IN THE SUPREME COURT OF FLORIDA

DARRELL WAYNE HALLMAN, :

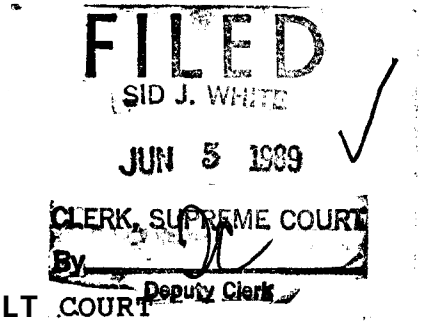
Appellant,

vs. Case No. 70,761

STATE OF FLORIDA,

Appellee.

_____:



APPEAL FROM THE CIRCULT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

On November 6, 1986, Darrell Wayne Hallman was charged by indictment with first degree murder of Lewis Hunick. (R1) In addition, Hallman was charged with two counts of armed robbery and two counts of kidnapping. (R1-3) All of the charges arose from the robbery of the United First Federal Savings and Loan Association in Lakeland on October 22, 1986. (R1-3)

The case proceeded to trial on April 27-30, 1987, before Circuit Judge J. Dale Durrance and a jury. The jury returned verdicts finding appellant guilty as charged on all counts except Count Four (armed robbery of Vernon Warren), on which he was found guilty of the lesser offense of grand theft. (R1307-08, 1655-59) The penalty phase of the trial began the following morning, May 1, 1987. The jury returned a recommendation of life imprisonment. (R1635, 1660) The trial judge, however, overrode the life recommendation and, on May 11, 1987 sentenced appellant to death. (R1689, 1695, 1704-07)[1]

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[1] On the remaining counts, appellant received three consecutive sentences of life imprisonment, and a consecutive 5 years on top of that (R1689, 1696-99, 1707). This represented a departure from the sentencing guidelines (R1689-90, 1703).

STATEMENT OF THE FACTS

A. TRIAL

The following is a summary of the evidence presented at trial. [The significant trial testimony concerned the circumstances of the robbery and shooting incident, since appellant's identity was not contested by the defense. Accordingly, this summary will omit most of the testimony regarding identity. In-court identifications of appellant by witnesses can be found in the record at 642-43, 654-56, 679-80, 708-09, 865-66].

In October of 1986, appellant, Wayne Hallman, was living in the Sherwood mobile home park in Lakeland. (R639-40) Most of the time he stayed with his sister, Shirley Phals, in trailer 110, but occasionally he would stay in trailer 108, owned by Roy Skinner. (R640, 659) Appellant had moved in with his sister after he broke up with his ex-wife, Linda. (R659)

Scott Anderson was a sixteen year old neighbor of appellant's in the trailer park. (R639-40) On the Friday night prior to appellant's arrest, appellant and Scott had a conversation in Roy Skinner's trailer. (R642-43) Appellant asked Scott if he knew where he could get a gun. (R644) Scott at first said no, but then said that his parents had one. (R644) Appellant offered to pay him $500.00 for the gun; Scott said he'd have to think about it. (R644) When Scott asked appellant why he wanted the gun, appellant wouldn't tell him. (R644) Scott did not know what appellant intended to do, but he thought whatever it was was

planned. **(R645-46)**

The conversation lasted about half an hour to forty-five minutes. **(R645)** According to Scott, appellant seemed depressed, and at times was shaking his head and crying. **(R645-46, 661-62)** Scott was aware of certain problems that were going on in appellant's life around this time. **(R661)** Appellant had taken his divorce from his wife pretty hard; then his father-in-law, whom he had remained close to, died. **(R645-46, 661-62)** Also, appellant had just lost his job. **(R646, 662)**

Scott testified that, when he left the trailer on Friday night, he was undecided whether to give appellant the gun. **(R644-45)** He subsequently decided to do it for the money, because he was planning on running away from home with his girlfriend. **(R649, 659)** The following Tuesday, Scott saw appellant outside his trailer, and told him he could get him the gun. **(R646-47)** At 6:00 o'clock on Wednesday morning, Scott got the firearm - a .38 - from under the seat of his mother's car. **(R641, 650-51)** The gun was normally kept with an empty cylinder under the hammer; the other five were loaded. **(R644-42)** Scott took it to appellant at his sister's trailer, and asked him not to fire it unless he had to. **(R651-53)** Appellant said he wasn't going to hurt anyone. **(R652-53, 662-63)** Scott was supposed to pick up the $500.00 that afternoon in appellant's sister's trailer; however, as it turned out, he never got the money. **(R650, 652, 656)**

At about 10:00 a.m. that morning - October 22, 1986 - appellant was picked up by cab driver Gloria Strahan at the carwash

at Brunell and Memorial. (R666-67) Appellant said he wanted to go to Piggly-Wiggly, and they headed north on 98. (R666-67) When they got near the bank, appellant asked her to pull in there; he needed to cash a check. (R667-68) Ms. Strahan noticed a security guard in the parking lot talking to one of the customers. (R675, 683) At appellant's direction, Ms. Strahan pulled into a parking space. (R668-69) He then told her he was going to commit an armed robbery, and if she did what she was told she wouldn't get hurt. (R669) Appellant said he had a gun. (R669) However, Ms. Strahan did not see the gun, and as far as she knew appellant never pointed it at her, either at that time or throughout the entire sequence of events. (R669, 682-83, 687)

Appellant told Ms. Strahan to turn off the cab and come into the bank with him. (R672) Ms. Strahan had the keys to the cab wrapped up in her hand, and she brought them into the bank. (R679)

When the taxicab pulled into the parking lot, two bank employees, Rose Wood and Jean Haller were watching out the window. (R763-64, 768-71) They were suspicious, because people don't usually come to the bank in a cab. (R763-64, 770-71) Ms. Haller went to the front door, intending to tell the security guard to watch the cab, but he was at the far end of the parking lot and she decided not to yell across to him. (R772-73)

Inside the bank, Ms. Strahan (the cab driver) waited by the door, while appellant got in a teller line. (R672, 728-29, 764, 775) The teller, Faye Alexander, noticed him, because he was

wearing a cap and sunglasses, and did not look like one of their run-of-the-mill customers. **(R728-29,** see **R787)** **Ms.** Alexander thought about activating the bank's surveillance camera, but she did not do ***so*** because she thought it would be too obvious a movement. **(R729,** see **R726-27)** Meanwhile, Jean Haller, who was observing from her office, did activate the camera. **(R776-77, 787)**

According to Faye Alexander, when appellant approached the window and she asked if she could help him, he said "This is a God damn stick-up", and pulled a revolver from underneath his shirt. **(R730, 732,** see **R765, 777-78)** He did not raise the gun to the level of the counter, but he held it where she could see it. **(R745-46)** [At this point, Jean Haller hit the silent alarm. **(R777-78,** see **R725-26,** 732-33)] Appellant slid a brown grocery bag over to Ms. Alexander. **(R730-31)** She picked it up and began to put the money from her drawer into it. **(R730,** see **R673-74, 757-58, 778)** The other teller, Terry LeFevere, realized at that point that something was going on. **(R757-58)** Appellant told Ms. Alexander to get the money from Ms. LeFevere's drawer. **(R730)** **As** she did ***so***, Ms. LeFevere could see the gun in appellant's hand, but he was not pointing it at anyone. **(R759)** The two customers Ms. LeFevere was waiting on were apparently unaware of what was occurring. **(R758-59)**

After Ms. Alexander handed him back the grocery bag with the money in it, appellant went out the front door. **(R674, 731, 733, 778)** When the cab driver started to follow him out, he told her to stay in the bank. **(R674)** [Ms. Alexander estimated that the

amount of money taken was something less than **$8000**; this sum included the "bait money." **(R731-32,** see **R727-28, 740-43)** The money (which actually totalled **$6803)** was all eventually recovered **(R743-44, 1009-10)].**

After appellant left, Ms. Alexander opened the door and called out to the security guard, Lewis Hunick, that they had been robbed, and to get a description and a tag number. **(R734-35, 747-48,** see **R675, 779)** According to Ms. Alexander, the guard had his hand on his gun, but had not pulled it out. **(R734, 748)** She could see appellant on the driver's side of the cab. **(R734-35)** Ms. Alexander then locked the door and told everyone inside to go to the back. **(R675, 735, 755-56, 766, 779-80)** After the door was locked, appellant came back, and it appeared that he was trying to get back inside; when he was unable **to** do ***so***, he immediately left. **(R736-37, 749-55, 761, 767, 781, 784) Ms.** Alexander went to the telephone and called the police. **(R736-37, 751-55, 761, 767)** At that point, a number of gunshots (at least five or six **(R747))** were **heard.**[2] **(R675-76, 735, 747, 761, 767, 781, 783-84)**

The shooting incident in the parking lot was also heard - or seen in part - by several other witnesses. Malcomb Fox was

[2] In her testimony, Ms. Alexander said she thought the gunshots had already been fired when she saw appellant at the door **(R736, 749).** The other bank employees - LeFevere, Wood, and Haller - all testified that appellant appeared at the door before any shots were heard **(R761, 767, 781, 784).** The recollection of these three witnesses was consistent with the tape recorded statement given by Ms. Alexander to the police a couple of hours after the robbery occurred; in which she said she saw appellant at the door, then went to the phone to call the police, and while she was on the phone she heard the shots fired **(R749-55).**

driving home, and he pulled into the bank parking lot. **(R688-92)** He noticed the cab which was in one of the parking spaces. **(R693)** As **Fox** started to pull in, the security guard suddenly moved in front of his car; **Fox** had to put on his brakes to keep from hitting him. **(R693-95, 715-17, 722)** The guard was moving at a rapid pace. **(R694, 722)** **Fox** saw the guard go around toward the rear window of the cab on the driver's side, and look through the back window to the back of the cab. **(R695-96, 719-20)** The guard then reached back and laid his hand on his gun. **(R696)** **Fox** did not see the guard draw the weapon from his holster, but he assumed that that was what he was about to do. **(R696, 708, 714)** Upon seeing the guard reach for his gun, **Fox** "didn't think he would be doing that playfully", ***so*** he looked up toward the front of the bank. **(R698)** There **Fox** saw appellant standing on the sidewalk, holding a sack in his left hand. **(R696-97, 717-18)** Appellant pulled a gun out of his belt. **(R697, 699)** At that point, **Fox** decided to get out of the way. **(R699, 710)** He swung his car out of the parking space and headed back toward **98.** **(R700)** While waiting for an opening to pull out onto the highway, **Fox** heard a number of gunshots, but could not tell who was doing the shooting. **(R701, 707-08, 718-19)** When he glanced back, he saw the guard fall backward onto the ground at the rear of the cab. **(R700-01, 720)** **Fox** was not sure where appellant was when the guard fell, but when he glanced back a second time he saw appellant "come up and put his gun down over top of him like this." **(R702)** **Fox** explained that appellant squatted down and looked at the guard, but did not fire any more

shots. (R702, 721)

