply. The problem with this is that it should have been - was required by law to have been - a proceeding before the court

32/ Note that defense counsel's representations indicate neither a waiver by appellant, nor a subsequent ratification by appellant (see R810-12)

when the jury is present. Rule 3.410; Ivory; Curtis; Bradley; Meek. The fact that the rule was violated in two other critical respects (i.e. failure to respond in open court; absence of the trial judge) cannot be used by the state to justify a third serious violation, namely the denial of appellant's right to be present, secured by Rule 3.180. Indeed, if appellant's right to be present had been observed, he would have had an opportunity to object to the other two violations, at a time when the errors could still have been avoided. Alternatively, he would have had an opportunity to make a valid waiver, if that had been his desire.

As appellant did not knowingly and intelligently waive his right to be present, his convictions must be reversed and a new trial granted on this ground as well.[33/]

D. Entry of the Prosecutor and Defense Counsel into the Jury Room During Deliberations

The last two sub-points will be brief. Not only was the jury's request not responded to in open court, the lawyers actually intruded into the jury room during deliberations (see R807-12). This was, to put it mildly, highly unorthodox. Florida courts have, in other contexts, recognized the inviolability of the jury room during the critical and sensitive stage of deliberations.

33/ In the alternative (as to this sub-issue only), this Court could remand for an evidentiary hearing, as it did in Amazon, so that testimony could be presented as to whether appellant "knowingly and intelligently" waived his presence. However, appellant submits that the record as it stands is sufficient to show that he did not. Furthermore, reversal on the Ivory issue, and/or the issue of the trial court's absence, and/or on Issues I or II, supra, will render the question of appellant's absence moot, and obviate any need for an evidentiary hearing on that question.

See e.g. Berry v. State, 429 So.2d 491 (Fla.4th DCA 1974) (mere presence of alternate juror in jury room during deliberations was fundamental error, requiring reversal even in the absence of an objection, and even though the alternate did not in any way participate in determining the verdict). See also Fischer v. State, 429 So.2d 1309, 1311-12 (Fla.1st DCA 1983); cf. Livingston v. State, 458 So.2d 235,238-39 (Fla.1984) (recognizing that jurors are especially sensitive to prejudicial influences during deliberations). The court in Berry stated: "... [O]nce the jury retires to consider its verdict, the alternate juror is a stranger to the deliberations of the jury and like any other non-juror will not be permitted in the jury room during the jury's consideration of the case" (298 So.2d at 492-93). The lawyers, quite simply, had no business going in there at all.

E. The Prosecutor's Statement to the Jurors that he did not Want Any Other Questions

The state will likely argue that the attorneys' entry into the jury room was "harmless error", on the theory that they merely served as a conduit to receive the jury's question. Appellant submits, first, that the situation is so fraught with potential prejudice, and subtle influence upon the jury, that the "harmless error" exception should not be applied. Cf. Ivory; Livingston. Secondly, however, it is simply not true that the attorneys acted only as silent messengers. Specifically, the prosecutor "asked [the jurors] what the question was and instructed the jurors that the Court said they need to write their question down on a piece of paper, that the question would then be taken to the Court and they would receive a written answer to it." (R807-08). When

the prosecutor asked the jurors exactly what they meant by the question, one of them said "Well, we would like the testimony of two people" (R811)[34/] Another juror added, "Well, at this time. Then we will probably ask for more at a later time." (R811). The prosecutor said "I don't want any other questions. All I want is an answer to the question that you have on the yellow sheet" (R811)[35/]

This encounter provides a fair illustration of why this Court has consistently held that strict compliance with Rule 3.410 is mandatory (and that failure to comply is per se reversible error). Ivory; Curtis; Williams; Bradley. Had the proper procedure been followed, the jury would have been conducted into the courtroom by the bailiff, and, in open court, with appellant present (Fla.R.Cr.P. 3.180(a)(5)), the judge would have responded to their question. The jury would have been told that transcripts were not available, but presumably they would not have been told "I don't want any other questions." One or more of the jurors might well have inquired whether, as an alternative, particular portions of the testimony which concerned them could be read back. Instead, however, the prosecutor's statement in the jury room - a statement not authorized by the trial judge in the telephone conversation - that he did not want any other questions clearly could have discouraged the jury from asking any. Thus, it cannot be said that the improper entry of the lawyers into the jury room had no effect on the course of their deliberations.

34/ Actually, the written request specifies three witnesses (R982).

35/ The prosecutor stated, in the April 15, 1987 colloquy, that defense counsel's representations to this effect were "the absolutely correct facts" (R812)

For this reason, and for the reasons discussed in Parts A, B, and C of this Point on Appeal, appellant's convictions must be reversed for a new trial. Ivory; Curtis; Williams; Bradley; Peri; Carter; McCollum; Dodd; Amazon; Johnson v. Zerbst.

ISSUE IV

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

The "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself.' " Perry v. State, ___ So. 2d ___ (Fla. 1988) (case no. 68,482, opinion filed March 10, 1988) (13 FLW 189,190).[36/] This Court has recently made it clear that this factor requires proof of "a careful plan or prearranged design". Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Mitchell v. State, ___ So.2d ___ (Fla. 1988) (case no. 70,074, opinion filed May 19, 1988) (slip opinion, p.6). As stated in Preston v. State, 444 So. 2d 939, 946 (Fla. 1984):

> [The cold, calculated, and premeditated] 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 think-

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36/ See also Garron v. State, ___ So.2d __ (Fla. 1988) (case no. 67,986, opinion filed May 19, 1988) (slip opinion, p.14) (heightened premeditation aggravating factor was intended to apply to execution or contract-style killings).

ing about killing her); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert.denied, __ U.S. __, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

As with any other aggravating circumstance, the state must prove beyond a reasonable doubt that the killing occurred in a cold, calculated, and premeditated manner, or else the aggravating factor cannot be upheld. See e.g. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Harris v. State, 438 So.2d 787, 797-98 (Fla. 1983); Peavy v. State, 442 So.2d 200, 202 (Fla. 1983). Thus, if the circumstances "[are] susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner", then a finding by the trial court of the aggravating factor is invalid, as the evidence does not establish it beyond a reasonable doubt. Peavy v. State, supra, at 202.

In the present case, the circumstances are clearly susceptible to the conclusion that the killing occurred - not as a result of any careful plan or prearranged design - but, rather, erupted from paranoia induced by marijuana and alcohol.[37/] Indeed, in his oral pronouncement of sentence, the trial judge indicated the belief that the killing occurred as a result of paranoia arising from drug use (R793-94). [However, this view of the evidence did not find its way into the written sentencing order prepared by the prosecutor, see Issue VII, infra].

37/ For purpose of the penalty issues only, undersigned counsel will assume arguendo that the killing was not done in self-defense. This should not in any way be construed as an admission in fact.

The state's hypothesis with regard to cold calculation is supported neither by the evidence as a whole, nor by logic and common sense. The prosecutor argued:

> My argument to the jury, my theory, and my belief, Your Honor, is the fact that when he said he went out to get a pack of cigarettes, he did not go out to get a pack of cigarettes. At that point, he had several times asked whether they were police. They had several times denied it.
>
> He went out to the car at that point and armed himself, jacked a round into that chamber and came back in; and when he came back in, he fully intended to kill the people that were in that house. That is what I argued and that is what I believe.
>
> MR. VECCHIO [defense counsel]: Of course my theory is, Your Honor, that he had his gun with him at all times from the very moment when he picked him up. If you base it on what Mr. Caruso's theory is, what is the motive for him to come back and go out and get a gun and come back, for the sole purpose he is going to kill everybody. For what reason, what purpose?
>
> THE COURT: Well, that was my next question.
>
> MR. CARUSO [prosecutor]: For the purpose, Your Honor, that he has now become convinced that these people are associated with the police --
>
> THE COURT: So what?
>
> MR. CARUSO: -- as informants or police officers, and he has already distributed drugs to them, and he is not going to do time for them, and so the only way to get out is to destroy them.
>
> MR. VECCHIO: He distributed two marijuana cigarettes.
>
> MR. CARUSO: I am not saying he is smart, Judge.

(R767-68)

Before getting into the main problems with the state's hypothesis, it should first be pointed out that (at least when he is not drunk or stoned) appellant is smart enough to have completed three years of college and to have had a responsible and financially successful career as vice-president of a major home building company. If his actions before, during, and after the shooting incident on September 8, 1986 were those of a stumbling fool [39], that simply indicates that his ability to think straight was significantly impaired by his drinking and his drug use.

The state's theory of "heightened premeditation" rests on the outlandish supposition that appellant carefully thought out a plan to execute four people he thought were police officers in order to avoid being arrested by them, even though he had done nothing more than share with them (at Brian Merrick's request) a quantity of marijuana which was barely sufficient to roll two joints. According to the state's scenario, every time Brian Merrick would repeat his request that appellant try to obtain some marijuana for him, appellant would ask if they were cops. If appellant was really concerned that these people were undercover police trying to entrap him into a trafficking offense, and if he was rational at the time, all he had to do was say he didn't know where to get any, and leave. But the state's theory is that he decided he needed to murder four officers so they would not arrest him for two joints.

Appellant testified that, when he decided to pick up the hitchhiker (who turned out to be Brian Merrick), he first got his

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39/ Note, especially, his leaving his car (with his identification inside, and the extra clip to his .380 automatic in the glovebox) at the scene of the shooting, because he could not find his keys. Note also his response to police questioning when arrested, in the nude, at his residence.

.380 automatic out of the glovebox, and put it in his back pocket for protection. Under this version, it is entirely reasonable that he would have left the extra clip in the glove-box (where it was found the morning after the shooting, when Detective Martelli inventoried the vehicle). Under the state's theory, on the other hand, appellant made a calculated decision to kill four police officers, and only then did he go out to his car to retrieve the weapon. Assume for the moment that that was the plan, fully formulated in appellant's mind. There are four adults in the house; all of them know appellant's first name, all of them know approximately where he lives, and one of them has actually been to his house. Since appellant (supposedly) believes that some or all of them are police, he has reason to be concerned that some of them may be armed.[40/] Obviously, anyone who would decide to kill a policeman to avoid arrest for two marijuana joints is going to be at least equally concerned about avoiding arrest for killing the policeman. Therefore, under the state's hypothesis, appellant's supposed "plan" would have required him to make absolutely certain that all four adults were dead, since if any of the four remained alive, they could identify him as a cop killer. So, under the state's theory, appellant goes out to his car to get the gun. In the glove compartment is a Walther .380 automatic, loaded with seven rounds. Right there with it is the spare clip, also loaded with seven rounds. It defies all logic to suggest that appellant - if he was operating from a careful plan

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40/ According to the testimony of Raymond Stacey, the only person appellant frisked was John Baxter.

or prearranged design - would have taken only the weapon and left the extra clip in the glovebox, giving him only seven shots instead of fourteen.