Fox made the turn onto 98 and drove to the nearby Foxfire restaurant, where he asked them to call the police and an ambulance. (R703) When he turned around, Fox saw appellant running along the berm of the highway in the direction of the Acura dealership. (R703-06) Then a red or maroon car came along; appellant opened the passenger door and got in. (R706) The car turned south on 98. (R707)

Pamela Harrell was driving along 98, and was stopped for traffic. (R819-21, 832) Her mother-in-law, Beatrice, was a passenger in the car. (R820-21) Ms. Harrell heard a pop or a bang, which she thought was a car backfiring. (R821, 833) She looked around toward the bank and saw the security guard standing at the back corner of the taxicab toward the passenger side. (R821-23) Appellant was on the driver's side of the car by the back seat door. (R823, 836-37) The front seat (driver's) door was open. (R836) The guard and appellant were more or less facing each other across the cab; appellant appeared to be using it as a shield. (R834, see R821-23, 833-37)

When Ms Harrell first looked up she already saw the glass from the blown-out cab window. (R825-26, 838-39) Ms. Harrell further testified that when she first looked up, appellant was not pointing a gun at the guard. (R842) Also, she did not see the guard's gun at that point, but because of the way the guard's body was positioned, she could not see his right hand. (R823, 826, 832, 833, 839-40) Therefore, she testified that the guard may or may

not have already had his gun out. (R823, 832, 833, 839-40)

Ms. Harrell testified that she did not know which of the two men fired the first shot. (R833) In a tape recorded statement which she had given to the police on the day of the shooting, she had said she thought the guard had his gun out and fired a few shots before he fell, but at trial she was no longer sure. (R840-42) However, she did testify on cross-examination as follows:

> MR. MASLANIK [defense counsel]: Now, I believe you said on direct examination that when you looked at the cab to see what was going on you already saw the glass.
>
> MS. HARRELL: Uh-hum.
>
> Q. Okay.
>
> A. Yes.
>
> Q. So if the guard had fired at Mr. Hallman from where he was standing, the shot you didn't see.
>
> A. Right.
>
> Q. If that went through the rear window of the cab and blew out the passenger door [window] then that would be an indication that that was the shot you didn't see.
>
> A. Right.
>
> Q. Because you already saw the glass.
>
> A. Right.

(R838-39)

When Ms. Harrell first looked up, after hearing the first shot, appellant was not pointing a gun at the guard. (R842) Then

he raised his hand; she heard a bang and the guard fell. **(R822-24, 834, 842)** That was when she realized it was a gun. **(R823)** Appellant was kind of looking back and forth around the cab. **(R824-25)** The guard, on the ground, lifted his head and fired some shots toward appellant. **(R825-26)** Appellant fired one or two more shots after the guard fell. **(R835, 837)**[3]

Ms. Harrell testified that, while the shooting incident was occurring, Malcomb Fox turned in front of her onto the highway. **(R827-28, 838)** Ms. Harrell did not see the portion of the incident described by Fox where appellant "sort of squatted over the guard but didn't shoot his gun at that time." **(R828-29, 837-38)**

Beatrice Harrell, Pamela's mother-in-law, did not see the guard get shot; he was already on the ground before she saw him. **(R845)** Appellant was walking at a fast pace away from the bank, carrying a paper bag. **(R845-46,** see **R829)** Since she was a nurse, Beatrice Harrell asked her daughter-in-law to take her to where the guard was, to see if she could help. **(R843, 846-48)** The guard was dying, and was not in a condition to say anything about what happened. **(R847-48)** There was no visible bullet wound and very little bleeding; just two tiny spots on the chest pocket on the left side of his shirt. **(R848-49)**

Mark Harrell (apparently no relation to Pamela and Beatrice) and Claude Williams were mowing a field at a bowling

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[3] Subsequent testimony established that appellant's gun, when recovered, contained two fired cartridges, three live rounds, and one empty chamber (**R1005-07, 1112, 1121-22**). The guard's weapon contained six fired cartridges (**R991, 1107, 1120-21**).

alley near the bank. **(R800-01, 813)** Harrell heard some popping sounds coming from the east. **(R801-02)** He heard three or four pops, then a short pause, and then one or two more pops. **(R802-03)** He looked up and saw somebody in the bank parking lot (about **80** yards away) "and they were just kind of stutter-stepping back and forth like they didn't know which way to go or what to do." **(R803, 810)** Harrell could not see the guard at that point, and could just see the back half of the taxicab. **(R804)** Harrell told Williams (who did not hear the shots) that he thought the bank had just been robbed. **(R814)** They both saw appellant walking away from the bank at a fast pace, carrying a brown bag. **(R804-95, 814, 817)** Appellant crossed the road, fell down in the median, then walked along the side of the highway toward the Acura dealer. **(R804)** He then turned a corner, whereupon a brown car pulled up and he got in the passenger side. **(R806, 815-16)** The car sat there for a second, and then headed in the direction of the Interstate. **(R806)**

Vernon Warren, a retiree, was traveling west on Wedgewood Blvd., driving a brown **1979** Toyota. **(R852-53)** While he was stopped at the stop sign at the intersection of highway **98,** appellant jumped in his car by the front passenger door. **(R853-54, 868)** Warren told him he didn't belong there, but appellant "persuaded him otherwise" by drawing a gun on him. **(R854, 868)** Instinctively, Warren reached over and grabbed the gun in appellant's hand, and pushed it against the dashboard. **(R854-55, 868)** Appellant did not retaliate against Warren for grabbing the

gun. (R868) He told Warren that if he didn't do anything, he wouldn't get hurt. (R856)

At appellant's direction, Warren headed south on 98, got on I-4 westbound, got off at Kathleen Road, and then drove through an area Warren was not familiar with. (R856-59) During the drive (which lasted about ten minutes) Warren noticed that appellant was hurt; his hand was bloody and he was holding his side in pain. (R856, 866-67, 870) Appellant looked scared and his hands were shaking. (R867-68) He told Warren that he had been shot. (R867) A calm came over Warren, and he began talking to appellant as if he were talking to a friend. (R857, 869) He offered to take appellant to a hospital or a doctor, but appellant said he couldn't do that. (R870) Warren also told appellant that he was *too* young to be doing things like this, and that God loved him. (R857, 869-70) Appellant didn't say anything, but just kind of hung his head down. (R870)

They went over a viaduct and Warren realized that they were coming back into Lakeland. (R859) Appellant directed Warren to pull off the road and park on the grass, and told him he was going to take his car. (R859-60) Warren got out of the vehicle; appellant also got out, came around to the driver's door, got back in and drove away. (R860-61) Warren then flagged down a passing car, and asked the driver to call the police. (R862) The police arrived 10-15 minutes later. (R862-63)

Appellant was seen returning to his trailer by Thomas Folsom, a neighbor from across the street. (R872-76) Folsom (who

knew appellant by sight but not by name) described him as wearing a cap and sunglasses, and carrying a bag in his right hand. (R875-76) His pace was between a walk and a run. (R875) Soon afterward, Folson saw a TV news broadcast about the bank robbery. (R876-77) He was not sure whether he had seen anything significant, but he went ahead and called the police. (R877-78)

The police initially set up a perimeter around trailer 110 (appellant's sister's trailer). (R899-901, 903-07, 976-77, 981-83) Subsequently, they were notified that he sometimes stayed in 108. (R901, 977, 982-83) An officer, assisted by a police dog, entered that trailer and found appellant hiding behind the door of the rear bedroom. (R977-79, 983-87, see R902) At the time of his arrest, appellant said his name was Ricky Suggs. (R979-80, 988) Apart from giving the false name (which was soon cleared up), appellant was cooperative and did not attempt to escape or resist arrest. (R904-11, 981-88) The officers testified that they were concerned about the possibility of gunfire or violent resistance, but this did not occur. (R904-11, 982-84) When Officer Reese frisked appellant immediately after his arrest, he was not carrying a weapon. (R986-87)

Appellant was taken to the hospital for surgery for a gunshot wound.[4] (R956-57, 961, 981, 1091-92, 1100) The bullet had entered his lower back near the waist and exited near the lower

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[4] The blood on appellant's clothing, the paper bag, and the seat of Vernon Warren's car was consistent with appellant's blood and not consistent with that of Lewis Hunick (R1126-38, see R965-66, 1072-76).

left abdominal area. (R957, 961, 981, 1091-92, 1100) Appellant also had an injury to his chest where glass fragments had penetrated. (R1092, 1100) That injury was thought initially to have been another gunshot wound. (R1100)

When the police later searched the trailer, they found a closed suitcase which contained the .38 revolver, and $ 6803 in cash. (R933-34, 1005-06, see R883-86) The gun contained one empty chamber (consistent with Scott Anderson's testimony that the gun was normally kept with an empty cylinder under the hammer (R641-42)), two fired cartridges, and three live cartridges. (R1005-07, 1112, 1121-22)

The officers conducting the search also observed a pillowcase in the corner of the bedroom, but they did not go through it. (R933-34) Later that evening, Roy Skinner, the owner of the trailer, noticed the pillowcase (which was not his) and some clothing inside it. (R887) The crime scene investigators were called back, and they recovered several articles of appellant's clothing, his cap and sunglasses, and a brown Publix grocery bag. (R935-43, see R887-90) Some of the clothing was wet and blood-stained, and there were holes in the back and front lower left portion of the pullover shirt, which were consistent with a possible gunshot wound. (R889-90, 935, 940-41)

Officers Herman Moulden and Michael Ivancevich were among the police officers who responded to the crime scene at the bank. (R989-90, 1061-62) They observed the taxicab in the parking lot. (R990, 1061-65) There were two bullet holes in the rear

windshield, and the glass was completely shattered (although still in place). (R990, 1061-62) The left (driver's side) rear door window was shattered and broken **out**. (R990, 1025, 1062) There was glass lying on the pavement beside that door. (R1062) [Of the photographs introduced into evidence, those which best depict the broken windows and the location of the glass are State Exhibits 1-d, l-e, l-f, and 1-n]. There were several other bullet holes in the body of the cab. (R1062-65) The driver's door was open. (R1062)

Sergeant Moulden testified that the reconstruction of the crime scene investigation was that the shot which went through the rear windshield, and then shattered the window of the seat behind the driver, was fired by the security guard from his position at the rear passenger-side corner of the cab. (R1025-26, see R990) [See also Pamela Harrell's testimony at R838-39]. Officer Ivancevich testified that his observations at the scene were consistent with the defendant being on the opposite [i.e., driver's] side of the cab from the guard, using the cab as a shield. (R1080-81) The physical evidence was consistent with the guard standing at the [back] end of the cab, and firing his gun toward appellant. (R1081)

> MR. MASLANIK [defense counsel]: .... And the majority of the glass that you found was on the outside of the cab which would indicate that that was the direction the glass went.
>
> A. Right
>
> Q. **So** somebody standing or crouching or whatever being

positioned on this side of the cab using it as a shield could have gotten hit by the glass that was blown out of the window.

A. Yes

(R1081-82)

Crime scene investigators Moulden and Melinda Clayton each testified that there was no evidence that any bullets were fired in the direction of the bank, and there was no damage to the windows, the door, or the interior or exterior of the structure. **(R950-51, 1023-24)** Sgt. Moulden testified:

Q. [by Mr. Maslanik]: So basically from your investigation of the scene of the robbery inside and the outside of the bank, there was no indication that any of the people in the bank had ever been like in the line of fire or had been shot at at any time during the shooting.

A. The people inside the bank?

Q. Yes.

A. That's correct.

(R1024)

The guard's revolver - a chrome Smith and Wesson **.38** - was recovered at the scene. **(R990-91)** It contained six fired cartridge cases. **(R991, 1105, 1120-21)**

An autopsy on the body of Lewis Hunick was performed by medical examiner Francis Drake. **(R1045-51)** The cause of death was a single gunshot wound to the left side of the front of the chest. **(R1048, 1051-51, 1058)** Dr. Drake was of the opinion that, after being shot, Hunick would have gone from shock to unconsciousness

to death within a matter of a few minutes. (R1051, 1056-58) When he arrived at the hospital, he was still alive, but had no pulse or blood pressure. (R1051)

At the close of all the evidence, defense counsel renewed his previously filed motion for a jury view of the crime scene at the bank. (R1142-43) Defense counsel pointed out that a jury view would be relevant not only to the guilt phase but also to the penalty phase, since the state was planning to argue the "great risk of death to many persons" aggravating factor. (R1143) The prosecutor contended that a jury view was unnecessary, and that the jury had enough information from the testimony, photographs, and diagrams upon which to base their decision. (R1143-44) The trial court denied the motion. (R1144)

B. DELIBERATIONS

After hearing the arguments of counsel and the court's instructions on the law, the jury retired to deliberate at 4:30 p.m. (see R1283) At 10:00 p.m., defense counsel moved that the Court recess deliberations for the night. (R1283) The state objected, and the trial court denied the motion. (R1284) Some time afterward (possibly as late as 11:00 p.m. (see R1305)), the jury asked for "clarification between the indictment and the

verdict form on Count I." (R1284)[5] The trial court, with the agreement of counsel, asked the jury to clarify their request for clarification, and they did so as follows:

> The indictment heading reads first-degree murder. Within same, Paragraph 1, Line 6, the indictment reads premeditated design to effect the death of a human being. The verdict form reflects a verdict of first-degree murder as charged. The instructions to the jury separate felony murder from premeditated murder by use of separate guidelines to determine guilt or innocence. Also on Page 8, Paragraph 4, Line 2, the same reads it will support. Will support does not suggest that it is mandatory to consider felony murder and premeditated murder as one and the same, example, first-degree murder. Is our decision to be based on what the defendant has been charged, first-degree elaborated as premeditated in the indictment?

(R1287)

The prosecutor took the position that the jury was "apparently ... confused as to whether they go by what's in the jury instructions or by - - are they limited to what's in the charging indictment which says premeditated murder and says nothing about felony murder." (R1289) Over strenuous defense objection (R1287-88, 1290, 1294-1300, 1306) that the judge's proposed

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[5] The indictment charged appellant with premeditated first degree murder (R1). The jury was instructed as to both premeditated and felony murder (R1258-1260). The verdict form simply indicated first degree murder as charged in Count I of the indictment (R1272-73, 1655). [The defense had requested specific verdict forms to reflect jury findings of felony murder, Premeditated murder, or both, but the trial court denied the request (R1180-81)].

clarifying instruction would unduly influence the jury to return a verdict of first degree murder, and was tantamount to directing a verdict, the trial court instructed the jury as follows:

> The indictment is the charging document that brings this case into court. The indictment is not evidence and is not to be considered by you as any proof of guilt. The indictment in Count I charges first-degree murder. There are two types of first-degree murder, first-degree premeditated murder and first-degree felony murder. You have been instructed on the elements of each and have a copy of those instructions. An indictment charging the defendant with first-degree premeditated murder will support a conviction for first-degree felony murder. The verdict form is the instrument that you sign indicating what you find the evidence to be and applying the law to that evidence.
>
> Should you become too tired or fatigued at any time during your deliberations to continue, please reduce your request to writing to recess and notify the bailiff.

(R1302)

The jury resumed its deliberations, and then reported that it had reached a verdict. (see **R1305-06)** Before the jury was brought back into the courtroom, defense counsel moved for a mistrial on the ground that any unfavorable verdict (i.e., any verdict for first-degree murder on Count I) would be a product of the court's above-quoted instruction, combined with his refusal to recess deliberations for the night. **(R1305-06)** The motion was denied. **(R1306)** The jury then returned its verdict finding

appellant guilty as charged of first degree murder. (R1307, 1655)[6]

C. PENALTY PHASE

The only additional witness presented by the state in the penalty phase was George Olivo, appellant's parole officer. **(R1396-97)** Appellant had been sentenced to prison for the **1979** armed robbery of a Tampa drugstore. **(R1397-98, 1400)** According to the PSI in that case (which Olivo did not prepare (R1403-04)), appellant and two other men had held up the store and ordered the people inside to lay down on the floor, in an unsuccessful attempt to obtain narcotics. (R1398) In **1983,** appellant was paroled from the DeSoto Correctional Institution. (R1397) His parole officer was Jerry Sadler. (R1399, **1404)** Two and a half years later, because appellant had not been a problem to Sadler, his supervision was reduced to minimum, and he was transferred to Olivo's caseload. **(R1396, 1399, 1404-05, 1408)** While he was supervised by Olivo, appellant filed his monthly reports and paid his costs of supervision "like clockwork." **(R1405-06)** He maintained steady employment, as required by the terms of his parole, by working as a welder at Buccaneer Steel (where he helped build the new Polk County Courthouse). (R1405) Up until September **25, 1986** (less than a month before the robbery and shooting at United First Federal), appellant had no problems with law enforcement, and was

[6] The jury also found appellant guilty as charged on the remaining counts, except for Count **4,** on which he was found guilty of the lesser included offense of grand theft. **(R1307-08, 1656-59)**

a "model parolee." (R1405, 1407) On that date, however, appellant was arrested for DWI. (R1399, 1409-10) Olivo testified that when a person "messes up" on parole he can either be sent back to prison, or reclassified to a higher degree of parole supervision. (R1409-10) At the time of the bank robbery and shooting, according to Olivo, no decision had yet been made as to how the DWI would affect appellant's parole status. (R1409-10)

The defense presented ten witnesses in the penalty phase, including appellant. Jerry Sadler, appellant's first parole officer, testified that appellant caused him no problems during his supervision, maintained steady employment, reported in person or by telephone as required, and regularly paid his costs of supervision. (R1411-16)

Joseph Crawford, an official with the Department of Corrections, brought appellant's inmate records to court. (R1417-18) These were introduced into evidence as Defense Exhibit 1. (R1418) Crawford testified that a "corrective consultation", in prison terminology, is for a minor infraction of the rules, and is sometimes referred to as a "speed ticket." (R1423) A disciplinary report (or DR) would be given for a more significant infraction. (R1423) During the entire period of his incarceration - nearly four years - appellant maintained a spotless disciplinary record, and did not receive even a corrective consultation, much less a DR (Def. Exh. 1, 8th page; see also R1423-24; Def. Exh. 1, p. 1-4, 9-10). The reports consistently rate appellant's attitude and adjustment toward other inmates, and toward corrections personnel,

as good or (more often) very good (Def. Exh. **1,** p **1-4).** He was described by his quarters officers as "trying very hard to stay out of trouble, and doing a very good job without ever complaining" (Def. Exh. **1,** 3rd page). Appellant was assigned to the Vocational Welding Program, where his instructor repeatedly rated his progress as above average, and commented that appellant worked to the maximum of his ability (Def. Exh. **1,** p. **1-4, 8;** see **R1420-22).** His overall school behavior was excellent (Def. Exh. **1,** p. **2).** After graduating fromthe program, appellant was utilized as a vocational aide, to help teach new students entering the program (Def. Exh. **1,** p. **8).** Appellant "receiv[ed] outstanding reports from his supervisor during the entire time he was assigned as an aide" (Def. Exh. **1,** p. **8).** During the last year of his incarceration at DeSoto C.I., appellant was assigned to the Division of Forestry, and worked approximately twenty miles away from the institution (Def. Exh. **1,** p. **8; R1422, 1434).** Once again, he earned outstanding reports from his supervisors (Def. Exh. **1,** p. **8).**

Crawford testified that vocational, educational, and peer counseling programs are available in prison for inmates serving lengthy sentences, and that appellant could participate in such programs if he were sentenced to life imprisonment. **(R1426)**

Appellant grew up in Columbus, Mississippi, the youngest of eight surviving siblings. **(R1436-36a-37)** Four of his sisters - Linda Harris **(R1435-51),** Betty Hendrick **(R1452-57),** Helen Edwards **(R1458-65),** and Shirley Phals **(R1484-89)** - testified in the penalty phase. Appellant's childhood and family background was related

primarily by Linda Harris, who was closest to him in age, and corroborated by the other sisters.

Linda, Betty, and Helen each testified that their father was a brutal, abusive alcoholic, who never contributed in the slightest to provide for his wife and eight children - a "very mean man ... no two ways about it." (R1460, see **R1437-42, 1453-54, 1460-61)** He sexually molested the oldest child, Helen, and he did some time in prison for it. **(R1460)** However, as Helen put it, "no one was spared." **(R1460)** He habitually beat all of the children; the boys (including appellant) would be made to strip naked, and he would beat them with belts, electrical straps, and other objects. **(R1440-41,** see **R1437, 1454, 1460-61)** When the father would come home drunk, the children would hide under the house wrapped up on blankets and quilts, ***so*** he couldn't find them. **(R1460)** Then, after he'd drank enough to have passed out, the children would have to bang on the house, because he locked the door ***so*** they couldn't get back in. **(R1461)**

He would also beat up their mother, and always called her awful names. **(R1439-61)** Asked to describe appellant's relationship with his mother, Helen said:

> Wayne felt protective and, you know, when you live with a man who tells you that he's going to blow your head off and actually shoots shotguns off at you and you're running across fields trying to get away from this person who does these things. My mother used to tell us when she was leaving she'd say, if I don't come back, honey, you tell the people where I went. She was

afraid my father was going to kill her. (R1461)

Linda also described their father as "mental", and said that she learned later in life that he had some kind of brain damage, possibly sustained during World War 11. (R1437-38) During the years that followed, while the children were growing up, he would get his government disability check on the first of every month, and would drink until it was gone. (R1438-39, 1441-42) He would send the kids out to buy bootleg whiskey, and would beat them if they balked. (R1441-42) Then he would lie in bed and drink, on a daily basis. (R1438) Linda did not remember her father ever working. (R1439) When he was drunk, in addition to the beatings, he would behave abusively in other ways. For example, as described by Linda, "[H]e would make us do things and like when we'd sit down to eat supper or something if he didn't want us to eat or something he would knock it all off the table and he would -- we used to just -- we would leave the house to get away from him, you know." (R1438-39)