Next, consider the manner in which the shooting occurred. If appellant was operating from a calculated plan to eliminate the four adults, he would almost certainly have done it execution style. See, for example, the facts of the homicides in Francois v. State, 407 So.2d 885,887 (Fla. 1981). When an individual is outnumbered 4 to 1 by the people he coldly plans to kill, he does not begin by firing wildly across the room at the person (of the three present in the room)[41] furthest from him.

Since the state's attempt to prove heightened premeditation is based on circumstantial evidence (and highly questionable inferences drawn therefrom), it is important to note a crucial discrepancy among the state witnesses themselves - a discrepancy which is not likely attributable to mere failure of memory. Raymond Stacey testified that the shooting occurred spontaneously to Brian Merrick's remark to the effect of "What's the difference if we are cops" (R394). According to Stacey, after Brian asked appellant if he would make the phone call again, to get some marijuana:

> At that point Richard asked him again if he was a cop. Brian said "What does it --". Let me think of his exact words. "What are you going to do if we are." At that point Richard said "What? What?" And he reached with his right hand behind his left side and pulled out a gun. He came around like this and pointed it toward me while I was seated

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41/ Barbara Merrick was in the bedroom packing when the shooting occurred.

on the couch eating a steak sandwich and took a shot at me --

(R369)

However, Brian Merrick, the person who supposedly made the comment about cops which set appellant off, testified that after he made the remark, a full five or ten minutes passed, during which appellant and John Baxter were engaged in an "absolutely normal conversation" about mortgages and real estate (R275-78). After that five or ten minute period, Merrick saw appellant point a gun toward his stepson Raymond and begin firing "[f]or no reason that I can see" (R277).

Thus, the facts surrounding the shooting - relied on by the state to establish circumstantially that appellant acted from a "careful plan or prearranged design" - do not, in actuality, even establish whether the shooting began as a reaction to Merrick's remark about cops, or for some other reason, or for no reason at all. The state's hypothesis that all this occurred out of a coldly conceived plan to avoid prosecution for possession of two marijuana joints is pure speculation, and unreasonable speculation at that.

Of the seven shots fired by appellant (whether or not an eighth shot was fired by Ray Stacey), three struck John Baxter, one hit Brian Merrick in the jaw, one hit Stacey in the back, and two

missed. When Stacey was shot, he said "I'm hit" and began crawling toward the bedroom (R370-71). Therefore, according to the state's own evidence, at least two of the four adults (Stacey and Barbara Merrick) were obviously still alive when appellant's gun ran out of ammunition. According to Barbara, she looked around the corner from the bedroom and saw appellant standing over Stacey, pointing the gun toward the back of his head.[41] She saw his hand move, but the gun did not go off; she thought it had jammed. Then, appellant "swung around and looked me right in the eye, and he looked real shocked to see me there, and with that he made the full circle and headed toward the front door" (R300).

In Rembert v. State, 445 So.2d 337,340 (Fla. 1984), this Court struck down the trial court's findings of three out of four aggravating circumstances, including the witness elimination and the "cold, calculated, and premeditated" factors, and

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41/ Stacey testified that as he was crawling toward his mother's bedroom, he saw appellant heading out the front door, but he never saw appellant standing over him (R371). Deputy sheriff Debbie Sharp, the first officer to arrive at the residence, testified:

> MR VECCHIO: Deputy Sharp, did Mrs. Merrick relate to you that she saw the suspect run out of the home?
>
> A. Yes, sir.
>
> Q. Did she ever tell you -- did she indicate to you that she did or did not see the suspect point a weapon at anyone as he was running out of the home?
>
> A. Did she indicate that she did?
>
> Q. Yes.
>
> A. She said she didn't.

(R410)

observed "The victim was alive when Rembert left the premises and could conceivably have survived to accuse his attacker. If Rembert had been concerned with this possibility, his more reasonable course of action would have been to make sure the victim was dead before fleeing".

In the instant case, appellant fled the house while three of the people he supposedly thought were police were still alive. Two of them were seriously injured, but at least one of these two, Stacey, was able to speak and crawl. Barbara Merrick was unhurt. Appellant never took a shot at her, never attempted to harm her in any other way, and ran out of the house (with a look of shock on his face) when she looked at him from the bedroom. Appellant's actions were wholly inconsistent with a "careful plan or prearranged design" to eliminate four police witnesses to his crime of marijuana possession. Rembert. His actions were consistent with self-defense (which the jury admittedly rejected), and they were also consistent with a drug and alcohol induced explosion of violence; done without any rational motive at all, or else from a paranoid reaction to some perceived danger.