Appellant's mother worked as a seamstress at a garment plant. (R1442) She worked long hours during the week and on Saturdays, and was not able to spend much time at home. (R1442) Linda remembered her bringing home only about 50 dollars a week. (R1443) "[T]he welfare used to take us to get clothes and stuff like that." (R1443)

As the children grew into adolescence, they would leave home as soon as possible, usually around age 15 or 16. (R1442-43,

see **R1445, 1455, 1459, 1462)** Helen (who married at **16)** testified "[I]t was awful being in school because I had the last name of Hallman. I couldn't hardly wait to get rid of that name." **(R1462)** None of the siblings finished school. **(R1444)** According to Linda, appellant quit school at about **14,** and she didn't think he made it past the sixth grade. **(R1444, 1446)** Linda and Betty described him as an extremely slow learner, who did poorly in school. **(R1444, 1454-55)** According to Helen, appellant never learned to read or write until he went to prison, and he still could not write very well. **(R1462)**

Appellant began working for a living when he was about **14.** (R1446) He did construction work. **(R1446)** Linda and Shirley both testified that he was a very hard worker, and that he worked steadily. **(R1446, 1489)**

Each of appellant's four sisters described him as a kind, soft-hearted, and generous person. **(R1448, 1457, 1464-65, 1488-89)** He is good with children, and spends time with his nephews just like they were his own. **(R1448, 1489)** When he got married and acquired a stepson, he "thought the world began and ended with [him] and that's all he could talk about was how he was going to raise this little boy, the little boy was not going to grow up like his grand-dad." **(R1464)** When (after three and **a** half years) appellant and his wife were divorced, appellant was devastated. **(R1449, 1457, 1489)** He was still very much in love with her. **(R1449)** Linda saw appellant when he visited her in Mississippi one weekend in late September of **1986** (a month before the bank robbery

and shooting incident). **(R1448-49)** She testified that appellant couldn't get over his wife; "he would just sit there in a daze and he couldn't - - he couldn't understand, you know, and he blamed it on himself." **(R1449)**

When appellant returned home to Florida, a disastrous series of events occurred. Appellant's father-in-law (to whom he remained close despite the divorce) died; that night appellant got a DWI. **(R1487-88)** Around the same time, he wrecked his truck and lost his job. **(R1450, 1488)** Linda, Betty, and Shirley each testified that appellant became extremely depressed and upset during this period of time. **(R1450, 1456-57, 1487-88)** On one occasion, described by Linda, appellant:

> called my husband one night and talked to him for an hour-and-a-half and then he turned around and called me and he was talking about not wanting to live, he didn't have anything to live for, he had lost everything he had, and he was wanting his wife back and he couldn't get her back. And he was in all this trouble with wrecking his truck and he had lost his job and he was wanting to kill himself. And we had talked to him those hours on the phone trying to talk him out of it.

(R1450-51)

William Edwards, the husband of appellant's oldest sister, Helen, is a sergeant with the Clayton County (Georgia) Sheriff's Department. **(R1490-91)** Before moving to Georgia, he was a correctional officer with the Florida Department of Corrections for six years. **(R1492-93)** Edwards met appellant, his future

brother-in-law, when he began dating Helen. (R1493-94) Appellant was 13 years old at the time, and was, according to Edwards, "a scared little boy, very scared, not knowing what he was going to do, where he was going." (R1494) In the years which followed, Edwards got to know appellant through the family relationship. (R1495) While making it clear that he did not condone the crime he committed (R1497), Edwards described appellant as kind, affectionate, and generous; "basically a good person." (R1495) "He would do anything for his family, didn't even have to be his family. If it was somebody in need he would try to help them if he could." (R1495) Edwards also described appellant as dependable and a hard worker. (R1495)

By stipulation, the results of testing conducted by Dr. Mark Zwingelberg, a psychologist, were published to the jury. (R1465-66) Appellant's IQ was in the low average range. (R1466) His reading ability fell below the third grade level. (R1466)

Linda Hallman is appellant's ex-wife. (R1467-68) She has a ten year old son, Christopher, by a prior marriage. (R1467) She testified that one of the qualities which first attracted her to appellant was his kindness. (R1473) Linda had split up with her former husband, and she wanted to send Chris to St. Joseph's Catholic School, but she could not afford the monthly tuition. (R1473) Appellant offered to pay the tuition; he did *so* even before he and Linda were married, and he continued to do *so* even after they were divorced. (R1473-74)

Appellant and Linda were married for three and a half

years. (R1473) Appellant worked steadily at constructions jobs, and Linda worked at Owens Illinois. (R1474, 1476) Appellant's paycheck "went for the bills, not for trivial stuff." (R1474) Also, appellant helped around the house; when Linda was on the late shift, appellant would pick up Chris and would cook dinner. (R1474) Asked to describe appellant as a father to his stepson, Linda testified that he had a lot of patience with Chris, and that he got involved with activities like being an assistant coach at Little League and helping with the church carnival. (R1474)

Appellant was not a Catholic when he and Linda first met. (R1474) "He said he would start going to church, he didn't know much about the catholic religion, but he got into the catechism classes and once he understood it he went all the time with us." (R1474-75)

Appellant and Linda separated around May of 1986, and the divorce became final in late September or early October. (R1477-78) During the separation, Linda would take Chris to visit appellant where he was staying. (R1478) In her testimony, Linda did not explain her decision to divorce appellant, but it was clear that she had some regrets about it:

> MR. NORGARD [defense counsel]: ... How did Wayne take the separation and divorce as for as the way he emotionally dealt with it?
>
> ... ...
>
> MR. NORGARD: Feel free to take a moment and calm yourself down if you need to.
>
> LINDA HALLMAN: Wayne really loved

> me. A lot of times you don't see stuff like this until its too late.
>
> Q. How did he act after the separation? Was it something that he was happy about when you got separated, was he depressed or upset.
>
> A. He was depressed. He was upset. He tried, you know, to talk to me and I just wouldn't listen.

(R1478)

During the same period of time their divorce became final, a number of other traumatic events happened in rapid succession. Appellant wrecked his truck, and as a result had no transportation to his construction job in the Tampa area. **(R1478-79)** Then his father-in-law died. **(R1468, 1479-80)** According to Linda, appellant had a close relationship with her whole family, but especially with her father, even after the marriage broke up. **(R1468-69, 1475)** She testified:

> It was like my dad was his dad. When my dad got sick and down where he had to go into a nursing home and even when he was at home when he was sick in bed Wayne would come by and feed him and talk to him. Dad couldn't read then because his eyes had gone. He had heart trouble and one of the first things that goes is your eyes. He'd read, you know, headlines to my dad out of the paper or an article or talk to him, just sit and talk to him, something that my mom had been with him all day and he just needed somebody to talk to and he would go to the nursing home when my father was there and feed him. He was there like clockwork at night.

(R1469)

When her father died, appellant "cried but he tried to be strong. He didn't cry in front of my mom. He tried to be strong for her and give her support." (R1480) He helped the family with the funeral arrangements. (R1479-80) Later that night, however - after her father was buried - appellant got drunk and got a DWI. (R1480) Two days later, Linda visited him at the trailer where he was staying. (R1480-81) Appellant was upset, because he knew that the DWI was a violation of his parole, and he didn't want to go back to prison. (R1481-82) He had his suitcase packed, ready to go to jail. (R1482) Linda said "[Y]ou've had such a good record for *so* long", and "[T]hey'll overlook this, won't they.'' (R1482) Appellant was pessimistic; he said "I know I'm going back to prison, there's no sense prolonging it. I've packed." (R1482)

Father Patrick O'Dorte, a Roman Catholic priest, knew the Hallmans from their attendance at St. Joseph's Church. (R1498-1500) Linda's son Chris attended the school which Father O'Dorte was in charge of. (R1500) Father O'Dorte had occasion to counsel with appellant, because of his desire to learn about Catholicism. (R1500-02) He described his impression of appellant's basic nature:

> Well, I was struck by -- immediately upon meeting him I was struck by how simple, kind of very simple. A lot of people are inhibited when they're talking to officials like priests and doctors and lawyers and he wasn't. He was there and I found him to be very upfront and honest and easily led by any question I would put to him, and

> I was also struck that the man was a gentle man by my standards. He struck me as a gentle soul or gentle person. It struck me even at the time that I wouldn't mind if he was part of my staff around at the time. That struck me, too.

(R1501)

Father O'Dorte testified that it also occurred to him at the time that it was a pity that a lot of people didn't get more education, since appellant appeared to be someone who could be led in either direction. (R1502) "... I suppose there's part of me that wanted to lead him into education." (R1503) Father O'Dorte concluded by saying that if he were in a position to do *so*, he would still offer appellant a job at his school. (R1503)[7]

Appellant testified in his own behalf in the penalty phase. His testimony concerning the circumstances of the robbery and shooting was consistent with that of the state's guilt phase witnesses (R1531-47), and his testimony concerning his life history was consistent with that of the defense's other penalty phase witnesses. (R1505-30) [In order to avoid repetition, and to keep the brief as close as possible to the page limitations of Fla. R. App. P. 9.210(a)(5), undersigned counsel will set forth here only that portion of appellant's testimony which involves the actual shooting incident in the bank parking lot].

Appellant testified that, as he was leaving the bank, the

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[7] On cross-examination, Father O'Dorte was asked if he was aware of appellant's prior conviction when he first met him. (R1503-04) Father O'Dorte replied that he was not, although he had some recollection of appellant mentioning something about his parole officer. (R1504)

cab driver started to follow him out. (R1537) He told her to stay inside. (R1537) Appellant went to the taxicab, opened the door, and put the bag and gun on the seat. (R1537) Then he realized that there were no keys. (R1537) He grabbed the bag and gun and went back to the door of the bank. (R1537) He was holding the gun behind the bag, to try not to arouse the suspicion of the security guard who was in the parking lot. (R1537) The guard started looking at him funny. (R1537) Appellant tried the door, but it was locked. (R1537) As he turned around and walked back toward the cab, he saw the guard with his gun drawn on him. (R1537) The guard was hollering something, but appellant did not know what he said. (R1537-38) Appellant thought the guard was going to shoot him; he was scared to death. (R1538) "... I don't know what ran through my head to make [me] just think look up at the eave of the building and act like you don't hear him and just keep walking and he won't shoot you, *so* that's what I did." (R1538) Appellant went to the front of the cab, and the guard got at the back of the cab. (R1538) The guard was hollering something, and appellant was trying to figure out which way to run. (R1538) Appellant's gun was still at his side. (R1538) The guard started moving around the corner of the cab, and appellant moved to the opposite side. (R1538) They were hollering at each other, and the guard raised his gun at appellant, through the back windshield. (R1539) Appellant kept telling himself "he ain't going to pull that trigger, he ain't going to shoot through all this glass." (R1539) Next thing he knew, the guard's hand moved; appellant jumped

sideways, and the glass blew out into his face and chest. (R1539-40) Appellant thought he had been shot. (R1539) He reached over the cab and fired off two quick shots. (R1539-40) Then he didn't hear any more gunfire, and he couldn't see the guard. (R1540) Appellant looked cautiously around the corner of the cab, and he saw the guard lying there with a red spot on his chest. (R1540) He thought "Oh, my God, I done shot him." (R1540) At that point, appellant testified, "So I started walking around the cab to see what had happened to him. The next thing I know, I see him raising that gun again, and I turned and as soon as I turned I heard him firing and something hit me - - -." (R1541) Appellant thought the guard unloaded his gun on him. (R1541) He felt something warm, and realized he had been shot. (R1541)[8]

Appellant ran toward the Foxfire, stumbled in a ditch, got back to his feet, and started running along the highway. (R1541) He saw a state trooper's car, and became even more panicked. (R1541) A car (Vernon Warren's) came down the road and pulled up; appellant snatched the door open and got in. (R1542)

Appellant testified that he never intended to hurt anyone in the robbery. (R1535) After his arrest, he was taken to the hospital and then to the jail. (R1546-47) "[W]hen ... they was

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[8] The physical evidence (including the broken glass and the number of fired cartridges found in each gun) was consistent with appellant's description of the incident, as was the testimony of Police Department crime scene investigators Moulden and Ivancevich regarding their reconstruction of what took place. (see R1025-26, 1081-82) Also, the sequence of events heard and seen by Pamela Harrell was consistent with appellant's testimony.

telling me my charges and when they told me I was charged with first-degree murder my legs about came out from under me, because when I left that man that man was alive and when I got in the hospital I was just in a trance, you know." (R1547) He called his ex-wife from the jail "and I said, baby, did I really kill somebody, and she told me yes." (R1547) Appellant couldn't believe it; he felt "scared, real scared, and sick." (R1547)

D. LIFE RECOMMENDATION AND OVERRIDE;

The jury recommended that appellant be sentenced to life imprisonment. (R1653, 1660) The judge set sentencing for the fol1owing week. (R1640) The defense filed a sentencing memorandum, in which it cited well-established Florida law that the jury's penalty recommendation represents the conscience of the community, is entitled to great weight, and may not be overridden unless the facts are so clear and convincing that death is the appropriate sentence that virtually no reasonable person could differ. (R1663-66) Defense counsel asserted that "The law does not allow a jury override in Mr. Hallman's case because there is a reasonable basis for the jury's recommendation contained within the facts and evidence." (R1664) The record established significant mitigating factors which related both to the character and life history of appellant, and also to the circumstances of the offense. (R1663) Defense counsel submitted the following (non-exclusive) list of reasons in support of a life sentence:

1. The Defendant's limited prior record.

2. The excellent and above average adjustment to prison along with above average attempts to better himself, not just job wise, but also in dealing with other human beings.

3. The Defendant's behavior as a parolee.

4. The Defendant's entire life history which proved his limited educational background, his third grade reading level and his low average intelligence quotient.

5. His religious background and religious activities.

6. The Defendant's exemplary work record.

7. Defendant's non-use of illegal drugs and his moderate use of alcoholic beverages.

8. His unfortunate family background and testimony regarding his abuse by his alcoholic father.

9. Evidence which indicates the likelihood that the Defendant will be a model prisoner and will also once again teach others not only job trades like welding, but perhaps more importantly to teach other individuals like him to avoid the mistakes that he has made.

10. The Court has heard all the facts and circumstances of this case which indicated that the killing of the victim was not premeditated and was not of such a nature which requires imposition of the death penalty.

11. The jury has recommended life imprisonment.

(R1663, see R1682)

At the sentencing hearing on May 11, 1987, the trial judge overrode the jury's life recommendation, and sentenced appellant to death in the electric chair. (R1683-89) In his sentencing order (entitled "Order Stating Aggravating Circumstances"), the trial court found six aggravating factors, including a finding that the killing of Mr. Hunick was "especially heinous, atrocious or cruel." (R1704-06, see R1684-87)[9] Regarding

[9] The remaining aggravating factors found by the trial court were (1) "under sentence of imprisonment" (based on appellant's parole status); (2) prior conviction of a felony involving the use or threat of violence; (3) defendant "knowingly created a great risk of death to many persons"; (4) capital felony committed during the commission of or flight from an armed robbery; and (5) "avoid lawful arrest." (R1704-06) In this brief, appellant will contend that the "especially heinous, atrocious, or cruel" factor and the "great risk of death to many persons" factor were invalid; the jury could reasonably have found that they were not proved by the evidence, and the judge erred in finding and weighing those factors (especially "h.a.c."). As for the "avoid arrest" factor, appellant will not contend that it was legally invalid, but will contend that the jury could reasonably have accorded it less weight, in view of the fact that the killing was not premeditated, and that appellant did not begin shooting until he was wounded by flying glass from a shot fired by the guard.

mitigating circumstances, the trial judge stated that he had "reviewed" the factors offered by the defense. (R1706, see R1688) Without making any clear findings that the mitigating factors did or did not exist,[10] the trial judge stated his view that "[t]hese do not outweigh the aggravating circumstances in this case." (R1707, see R1688)

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[10] See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) ("In order to have weighed the aggravating circumstances against the mitigating circumstances, the [trial] court must have found some of the latter") (emphasis in opinion). See also Hall v. State, 381 So.2d 683, 684 (Fla. 1978) (Order for Clarification) (in order to enable Supreme Court to properly review a death sentence, trial court's sentencing order must specifically delineate what aggravating and mitigating factors have been found to exist).

SUMMARY OF THE ARGUMENT

The trial judge's imposition of the death penalty in this case (overriding the jury's recommendation of life imprisonment) is replete with error. The judge found six aggravating circumstances, and declared that virtually no reasonable person would differ with him on these findings. In actuality, not only could the jury reasonably have declined to find two of these aggravating circumstances (and given less weight to a third), it was the judge who was in error in finding that this homicide was "especially heinous, atrocious, or cruel," and that appellant "knowingly created a great risk of death to many persons." The well established standards adopted by this Court clearly show that neither of these aggravators can be applied under the facts of this case. The death of Mr. Hunick, from a single gunshot wound to the chest, was not in any way "accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon. In fact, the circumstances of this homicide were considerably less heinous or cruel than the facts of many cases in which this Court disapproved trial court findings of "h.a.c." See, for example, Riley v. State; Blanco v. State; Parker v. State; Lloyd v. State; Brown v. State; Amoros v. State; Lewis v. State; Teffeteller v. State.

In order to support a finding of the "great risk of death

to many persons" aggravating circumstance, the evidence must establish more than "some" risk or a possibility of risk. Rather, as the words themselves plainly convey, **great risk" means a likelihood or a high probability. Kampff v. State, Lewis v. State, Barclay v. State, Scull v. State. In addition (again as the statutory language makes clear) many individuals, not just a few, must be placed at a high probability risk of death. Kampff, Lewis, Williams v. State, Odom v. State, Lucas v. State. In the present case, the only persons shown by the evidence to have been placed at a high probability risk of death were appellant, the security guard Lewis Hunick, and, arguably, Malcomb Fox. The shooting was done with pistols at close range in the immediate vicinity of the taxicab, with nobody but the participants in the line of fire. See Jacobs, Tafero. The people inside the bank all went to the back of the building well before the shooting began. According to police crime scene investigators, there was no evidence that any bullets were fired in the direction of the bank, and there was no damage to the windows, the door, or the interior or exterior of the structure. At most, there was an outside possibility that a stray bullet conceivably could have struck a bystander, but that was equally true, or more so, in Kampff, Lewis, Jacobs, and Tafero (in each of which this Court disapproved the "great risk of death" aggravating factor).

Not only did the judge consider improper aggravating factors, the record contains far more than ample mitigating

evidence to support the jury's life recommendation, including (1) appellant's traumatic and deprived childhood, dominated by an abusive alcoholic father [Holsworth v. State, McCampbell v. State, Burch v. State, Brown v. State]; (2) his character traits of kindness, gentleness, and generosity, as testified to by his four sisters, his brother-in-law, his ex-wife, and his priest [Roaers v. State, Washinaton v. State, Fead v. State, **Masterson v. State**, Perry v. State]; (3) his lifelong exemplary employment record [McCampbell, Fead, Holsworth, Cooper v. Duuaer]; (4) his lack of educational opportunity, his low average IQ, and his less than third-grade reading ability; *(5)* his sincere efforts to learn about the Catholic religion, in order to adopt the religion of his new family; (6) his consistently good conduct and his productivity during his prior imprisonment, and the likelihood that he would be a model prisoner if sentenced to life imprisonment [Valle v. State, Cooper v. Duaaer, Fead, Holsworth, Brown]; (7) his three and a half years of outstanding conduct on parole [Fead]; *(8)* the emotional stress he was under for about a month prior to the crime, including his divorce, the loss (through the divorce) of his stepson, the death of his father-in-law, the loss of his job, and his fear of returning to prison because of the DWI which he got on the eve of his father-in-law's funeral [Huddleston v. State, Perry v. State]; and (9) the fact that this was not an intentional or predatory type of murder, but rather a killing which occurred in the course of a robbery, and in which the actual shooting of the guard was done out of the instinct for self-preservation, after appellant had been

shot at and wounded [Norris v. State, Canndav v. State, Brown].

The jury's life recommendation, based on a multitude of valid non-statutory mitigating circumstances relevant to appellant's character and the totality of his life, was patently reasonable. See e.g. Weltv v. State, Gilvin v. State, Herzoa V. State, McCampbell; Holsworth; Perry. The judge expressed no compelling reason for overriding the jury's recommendation, and it is evident from his sentencing order that he merely disagreed with the weight which the jury gave to the evidence in aggravation and mitigation. (R1707) That would not be a proper basis for an override even if the judge's findings were all legally sustainable [Ferry v. State; see also Holsworth, Gilvin, Burch, Rivers v. State], but in addition the reliability of the judge's weighing process here was compromised by his consideration of two invalid aggravating circumstances. The jury was not misled or inflamed, and the judge had no information relevant to penalty which the jury did not have [see e.g. Herzoa v. State]. Appellant's sentence must and should be reduced to life imprisonment, in accordance with the jury's recommendation.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND IN STATING (IN ATTEMPTING TO JUSTIFY HIS OVERRIDE OF THE JURY'S LIFE RECOMMENDATION) THAT "VIRTUALLY NO REASONABLE PERSON WOULD DIFFER" FROM HIS FINDING OF THIS AGGRAVATING FACTOR.

In the early case of State v. Dixon, **283 So.2d 1, 9** (Fla. **1973)**, this Court defined the "especially heinous, atrocious, or cruel" aggravating circumstance.