The state may counter by saying "Of course, he left three of the four people alive. He ran out of bullets." If, however, this had been a calculated murder, appellant would not have run out of bullets, because he would have taken the spare clip when he (according to the state's theory) took the gun out of the glovebox. Also, if this had been a planned execution of potential witnesses, appellant would not merely have turned tail and run when he ran out of ammunition; he would have realized that he needed to finish what he'd started by some other means.

Otherwise, he would have at least two witnesses alive to have him arrested, and to testify against him, not for marijuana possession but for murder. These live witnesses knew his name, and at least approximately where he lived. The two adult males still alive were both seriously injured (Brian Merrick was apparently unconscious, and Ray Stacey had been hit in the back and was able only to crawl); and could not have defended themselves. The only adult who would have been able to resist or run was Barbara Merrick, and she was in the bedroom. If appellant's pre-planned intention was to eliminate four people he thought were police officers or informants, he would have gotten a kitchen knife, or a piece of furniture, or a ligature of some sort, or used the butt of his gun. He would not have looked Barbara Merrick right in the eye, with an expression of shock on his face, and make full circle and head for the front door (see R299-300). Rembert. Once again appellant's actions are as consistent - in fact, much more consistent - with a drug and alcohol induced paranoid explosion, than with a predesigned execution for the purpose of eliminating witnesses. Cf. Peavy v. State, supra (aggravating factor struck down where circumstances of killing were susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner).

Appellant submits that the evidence, considered in its totality (and considering that the state witnesses were in conflict among themselves regarding the circumstances leading up to the shooting), clearly does not support a finding of "heightened premeditation". The testimony of Barbara Merrick to the effect

that appellant stood over Raymond Stacey pointing the gun toward the back of his head, and that she saw his hand move but the gun did not go off; is insufficient, even if believed[42/], to establish heightened premeditation, since the aggravating factor requires proof of "a careful plan or prearranged design" preceding the actual killing. See Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), receding from holding in Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). Similarly, Brian Merrick's testimony concerning a remark appellant supposedly made earlier in the evening about "Betsy" is inherently improbable, and, even if believed, does not establish heightened premeditation. The prosecutor had asked Merrick whether there was any discussion of marijuana on the way to appellant's house (R206). Merrick replied, "Not that I remember. I think it was on the way back that I did, that that

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42/ Barbara Merrick's testimony on this point is directly contrary to what she told Deputy Sheriff Debbie Sharp on the night of the shooting (R410). Also, Ray Stacey saw appellant leaving the house, but never saw appellant standing over him (R371)

was possibly mentioned"[43/] (R206). Asked what they discussed in that possible conversation about marijuana, Merrick testified that he told appellant that he was not really looking right now because he didn't have any money, but he would like to possibly get some in the future from him (R206). Appellant asked Merrick is he was a cop, and Merrick said no, he was a software computer person (R206). Then, according to Merrick, appellant kind of leaned over in his dash and said "That doesn't matter anyway. I have got Betsy in here just in case you are or if you were a cop" (R207).

43/ On cross-examination, Merrick testified:

> MR. VECCHIO: Now, when you picked up Mr. Brown, you stated that you were not sure of the conversation concerning marijuana?
>
> BRIAN MERRICK: That's true.
>
> Q. You don't recall any conversation concerning marijuana?
>
> A. I don't recall the conversation but when he got back and honked the horn and said that he could get me some, there must have been something mentioned about smoking marijuana --
>
> Q. All right.
>
> A. -- prior to that.
>
> Q. Yes. I feel that there must have been something mentioned prior to that also. Isn't it true that you asked Mr. Brown, while he was driving you home, whether he could get you some marijuana?
>
> A. I don't think so. I don't really remember that. I -- he may have mentioned the fact that he smoked and I said I did, too, or something along those lines. Like I say, I don't remember the actual --
>
> Q. You don't recall?
>
> A. -- talk.
>
> Q. But later on in the evening, on a number of occasions, at least two or three, you inquired of him whether he could get you any marijuana; is that correct?
>
> A. Yes.

(R232-33)

The prosecutor, in his guilt phase closing argument, used Merrick's testimony about "Betsy" (embellishing it from "kind of leaned over in his dash" (R207)to "pats the glove compartment" (R658)) to argue that appellant did not put his gun in his pocket when he decided to pick up the hitchhiker, but instead that the gun was in the glove compartment, and appellant got it when he claimed he went to get a pack of cigarettes (R658).

Putting aside for the moment Merrick's admitted inability to remember the details of the "possible" conversation about marijuana in the car, and putting aside the inherent improbability that appellant would tell the person of whom he was suspicious that he had "Betsy" in the glovebox when that person, being on the passenger side, had better access to the glovebox than he did, the fact remains that the "Betsy" comment does not even begin to establish that appellant had a prearranged plan to commit murder. In fact, it tends to prove that he did not have such a plan, since, under the state's own theory, he left "Betsy" in the car during the bulk of the time he was in the house with the Merricks, Baxter, and Stacey. Assuming arguendo that the "Betsy" comment could be construed as proof that appellant got the gun out of the car, that does not prove premeditation, much less heightened premeditation. The specific act which, according to Raymond Stacey, set appellant off, occurred after he had gone out to the car (see R367-69). Appellant had come back inside and sat down in a different chair. Brian said it was getting late and asked appellant if he would make the phone call

again to buy some marijuana. According to Stacey:

> At that point Richard asked him again if he was a cop. Brian said "What does it --". Let me think of his exact words. "What are you going to do if we are." At that point Richard said "What? What?" And he reached with his right hand behind his left side and pulled out a gun. He came around like this and pointed it toward me while I was seated on the couch eating a steak sandwich and took a shot at me --

(R369)

While it is true that appellant had asked several times before whether they were cops, this statement by Brian "What are you going to do if we are" was the first provocative response. Appellant's saying "What? What?" indicates surprise and anger; his firing first (and missing) across the room at Stacey on the couch indicates an explosion of paranoia or rage; not a coldly executed plan. If appellant had the gun in his pocket all along, then there is no evidence of simple premeditation, much less heightened premeditation [see Issue V, infra]. And even if he got the gun out of the car (and the only piece of evidence which even remotely tends to prove this is the "Betsy" comment), that still does not prove that he had formulated an intent to kill at that time. Given his consumption of alcohol and marijuana, and his growing paranoid fear, he may well have felt he needed it for protection, and then simply lost control when Brian Merrick said "What are you going to do if we are [cops]".

Brian Merrick's version of the incident is even less supportive of the state's hypothesis than Stacey's, since according to him, a five to ten minute "absolutely normal" conversation about mortgages and real estate took place between appellant and

John Baxter, after his [Brian's] comment about cops.[44/] According to Merrick, appellant began shooting [f]or no reason that I can see" (R277).

The state's hypothesis that appellant's motive for the shooting was to eliminate witnesses to the crime of marijuana possession, and its further hypothesis that he was operating according to "a careful plan or prearranged design" to achieve this purpose, is sheer speculation, and is inconsistent with appellant's actual actions before, during, and after the shooting spree. The trial court's finding of the "cold, calculated, and premeditated" aggravating factor must be reversed. Peavy; Preston; Rogers; Perry; Garron; Mitchell.

Ordinarily, the striking of an aggravating circumstance, where there exists one or more mitigating circumstances to weigh against the remaining aggravating factors, requires reversal of the death sentence and a remend for resentencing. See e.g. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Peavy v. State, supra, 442 So.2d at 202-03. In the instant case however, the only remaining aggravating factor is that of "previous conviction of a felony involving the use or threat of violence", and that finding is based solely on the concurrent convictions of attempted murder of Brian Merrick and Raymond Stacey, arising from the same incident. As a mitigating factor, the trial court found that appellant, up to the time of this incident (which occurred when he was 36 years old) had no significant history of criminal activity. Regardless of the presence or absence of mitigating factors, and regardless

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44/ According to Merrick, his remark was to the effect of "I've already told you we are not cops. Why do you keep asking?"(R275).

of the extent of the defendant's criminal record, this Court has never affirmed a death sentence where the only aggravating circumstance was that of "prior violent felony". Appellant submits that imposition of the death penalty is proportionally unwarranted in this case, especially in view of appellant's responsible and non-violent life history. The shooting which resulted in the death of John Baxter, and the wounding of Brian Merrick and Raymond Stacey, was clearly out of character for appellant. It was (assuming it was not self-defense) a single, isolated explosion of violence brought on by the use of marijuana and alcohol, and by a paranoid reaction to some people who (even reading between the lines of their own testimony) are not the semi-wholesome American family they portrayed themselves as at trial.

The trial judge in this case expressed serious doubt whether a death sentence was appropriate, notwithstanding the jury's recommendation (see R733,774). Those doubts were well founded. As this Court recognized in State v. Dixon, 283 So.2d 1,7 (Fla. 1983) and Holsworth v. State, 522 So.2d 348, 354-55 (Fla. 1988), the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes". Accordingly, this Court has not hesitated to reverse a sentence of death, even where the jury has recommended death, if, under the totality of the circumstances, the ultimate penalty is not proportionally warranted. See e.g. Rembert v. State, 445 So.2d 337, 340-41 (Fla. 1984); Caruthers v. State, 465 So.2d 496,499 (Fla. 1985); Ross v. State,

474 So.2d 1170, 1174 (Fla. 1985); Wilson v. State, 493 So.2d 1019, 1023-24 (Fla. 1986); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Livingston v. State, __ So.2d __ (Fla. 1988) (case no. 68,323, opinion filed March 10, 1988) (13 FLW 187, 188); Lloyd v. State, __ So.2d __ (Fla. 1988) (case no. 65,631, opinion filed March 17, 1988) (13 FLW 211, 214). This Court should do the same in the instant case, and reduce appellant's penalty to life imprisonment, without possibility of parole for 25 years.

ISSUE V

THE EVIDENCE OF PREMEDITATION IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION OF FIRST DEGREE MURDER.

Appellant will rely on his argument as to Issue IV, and submits that not only was the evidence insufficient to prove that appellant acted according to a "careful plan or prearranged design" (the prerequisite for a valid finding of the "cold, calculated, and premeditated" aggravating factor), it was insufficient even to prove simple premeditation needed to sustain a conviction of first degree murder. As defined by this Court in such decisions as Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975) and McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957), premeditation is "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide". The evidence in this case is not inconsistent with the hypothesis that appellant had no premeditated intent to kill, but (under Stacey's version) simply exploded into violence as a spur-of-the-moment paranoid

reaction to Brian Merrick's provocative remark to the effect of "What are you going to do if we are [cops]?" Cf. Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981). Under Brian Merrick's version, on the other hand, there is no explanation at all - only speculation - as to what, if anything, provoked the shooting. Appellant's conviction should be reduced to second degree murder. See Hall v. State, supra.

ISSUE VI

EVEN ASSUMING ARGUENDO THAT THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR COULD BE UPHELD, IMPOSITION OF THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED UNDER THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE.

Appellant will rely on his Statement of Facts, and on this Court's recognition in Dixon and Holsworth that the death penalty is appropriate only in the most aggravated and unmitigated of homicides. This is not such a case.

ISSUE VII

THE TRIAL COURT ERRED IN DELEGATING TO THE PROSECUTOR THE RESPONSIBILITY OF PREPARING THE ORDER SENTENCING APPELLANT TO DEATH, IN VIOLATION OF FLA.STAT. §921.141, AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In State v. Dixon, 283 So.2d 1,8,(Fla. 1973), this Court emphasized the trial court's serious responsibility to independently weigh the aggravating and mitigating circumstances before imposing a death sentence or life imprisonment:

> [T]he trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die....
>
> The fourth step required by Fla.Stat. §921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

In the instant case, as in Nibert v. State, 508 So.2d 1, 3-4 (Fla. 1987) and Patterson v. State, 513 So.2d 1257, 1261-63 (Fla. 1987), the trial court delegated to the prosecutor the responsibility of preparing the written findings in support of the death sentence.[45/] The circumstances here fall in between those

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45/ The circumstances are set forth at p.47-53 of the Statement of Facts.

of Nibert and Patterson, but appellant contends that, because the weighing process was compromised, and because the assistant state attorney's written findings did not accurately reflect the trial court's view of the case as expressed in his oral pronouncement of sentence, the instant case involves the same statutory and constitutional considerations as Patterson.

In Nibert, this Court (in dicta, since Nibert's death sentence was reversed on other grounds) concluded that, under the circumstances of that case, the trial court's failure to prepare his own written findings in support of the death sentence did not rise to the level of reversible error. The Court said:

> The record reflects that the trial judge made the findings and conducted the weighing process necessary to satisfy the requirements of section 921.141, Florida Statutes (1985). We further note that defense counsel did not object when the court instructed the state attorney to reduce his findings to writing. Although we strongly urge trial courts to prepare the written statements of the findings in support of the death penalty, the failure to do so does not constitute reversible error so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing.

Nibert v. State, supra, at 3-4.

[It is also important to note that, in Nibert, there were no mitigating circumstances found; and thus the weighing process, at least theoretically, could not have been affected by delegating the preparation of the sentencing order to the prosecutor. See Elledge v. State, supra, 346 at 1003].

In Patterson, the opposite conclusion was reached. This Court observed:

> This record, contrary to Nibert, does not demonstrate that the judge articulated

> specific aggravating and mitigating circumstances. On the contrary, the trial judge's action in delegating to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors raises a serious question concerning the weighing process that must be conducted before imposing a death penalty. It is insufficient to state generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that were presented to the jury. It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances.

Patterson v. State, supra, 513 So.2d at 1262-63 (emphasis supplied)

Nibert and Patterson, read together, indicate that reversible error need not be found if the delegation of responsibility to the prosecutor merely involves reducing the judge's oral findings to writing (provided, of course, that it is done accurately). Patterson makes it clear, however, that the responsibility of determining, explaining, and weighing the aggravating and mitigating circumstances cannot be delegated. To properly perform its mandatory review of any sentence of death, required by statute and by the Constitution, this Court needs to know the trial court's view of the evidence, not the view of an interested party. Cf. State v. Dixon, supra.

In the present case, the trial court expressed serious concern about whether a death sentence was appropriate (R733,774). After discussing the evidence with the attorneys (R754-74), he put the case over for sentencing. At the February 26, 1987 sentencing hearing, after hearing argument of counsel, the court orally pronounced sentence:

> I find two aggravating and one mitigating, and my hesitation in the case dealt with guilt

> or innocence. Having considered it further and carefully gone through the facts and the trial testimony, in my mind, at least, I feel that guilt was the appropriate finding here and that there was no self-defense, and the determining factor to me is we have strong evidence here -- there is no question of it -- of drug use.
>
> What has happened here, and it has the ring of truth to me, and it's what I believe happened, is as a result of this drug use, we have paranoia.
>
> Paranoia is not an unusual circumstance that arises out of drug use, and that is what we have here, a killing out of paranoia, a fear that the police are onto him and he was going to be arrested, so I am comfortable with the jury verdict and comfortable with their recommendation.

(R793-94)

At the close of the proceeding, the judge said "Ask the prosecutor to get me a written order next week, two to one. Get a written order on the death case ... Two aggravating and one mitigating" (R795)

On March 9, 1987 (at the hearing in which appellant's motion for new trial was denied, and defense trial counsel was permitted to withdraw), the judge asked whether the written order was in (R801). Assistant State Attorney McClain said "I believe so. I understand Mr. Caruso did it" (R801). The judge replied "We don't have it so get it, a written order on aggravation. It's got to be a written order of death setting out the aggravating circumstances" (R801-02).