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict **a** high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony **was** accompanied **by** such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or Pitiless crime which is unnecessarily torturous to the victim. **"**

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[11] See also, e.g., Cooper v. State, **336** So.2d **1133, 1140-41** (Fla. **1976); Fleming v. State, 374 So.2d 954, 958-59** (Fla. **1979);** Armstrona v. State, **399 So.2d 953, 962-63** (Fla. **1981);** Teffeteller v. State, **439 So.2d 840, 846** (Fla. **1983);** Clark v. State, **443** So.2d **973, 977** (Fla. **1983);** Blanco v. State, **452** So.2d **520, 525-26** (Fla. **1984);** Brown v. State, **526 So.2d 903, 906-07** (Fla. **1988);** Amoros v. State, **531** So.2d **1256, 1260-61** (Fla. **1988).**

Applying the above standard, this Court has, over the past sixteen years, developed a consistent line of precedent that a homicide committed by gunshot is not "especially heinous, atrocious, or cruel," within the meaning of Florida's death penalty law, unless the actual killing was preceded by the infliction of physical or mental torture. This distinction has been drawn repeatedly by this Court[12]; most recently in Cook v. State, ___

[12] A partial list of gunshot homicide cases in which the "especially heinous, atrocious, or cruel" aggravating circumstance was held to be invalid for this reason includes: Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976); Riley v. State, 366 So.2d 19, 21 (Fla. 1979); Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979); Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979); Fleming v. State, 374 So.2d 954, 958-59 (Fla. 1979); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Williams v. State, 386 So.2d 538, 543 (Fla. 1980); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); Armstrong v. State, 399 So.2d 953, 962-63 (Fla. 1981); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); McCray v. State, 416 So.2d 804, 807 (Fla. 1982); Raulerson v. State, 420 So.2d 567, 571-72 (Fla. 1982); Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983); Clark v. State, 443 So.2d 973, 977 (Fla. 1983); Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Blanco v. State, 452 So.2d 520, 525-26 (Fla. 1984); Parker v. State, 458 So.2d 750, 754 (Fla. 1984); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986); Jackson v. State, 502 So.2d 409, 411-12 (Fla. 1986); Lloyd v. State, 524 So.2d 396, 402-03 (Fla. 1988); Brown v. State, 526 So.2d 903, 906-07 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988); Cook v. State, ___ So.2d ___ (Fla. 1989) (case no. 68,044, opinion filed April 6, 1989) (14 FLW 187, 189).

In order for the "h.a.c." factor to be upheld in a gunshot homicide, there must be acts of physical or emotional torture to set the killing apart from the norm. See e.g. Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) ("[p]roof of such additional acts are provided by the evidence of the victim's hours-long ordeal" in which she was abducted at knifepoint, brought to a motel room where she was repeatedly raped, and then taken to the woods and executed); Mills v. State, 462 So.2d 1080-81 (Fla. 1985) (victim was abducted and begged for his life to no avail; he was then bound and struck on the head with a tire iron before being killed by an execution-style shotgun blast to the face); Francis v. State, 473 So.2d 672, 676 (Fla. 1985) (victim was forced to crawl on his hands and knees and beg for his life; he was placed on toilet stool, with his hands taped behind his back, for a period

(footnote continued on on the next page)

So.2d ___ (Fla. 1989) (case no. 68,044, opinion filed April 6, 1989) (14 FLW 187, 189) ("h.a.c." aggravating factor "generally is appropriate when the victim is tortured, either physically or emotionally, by the killer"; aggravating factor held invalid where victim was shot once in the chest after a brief struggle.)

In the instant case, all of the evidence (including the physical evidence presented by the state; the police crime scene investigators' reconstruction of what occurred; the testimony of state witnesses regarding their observation of portions of the shooting incident; the testimony of the medical examiner Dr. Drake and the nurse Beatrice Harrell; and the penalty phase testimony of appellant) was consistent with the following sequence of events.[13] Appellant came out of the bank, intending to drive away in the taxicab. When he got to the cab, he realized that he didn't have the keys. He went back to the front door of the bank, but found it locked. As he turned around and walked back toward the cab, he saw the security guard with his gun drawn on him. Appellant and the guard were positioned on opposite sides of the cab; the guard

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in excess of two hours; he was threatened with the injection of Drano and other forein substances into his body; and he was gagged and taunted before being shot to death); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987) (victim was lured from home, beaten so badly that part of his ear was torn off, placed in back seat and then trunk of car, and then marched into a swamp at gunpoint to die); see also Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); Squires v. State, 450 So.2d 208, 212 (Fla. 1984); Henderson v. State, 463 So.2d 196, 201 (Fla. 1985); Garcia v. State, 492 So.2d 360, 362 (Fla. 1986); Cooser v. State, 492 So.2d 1059, 1062 (Fla. 1986); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988).

[13] The evidence which establishes these facts is set forth in detail at p. 7-12, and 32-34 of this brief.

was hollering something and appellant was trying to figure out which way to run. Appellant's gun was still at his side. The guard raised his gun and fired through the back windshield and side window of the cab. THe glass blew out into appellant's face and chest. He thought he had been shot.[14] He reached over the cab and fired two quick shots. One of the shots struck the guard, who fell. Appellant, not realizing that the guard had been hit, looked cautiously around the corner of the cab and saw the guard lying there with a red spot on his chest. Appellant went over to see what had happened to him. [This, apparently was the fragment of the incident seen by Malcomb Fox (but not seen by Pamela Harrell) when, according to Fox, appellant "came up and put his gun over top of him like this"; he squatted down and looked at the guard but did not fire any more shots (R702, 721)].

Appellant had three live rounds left in his gun at that point; the guard was still alive, and appellant knew that he was still alive. Appellant could easily have executed him, but he did not. Instead, appellant turned around, and as he did so, the guard raised his gun and fired at appellant until his weapon was empty. One of these gunshots struck appellant in his lower back near the waist; the bullet exited from his lower left abdominal area. After being shot, appellant made his way to the highway, stumbled in a ditch, got up, and continued to run. When Vernon

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[14] According to Detective Harrison, when appellant was later taken to the hospital, the injury to his chest caused by the shattering glass was initially thought to have been a gunshot wound. (R1100)

Warren's car pulled up at a stop sign, appellant opened the door and got in.

Subsequently, Beatrice Harrell, a nurse (who had been a passenger in the car driven by her daughter-in-law Pamela) went to check on the guard's condition. When she got there, the guard was already dying. However, there was no visible bullet wound and very little bleeding; just two tiny spots on the chest pocket of his shirt. [The medical examiner, Dr. Drake, testified that the cause of death was a single gunshot wound to the left side of the front of the chest. After sustaining this injury, according to Dr. Drake, the guard would have gone from shock to unconsciousness to death within a matter of a few minutes].

Appellant was arrested later that afternoon, and was taken to the hospital for treatment of his injuries. It was not until the police informed him that he was charged with first degree murder that appellant realized that the guard had died. Appellant was stunned; he felt frightened and sick.

The trial judge's finding of the "especially heinous, atrocious, or cruel" aggravating factor was plainly wrong under the evidence in this case, especially when considered in light of the legal standard established by this Court. The trial judge's further statement (made in attempting to justify his override of the jury's life recommendation) that the facts supporting his findings on each of the aggravating circumstances (including, presumably, this finding of "h.a.c.") "are ***so*** clear and convincing that virtually no reasonable person would differ" (R1706) is even

more indefensible. If the "especially heinous, atrocious, or cruel" aggravator can be found in this case, then there is virtually no case in which it cannot be found; such overbroad application of an aggravating factor violates the Eighth Amendment of the United States Constitution. See Maynard v. Cartwriaht, ___ U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 372 (1988).

Virtually every first degree murder is reprehensible. See Williams v. State, supra, 386 So.2d at 543; Clark V. State, supra, 443 So.2d at 977; Jackson V. State, supra, 498 So.2d at 906. In order to fall within the category which the legislature has denominated "especially heinous, atrocious, or cruel," the homicide must be accompanied by physical torture or emotional agony to a degree which sets it apart from the norm of capital felonies. See e.g. Teffeteller v. State, supra, 439 So.2d at 846; Lloyd v. State, supra, 524 So.2d at 403; Amoros v. State, supra, 531 So.2d at 1260; Cook v. State, supra, 14 FLW at 189. Many of the gunshot cases in which this Court has disapproved findings of the "h.a.c." aggravating circumstance involved considerably more suffering by the victim, or considerably more viciousness on the part of the defendant, than what occurred in the instant case. For example, in Riley v. State, supra, 366 So.2d at 20-21, the victim was threatened with a pistol, forced to lie on the floor, bound and gagged, and then executed by a shot to the head. This Court held that "h.a.c." was improperly found. In Blanco v. State, 452 So.2d at 522, 525-26, the defendant, in committing an armed burglary of a home, cut the phone lines to a 14 year old girl's room and told

her to keep quiet. The girl's uncle appeared in the room and tried to take the defendant's gun away. The uncle was shot during the scuffle and landed on the bed on top of his niece. The defendant then shot the victim six more times. This Court held that "h.a.c." was improperly found. In **Parker v. State**, supra, **458** So.2d at **752**, **754**, the victim, a seventeen year old girl, was lured from her home by a promise that she would be taken to the woods to see her boyfriend (who, in fact, had already been murdered):

> Her first indication that something was amiss came when she saw [her boyfriend's] body in the ditch. She fell to her knees, covered her face with her hands and cried out. Almost immediately she was shot and killed, execution style. There was nothing unusual in the manner or method of effecting the crime. We do not gainsay the pathos surrounding the murder of this young girl. However, [the h.a.c.] aggravating factor cannot properly be considered.

Parker v. State, supra, **458** So.2d at **754**.

In Lloyd v. State, **supra**, 524 So.2d at **397**, **402-03**, the defendant entered the home of a woman and her five year old son, and ordered them to go into the bathroom. According to the boy's testimony, the robber demanded money from his mother. She had her wallet out and tried to give the defendant money and a ring, when he shot her twice. [A neighbor heard the woman scream before he heard the two shots]. This Court, in disapproving the trial court's finding of "h.a.c." (and in reversing the death sentence imposed by the judge notwithstanding the jury's life recommendation) said:

> We find nothing in the record which would demonstrate that this murder was "extremely wicked or shockingly evil," or "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering" of this victim. State v. Dixon, **283** So.2d 1, **9** (Fla. **1973),** cert. denied, **416** U.S. **943, 94** S.Ct. **1950, 40** L.Ed.2d **295 (1974).** Here, the victim was shot twice and died. There is nothing in the facts which sets this murder "apart from the norm of capital felonies." Id. at **9.**

Lloyd v. State, supra, at **403.**

In Brown v. State, supra, **526 So.2d** at **904, 906-07,** the defendant jumped a police officer who was trying to arrest him for armed robbery. The defendant shot the officer once in the struggle. The officer said "Please don't shoot," whereupon the defendant shot him two more times. This Court held that "h.a.c." was improperly found. In Amoros v. State, supra, **531 So.2d** at **1257, 1260-61,** the defendant shot the victim three times at close range; twice in the arm and once (fatally) in the chest. There was evidence that the victim "made a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door." This Court disapproved the trial court's finding of "h.a.c.":

> We reject the state's contention that our decision in Phillips v. State, **476** So.2d **194** (Fla. **1985),** applies. We note that in Phillips, the victim was stalked by the defendant and the defendant stopped and reloaded his weapon before firing the final shots. In the instant case, the evidence reflectstheshots were fired very soon after Amoros

> discovered the victim. On this record, we find the state has failed to establish beyond a reasonable doubt that this conduct comes within the scope of "especially heinous, atrocious, and cruel." The facts do not set this murder "apart from the norm of capital felonies.** See Dixon, 283 So.2d at 9; see also Lloyd v. State, 524 So.2d 396 (Fla. 1988).