The written sentencing order prepared by the assistant state attorney was not filed until March 19, 1987.

The trial judge never specifically identified which aggravating circumstances he was finding. See Patterson v. State, supra. The prosecutor undoubtedly (and probably correctly) assumed,

from the penalty phase charge conference (R716-36), that the judge was referring to the two aggravating factors on which he had instructed the jury (R749-50); i.e. "prior violent felony" and "cold, calculated, and premeditated." With regard to the mitigating factors, however, the judge instructed the jury on all eight (including the "catchall" instruction for non-statutory mitigating cricumstances) (R750-51), and defense counsel argued at least two (R788-89). [Counsel argued that the court should find the statutory factor of no significant history of criminal activity and the non-statutory factor of appellant's gainful employment throughout most of his adult life. The latter has been recognized as a valid non-statutory mitigating consideration, as it goes both to the defendant's character and his potential for rehabilitation. See McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Cooper v. Dugger, __ So.2d __ (Fla. 1988) (case no. 71,139, opinion filed May 12, 1988) (13 FLW 312,313)]. Therefore, the prosecutor's assumption in his sentencing order that the judge, in finding "one mitigating", meant the statutory factor rather than the non-statutory factor was essentially a guess. See Patterson. Neither the fact that it was probably a correct guess as to the judge's intention, nor the fact that the judge subsequently "ratified" the prosecutor's order by signing it, obviates the constitutional and statutory infirmity caused by the trial court's abdication of his responsibility to identify, explain, and weigh the aggravating and mitigating circumstances according to his view of the evidence.

The sentencing order written by the prosecutor nowhere reflects the circumstance which (according to the trial judge's expressed belief) was the causal factor in the shooting - paranoia created by drug use [compare R793-94 (judge's oral pronouncement of sentence) with R944-47 (sentencing order prepared by prosecutor)]. Instead, and not surprisingly, the sentencing order expresses a view of the evidence identical to that which the prosecutor argued to the jury and to the judge. In explaining the finding of "previous conviction of a violent felony", the prosecutor wrote "... [T]he court gives significant weight to this aggravating circumstance as it is a clear indication of the violence and cruel nature of this defendant" (R944-45); even though the judge had never indicated what weight he wished to accord this factor.[46/] See Patterson v. State, supra. In finding the "cold, calculated, and premeditated" factor, the prosecutor wrote "Defendant went to his car to get his gun with the idea that he was going to kill his victims. He at that time coldly planned the killing." As argued in Issues IV and V, appellant submits that the evidence wholly fails to establish that he acted upon any calculated plan. More to the point here, however, is that the only piece of evidence which even remotely tends to prove that appellant got the gun out of the car (as opposed to having it in his back pocket all along) is the remark appellant supposedly made to Brian Merrick about "Betsy". See

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46/ In fact, in the penalty phase charge conference, the judge had expressed some surprise when he learned that concurrent convictions arising out of the same incident could even be used to establish the "previous conviction" aggravating factor (R716-17)

p. 108-111 of this brief. We know that the prosecutor believed that such a remark was made, but, without an explanation by the trial court of his findings as to the various aggravating and mitigating factors, we have no way of knowing whether the court believed this testimony, or whether he was basing his finding of the "cold, calculated, and premeditated" circumstance on something else. By having the aggravating and mitigating circumstances explained by an interested party, rather than by the neutral magistrate, this Court's review process is irreparably compromised. Cf. State v. Dixon, supra.

With regard to the statutory mitigating factor identified in the order, the prosecutor simply wrote "The defendant has no significant history of prior criminal activity." In stark contrast to his handling of the aggravating factors, his statement on the mitigating factor contains no explanation at all. As previously discussed, there is no mention whatever of the other mitigating factor urged by appellant's counsel, that of his history of gainful employment. Since the trial court never specifically rejected this proffered mitigating factor, but merely stated that he was finding "one mitigating" (which the prosecutor identified as "no significant criminal history"), this not only violates the holding of Patterson v. State, supra, but also violates the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) and Skipper v. South Carolina, 476 U.S __, 106 S.Ct. 1669 (1986) [see Issue VIII, infra]. There is absolutely nothing in the record to indicate that the trial court weighed or even considered the proffered non-statutory mitigating circumstance. See also Rogers v. State, 511 So.2d 526, 534 (Fla. 1987).

Finally, the prosecutor wrote "After considering only the evidence before the jury, the Court finds that the two aforesaid statutory aggravating circumstances clearly outweigh the one statutory mitigating circumstance" (R946). Note that the trial court, in orally imposing sentence, said only that he found two aggravating and one mitigating; that the jury appropriately found appellant guilty and rejected self-defense; that he believed the crime occurred as a result of paranoia caused by drug use; and that he was "comfortable" with the jury's recommendation of death (R793-94). Therefore, it cannot even be said to a certainty that the trial court (prior to directing the prosecutor to prepare the sentencing order) meaningfully weighed the aggravating circumstances against the mitigating circumstances; he may merely have counted them and determined that death wins, two to one (see R795,802).

All things considered, the circumstances here are much closer to Patterson than to Nibert. The trial judge abdicated his statutory and constitutional responsibility to identify, explain, and weigh the aggravating and mitigating circumstances before imposing a sentence of death. Instead this critical function was delegated to an interested party. Appellant's sentence of death, imposed in this manner, cannot stand.[47/]

47/ Appellant would note that, even in the context of sentencing guidelines, the trial court cannot delegate to the prosecutor his obligation to identify and explain his reasons for departure. Carnegie v. State, 473 So.2d 782 (Fla.2d DCA 1985); cf. State v. Jackson, 478 So.2d 1054 (Fla. 1985). In point of fact, this occurred in the instant case as well; the first statement of reasons for the departure from the guidelines on the two counts of attempted murder appears in the order written by the prosecutor (R947). Thus Carnegie and Jackson require reversal of those sentences, and it

FOOTNOTE CONTINUED ON NEXT PAGE

ISSUE VIII

IN FAILING TO WEIGH OR CONSIDER THE PROFFERED NON-STATUTORY MITIGATING CIRCUMSTANCE OF APPELLANT'S HISTORY, THROUGHOUT MOST OF HIS ADULT LIFE, OF GAINFUL EMPLOYMENT, THE TRIAL COURT VIOLATED THE CONSTITUTIONAL PRINCIPLE OF LOCKETT V. OHIO, 438 U.S. 586 (1978) AND ITS PROGENY.

This Point on Appeal involves constitutional error related to, but independent of, the delegation of the trial court's sentencing responsibility to the prosecutor, discussed in Issue VII, supra. Appellant will rely on the authorities and argument set forth at p. 120-123 of this brief.

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

would be absurd and unfair, under these circumstances, to reverse the sentences of imprisonment, but to allow the ultimate sentence of death to stand.

As the U.S. Supreme Court has repeatedly recognized, the death penalty is different from all other punishments, and therefore "a correspondingly greater degree of scrutiny of the capital sentencing decision" is necessary. California v. Ramos, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); see also Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Caldwell v. Mississippi, 472 U.S. 333, 105 S.Ct. __, 86 L.Ed.2d 231, 239, 246-47 (1985); Sumner v. Shuman, 483 U.S., __, 107 S.Ct. __, 98 L.Ed.2d 56, 63 (1987); Booth v. Maryland, 482 U.S. __, 107 S.Ct. __, 96 L.Ed.2d 440, 452 (1987). Due to the unique nature of the death penalty, the Eighth Amendment demands heightened reliability in the decision of whether to impose it in any particular case. Sumner v. Shuman, supra 97 L.Ed.2d at 63, see Woodson; Caldwell. Accordingly, this Court cannot constitutionally countenance a delegation of the sentencing responsibility to the prosecutor in a death case which would not even be tolerated in a garden variety guidelines case.

ISSUE IX

THE JURY'S RECOMMENDATION OF DEATH WAS IRREPARABLY TAINTED BY A SERIES OF COMMENTS BY THE TRIAL JUDGE AND THE PROSECUTOR DENIGRATING THE IMPORTANCE OF THEIR PENALTY VERDICT.

On several occasions in this trial, the judge and the prosecutor made comments to the jury to the effect that the decision on whether the death penalty should be imposed was "solely up to His Honor" (R10), and that the jury's penalty verdict was merely a recommendation (R10,15,97,738,749). During voir dire, for example, the prosecutor remarked "Now you don't sentence anyone. His Honor sentences people. That's what he gets paid for. You don't sentence anyone. You recommend things to him" (R97). Immediately prior to the arguments of counsel in the penalty phase, the trial judge reminded the jurors, "Final decision as to what punishment shall be imposed rests solely with me". (R738).

These comments are very much in the nature of those condemned in Caldwell v. Mississippi, 472 U.S. 320 (1985) and Adams v. Wainwright, 804 F.2d 1526, amended on rehearing, 816 F.2d 1493, rev. granted sub nom, Dugger v. Adams, U.S. Supreme Court case no 87-121 (42 Cr.L. 4181). Several of the remarks were quite strongly worded. They denigrated the importance of the jury's role in sentencing, and implied (incorrectly, even under Florida law, see Tedder v. State, 322 So.2d 908 (Fla. 1975) and its progeny) that the jury's penalty verdict was inconsequential. Appellant's death sentence, imposed pursuant to such a proceeding, is constitutionally infirm. Caldwell; Adams.

CONCLUSION

Based on the following argument, reasoning, and citation of authority, appellant respectfully requests the following relief:

1. Reverse his convictions and death sentence, and remand for a new trial [Issues I, II, and III].

2. Reverse his conviction of first degree murder (and death sentence), and remand for entry of a judgment of conviction for second degree murder [Issue V].

3. Reverse his death sentence, and remand for imposition of a sentence of life imprisonment, without possibility of parole for 25 years [Issues IV and VI].

4. Reverse his death sentence, and remand for a new penalty proceeding before a newly impaneled jury [Issue IX].

5. Reverse his death sentence, and remand for resentencing by the trial judge [Issues VII and VIII].

Respectfully submitted,

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