Amoros v. State, supra, at 1260-61.

The Court in Amoros observed that it could not distinguish the facts of the case from those of Lewis v. State, supra, 377 So.2d at 641-42, 646 (Fla. 1979), in which the victim was shot in the chest, and then shot several more times as he attempted to flee. The Lewis court said:

> It is apparent that all killings are heinous - the members of our society have deemed the intentional and unjustifiable taking of human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is "especially heinous" - "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." ... The killing in the case at bar simply does not fall within that category when viewed in the context of thepublisheddecision of this Court.

377 So.2d at 646.

In Teffeteller v. State, supra, 439 So.2d at 842, 846 (Fla. 1983), a jogger was stopped on his way home by two men in a car, who demanded his wallet; when the victim said he had no money he was shot. The victim sustained massive abdomenal damage from a single shotgun blast, but remained conscious for about three

hours before dying on the operating table. This Court held that the "especially heinous, atrocious, or cruel" aggravating factor was improperly found:

> The criminal act that ultimately caused death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Teffeteller v. State, supra, at **846**.

See also Jackson v. State, supra, 502 So.2d at 411-12.

The crime committed by appellant in the instant case was not done in such a manner as to set it apart from the norm of capital felonies, and plainly does not begin to meet the definition of "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." [State v. Dixon; Teffeteller]. As previously mentioned, this Court has considered a number of cases where the defendant shot and wounded the victim, and then deliberately fired the fatal shot or shots while the injured victim was either helpless [Blanco; Brown] or vainly trying to flee [Amoros; Lewis]. In Brown, the wounded victim, a police officer, said "please don't shoot," before the defendant shot him twice in the head. In each of these cases, this Court held the finding of "h.a.c." invalid. In the present case, after appellant **came away** from the front door of the bank, an armed confrontation developed between him and the security guard, in which the guard fired the first shot. Appellant, wounded in the chest by the shattering

glass and thinking he had been shot, fired two quick shots over the cab. He then came around the cab, holding his gun in front of him, to see what happened. The guard was lying on the ground with a small red spot on his chest. He was still alive, and appellant was aware that he was still alive. If appellant had wanted to torment him, or if he just wanted to make sure the guard was dead in order to facilitate his own escape and eliminate a possible witness, he would have continued to shoot him while he was (or appeared to be) helpless, or coldly executed him with a shot to the head. But that is not how appellant acted. Instead, after realizing to his dismay that he had shot the guard, appellant turned to run away. As he did ***so***, the guard raised his weapon and fired it until it was empty; one of the bullets struck appellant in the lower back. Even then, appellant did not try to inflict any further harm on the guard, but continued to run toward the highway to try to get away.

Clearly, then, this crime was less "heinous, atrocious, or cruel" than the killings in Blanco, Brown, Amoros, and Lewis (as well as Riley, **Parker**, Lloyd, and Teffeteller); in each of which this Court reversed "h.a.c." findings. Ironically, the trial judge's asserted justification for his findings of "h.a.c." in the instant case derives from the moment in the shooting incident when appellant could have executed the victim, but didn't. The judge's finding (based on the testimony of Malcomb Fox) reads:

> The capital felony was especially heinous, atrocious, or cruel, to wit: In mortally wounding Lewis Hunick and falling (sic) him to the ground, defendant approached Hunick, knelt down over him and pointed his firearm

> at him as if to discharge another bullet into his body. The evidence indicates he was alive and conscious, therefore was aware of defendant's actions *so* it was an infliction of extreme and cruel mental anguish upon Lewis Hunick.

(R1706)

If appellant had pointed his gun at the wounded victim and deliberately shot him again, the state would undoubtedly be arguing that that made the killing "especially heinous, atrocious or cruel", and also "cold, calculated and premeditated." In fact, however, even if appellant had done that, the legal criteria for establishing either of these aggravating factors would not be met. Blanco; Brown; Amoros; Lewis ("h.a.c."); Roaers v. State, **511** So.2d **526**, 533 (Fla. **1987);** Mitchell v. State, 527 So.2d **179, 182** (Fla. **1988)** (**"c.c.p."** aggravating factor requires proof of a "careful plan or prearranged design"). Plainly, then, the fact that appellant momentarily pointed his gun but did **not** execute the guard cannot make this crime "especially heinous, atrocious, or cruel." There is no evidence - not even any reasonable inference from the evidence - that appellant was pointing the gun to torment the fallen (but still armed) guard. Rather, appellant had his gun out in front of him to protect himself; he had no way of knowing at that point whether he would get shot at again (and, in fact, he did get shot at and hit again). The apprehension that the guard would have felt at that point was momentary, and certainly no worse than what the victims would have felt in Brown, Amoros, Lewis, Parker, and Riley.

The fact that appellant had enough humanity, even in the heat of a gun battle in which he also was injured[15], to choose not to execute or inflict further harm on the wounded guard, when he had the opportunity to do *so* (and what many capital defendants would have seen as a motive to do *so)*, should not be turned around aaainst him to manufacture an aggravating circumstance which is clearly unsupportable under the evidence and the law. This killing was not "the conscienceless or pitiless crime which is unnecessarily torturous to the victim", and it was not accompanied by such additional acts as to set it apart from the norm of capital felonies. The trial court's finding of the "h.a.c." factor was wrong; and his statement that "virtually no reasonable person would differ" from his findings on the aggravating factors (R1706) is (in the context of the "h.a.c." finding) indefensible. The trial court's use of this aggravating circumstance in his decision to override the jury and impose the death penalty was highly prejudicial error. This Court should reduce appellant's sentence to life, in accordance with the jury's entirely reasonable life recommendation.

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[15] A gun battle in which (while it would not have happened if appellant had not robbed the bank or tried to escape) the actual shooting was started by the guard.

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT APPELLANT "KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS", AND IN STATING (IN ATTEMPTING TO JUSTIFY HIS OVERRIDE OF THE JURY'S LIFE RECOMMENDATION) THAT "VIRTUALLY NO REASONABLE PERSON WOULD DIFFER" FROM HIS FINDING OF THIS AGGRAVATING FACTOR.

In order to support a finding of the "great risk of death to many persons" aggravating circumstance, the evidence must establish more than "some" risk or a possibility of risk. Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Barclay v. State, 470 So.2d 691, 694-95 (Fla. 1985); Scull v. State, 533 So.2d 1137, 1141 (Fla. 1988). Rather, as the words themselves plainly convey, "great risk" means a likelihood or a high probability. Kampff; Lewis; Barclay; Scull. In addition (again as the statutory language makes clear), many individuals, not just a few, must be placed at a high probability risk of death. See Kampff v. State, supra; Lewis v. State, supra; Williams v. State, 386 So.2d 538, 542 (Fla. 1980); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Lucas v. State, 490 So.2d 943, 946 (Fla. 1986).

Thus, in Kampff, this Court disapproved a finding of the "great risk of death" factor where the defendant fired five shots (three of which struck the victim) at close range inside a bakery. Aside from the defendant and the victim, two other people were inside the bakery, and there were other people in the building and

in the general area. One of the bullets fired by the defendant ricocheted and lodged in a wall. In Lewis, the trial court's finding of the "great risk of death" factor was "based upon the fact that the victim's daughter and son were standing in the yard in the possible path of bullets when their father was shot" (377 So.2d at 646). On appeal, this Court held that the aggravating factor was improperly found.

In Jacobs v. State, 396 So.2d 713, 715-16, 717-18 (Fla)[16], this Court held that "[a]lthough the shooting occurred in

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[16] The circumstances in Jacobs (and in Tafero v. State, 403 So.2d 355 (Fla. 1981)) were as follows: "Phillip Black a Florida Highway Patrolman, was on routine patrol in the early morning hours of February 20, 1976. Riding with him was his friend, Donald Irwin, a Canadian constable on vacation. As Black drove his patrol car into a rest area along Interstate 95 he noticed a Camaro automobile in which Rhodes, Tafero, Jacobs, and her two children were sleeping. Rhodes occupied the driver's seat, Tafero the right front seat, and Jacobs and the children the rear seat.

Trooper Black stopped his car alongside the Camaro and walked to the driver's side to ask for identification. Upon approaching the car, he saw a gun at Rhodes' feet. Taking the gun he returned to his patrol car to run a radio check on Rhodes and the weapon. Rhodes exited the car while Tafero handed a second gun to Jacobs in the back seat. From the radio check Black learned that Rhodes was a convicted felon, and he returned to the Camaro to ask the identity of the car's other occupants. Noticing a gun holster on the floor of the back seat, he ordered everyone out of the car.

Tafero was slow getting out of the car, so Black pulled him out. The two struggled, until Black, with Irwin's help, subdued Tafero. While Irwin held Tafero against the patrol car, Black backed away and drew his gun. Rhodes walked to the front of the car and stood facing away from the vehicle with his hands in the air. Shortly thereafter Rhodes heard two or three shots; he turned and saw Jacobs, still in the car, with a gun her hands. Tafero escaped from Irwin's grasp, ran to the car, grabbed the gun, and shot Black and Irwin.

Tafero took the trooper's gun and some shell casings; he and the rest of the group then fled in the patrol car. With Rhodes driving, they exited Interstate 95 and entered an apartment complex

(footnote continued on next page)

at rest area close to a major highway, it was done with pistols at close range where few, not many, suffered a risk of injury. These facts fall short of the aggravating factor of risk to many persons. See Kampff v. State, 371 So.2d 1007 (Fla. 1979)."

In Tafero v. State, 403 So.2d 355, 358-59, 362 (Fla. 1981), on the same facts as in Jacobs, this Court added that the act of attempting to run the roadblock and being stopped by police gunfire did not constitute "great risk" to "many persons" as those terms were defined in Kampff.

In the present case, the shooting was done with pistols at close range [see Jacobs], and it all occurred in the immediate area of the taxicab. The people inside the bank were already at the back of the building at the point in time - well before the shooting began - when appellant came back to the door (to try to retrieve the cab keys) and found it locked. Mark Harrell and Claude Williams were riding lawn mowers in the field north of the bowling alley some 80 yards (nearly the length of a football field) away (see R810). Pamela Harrell and her mother-in-law were in their car on highway 98, all the way across the parking lot and front lawn of the bank. [The taxicab was parked in one of the spaces near the front of the bank, but off to the left of the

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parking lot where they saw Leonard Levinson emerging from his Cadillac. Rhodes, gun in hand, demanded that Levinson surrender his keys. Tafero told Levinson that they had a sick child to take to a hospital. Jacobs echoed that statement by nodding agreement. Tafero grabbed Levinson, and all the parties entered the Cadillac. With Rhodes again driving the group sped off. They were finally captured when Rhodes lost control of the car while trying to evade a police roadblock". (396 So.2d at 715-16).

building. See State Exhibits l-L, l-M, l-N, l-P, and 1-Q. The bank (and the parking spaces in front of it) was set back away from the highway. See State Exhibits **7, 8,** and **9** (aerial photographs)]. Malcomb Fox was at the parking lot exit, about to turn onto the highway, when he heard the gunshots.[17]

Appellant and the security guard were facing each other across the cab, with no one else in the immediate vicinity. The first shot, which shattered the cab windows and sent flying glass into appellant's chest, was fired by the security guard. Appellant, thinking he had been shot, fired two quick shots, one of which struck the guard. Appellant came around the cab to see what happened, and saw that the guard had been hit. When appellant turned to run away, the fallen guard raised his gun and fired until it was empty. One shot struck appellant in the back, while several of the others lodged in the cab (see **R1061-71).** Police crime scene investigators Moulden and Clayton each testified that there was no evidence that any bullets were fired in the direction of the bank, and there was no damage to the windows, the door, or the interior or exterior of the structure. **(R950-51,** 1023-24). Sgt. Moulden testified:

Q. [by Mr. Maslanik]: ***so***

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[17] Even assuming arguendo that Fox (who was in his car, near the taxicab, when he saw the guard reach for his gun and appellant pull his out of his belt, but who had wisely gotten out of the way by the time the shooting started) could be considered to have been at a "great risk of death" as defined in Kampff and the subsequent decisions, that is still only one person beside the participants; not "many persons" as meant in Section 921.141(5)(c). See Lucas v. State, supra, **490** So.2d at **946;** see also Kampff; Lewis; Williams; Odom.

basically from your investigation of the scene of the robbery inside and the outside of the bank, there was no indication that any of the people in the bank had ever been like in the line of fire or had been shot at any time during the shooting.

A. The people inside the bank?

Q. Yes.

A. That's correct.

(R1024)

Therefore, under the legal standard developed by this Court in Kampff, Lewis, Williams, Jacobs, Tafero, Odom, Barclay, Lucas, and Scull, the evidence plainly does not support the trial court's finding of the "great risk of death to many persons" aggravating factor. At most, there was an outside possibility that a stray bullet could conceivably have struck a bystander, but that was equally true (or more so) in Kampff, Lewis, Jacobs, and Tafero. Similarly to Jacobs, the shooting here was done with pistols at close range in the immediate vicinity of the cab, with nobody but the participants in the line of fire. Contrast Raulerson v. State, 420 So.2d 567, 571, (Fla. 1982) (shootout inside restaurant between defendant and police; in addition to the participants there were four bystanders who took refuge on the floor behind tables and counters; this Court held that [a] gun battle in a confined area certainly created a 'likelihood' or a 'high probability' that someone, bystanders or police officers, would be hit and killed''); Suarez v. State, 481 So.2d 1201, 1202, 1209 (Fla. 1985) (shooting took place at migrant labor camp, after high speed chase, with

three deputies beside the victim in the line of fire).

The trial judge erred in finding as an aggravating circumstance that appellant "knowingly created a great risk of death to many persons". He further erred in concluding, as part of his justification for overriding the jury's life recommendation, that "virtually no reasonable person would differ" from his finding of this aggravating factor. As the trial judge considered invalid aggravating factors ("great risk of death" and "h.a.c."), and as the record contains ample mitigating evidence to support the jury's life recommendation, the death sentence must be overturned.

ISSUE III

THE JURY COULD REASONABLY HAVE GIVEN LITTLE WEIGHT TO THE AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED TO AVOID LAWFUL ARREST.

After considerable thought, undersigned counsel has decided not to challenge the legal sufficiency of the trial court's finding that the capital felony was committed to avoid lawful arrest. This was a case of felony murder, in which the shooting presumably could have been avoided if appellant had simply surrendered when approached by the guard. However, it should also be taken into consideration that it was the guard who began the shooting by firing at appellant through the windows of the cab. Appellant was hit in the chest by flying glass, and thought he had been shot. Only then did he fire two quick shots - the only shots he fired during the entire incident - one of which struck and killed the guard.

In order to support a finding of this aggravating factor, at least where the victim is not a law enforcement officer, the requisite intent to avoid arrest, effectuate escape, or eliminate a witness must be shown to be the "dominant or only motive" for the killing. See e.g. Scull v. State, 533 So.2d 1137, 1141-42 (Fla. 1988); Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Here, the victim was not a law enforcement officer, but he was a person hired by the bank to perform a quasi-law-enforcement function. Appellant clearly was motivated to avoid arrest, but when he was struck in the chest by

exploding window glass from the guard's initial shot, his dominant motive in returning the fire was very likely the instinct of self-preservation. Cf. Cannady v. State, 427 So.2d 723, 730 (Fla. 1983). As for witness elimination, when appellant saw that the guard had been shot but was still alive, he had the opportunity to "eliminate" him and chose not to do so. See Rembert v. State, 445 So.2d 337, 340 (Fla. 1984). Under the totality of these circumstances, the jury could reasonably have given the "avoid arrest" aggravating circumstance less weight than if, for example, it had been appellant who started the shooting.

ISSUE IV

THE TRIAL JUDGE IMPROPERLY OVERRODE THE JURY'S LIFERECOMMENDATION, WHERE (A) THE JUDGE CONSIDERED INVALID AGGRAVATING FACTORS AND (B) THE RECORD CONTAINS MORE THAN AMPLE MITIGATING EVIDENCE TO SUPPORT THE JURY'S RECOMMENDATION.

In a capital case, the jury's recommendation reflects the conscience of the community, and is entitled to great weight. See e.g. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). A trial judge may not override a jury's recommendation of life imprisonment unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." See e.g. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Cannadv v. State, 427 So.2d 723, 732 (Fla. 1983); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Amazon v. State, 487 So.2d 8, 12 (Fla. 1986); Fead v. State, 512 So.2d 176, 178-79 (Fla. 1987); Holsworth v. State, supra, 522 So.2d at 354.

Only when there is no reasonable basis in the record for a jury's life recommendation - i.e., "cases when the jury can be said to have acted unreasonably" [Brown v. State, 526 So.2d 903, 907 (Fla. 1988)] - can this Court uphold a death sentence imposed by means of override. Where, on the other hand, the record contains any significant mitigating evidence - whether statutory or non-statutory - to support the jury's life recommendation, then the trial judge is not free to override it. See e.g. Weltv v.

State, 402 So.2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); McCampbell v. State, supra, 421 So.2d at 1075; Cannady v. State, supra, 427 So.2d at 731; Herzou v. State, 439 So.2d 1372, 1380-81 (Fla. 1983); Holsworth v. State, supra, 522 So.2d at 353-54; Perry v. State, 522 So.2d 817, 821 (Fla. 1988). As this Court made clear in Ferry v. State, 507 So.2d 1373, 1376-77 (Fla. 1987), review of a "life override'' focuses on whether there was mitigating evidence to establish a reasonable basis for the jury's recommendation; not on the four corners of the trial judge's sentencing order:

> The state .... suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Accordingly, where the trial judge, in overriding a life recommendation, "merely substituted his view of the evidence and

the weight to be given it for that of the jury", the override is improper.[18] Holsworth v. State, supra, 522 So.2d at 353; see also Gilvin v. State, supra, 418 So.2d at 999; Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Burch v. State, 522 So.2d 810, 813 (Fla. 1988). Similarly, even in cases where the trial judge found no mitigating circumstances, overrides have been held improper where the jury reasonably could have found mitigating factors. See Welty v. State, supra, 402 So.2d at 1164 ("Under the circumstance of this case, we believe that reasonable persons could differ. Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to nonstatutory mitigating factors which could have influenced the jury to return a life recommendation"); see also Gilvin v. State, supra, 418 So.2d at 99; Amazon v. State, supra, 487 So.2d at 13.

As this Court recognized in the "life override" case of Holsworth v. State, supra, 522 So.2d at 354-55, "[t]he 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

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[18] In the instant case, the trial judge evidently found all or at least some of the non-statutory mitigating factors proffered by appellant (see R1706-07), but concluded, in his view of the evidence, that "[t]hese do not outweigh the aggravating circumstances in this case." (R1707) It should also be noted that the trial judge's weighing process was tainted by his consideration of two invalid aggravating circumstances [see Issues I and II]. See e.g. Cannady v. State, 427 So.2d at 732; Richardson v. State, 437 So.2d at 1094 (trial judge erroneously relied on improper aggravating factor or factors in overriding jury life recommendation).

serious crimes' State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)."

In the instant case, the judge articulated no compelling reason for his overriding the jury's life recommendation [see Thompson v. State, 328 So.2d 1, 5 (Fla. 1976)]; rather, it appears that he merely disagreed with the jury's view of the evidence and their weighing of the aggravating and mitigating factors. See Holsworth; Gilvin; Rivers; Burch. As previously discussed [Issues I and II], the judge improperly found two aggravating factors - "especially heinous, atrocious, or cruel" and "great risk of death to many persons" - which were not established by the evidence, and which the jury could reasonably have declined to find. There is nothing to indicate that the jury was misled or inflamed; nor did the trial judge have any information on which to base his decision that was not available to the jury. See Herzoa v. State, 439 So.2d 1372, 1381 (Fla. 1983); Smith v. State, 403 So.2d 933, 935 (Fla. 1981); McKennon v. State, 403 So.2d 389, 391 (Fla. 1981); Brown v. State, 367 So.2d 616, 635 (Fla. 1979); contrast White v. State, 403 So.2d 331, 339-40 (Fla. 1981); Porter v. State, 429 So.2d 293, 296 (Fla. 1983). The circumstances of the killing were not of such a nature that reasonable people could not disagree as to the appropriate penalty. While the verdict form did not call for specific findings as to premeditated murder or felony murder[19], it

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[19] The defense had requested specific verdict forms to reflect jury findings of felony murder, premeditated murder, or both, but the trial court denied the request. (R1180-81)

is virtually certain from the jury's question during deliberations (and from the evidence produced at trial) that they determined that appellant was guilty of felony murder. See Norris v. State, 429 So.2d 688, 690 (Fla. 1983) (jury recommendation of life was reasonable where "the state produced no evidence that [Norris] intended to kill anyone, even though the conviction of first-degree felony murder is amply supported by the lethal assault on the deceased during commission of a burglary").[20] Also, the jury reasonably could have considered the fact that appellant did not fire until after he had been shot at by the guard and hit in the chest by the shattering glass from the cab window. Appellant, thinking he had been shot, fired off two quick shots, and that was all he fired, even though he had three more live rounds in his weapon. His act, therefore, was in all likelihood an instinctive reaction, out of self-protection. Compare Cannady v. State, supra, 429 So.2d at 730. When appellant saw the guard on the ground, and had an opportunity for reflection or calculation, he did not try to finish him off or inflict any further damage. As appellant tried to flee the scene, he was fired at repeatedly by the guard, and was hit in the lower back by one of the bullets. Still he did not attempt to further harm the guard, even after the latter's gun

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[20] Even in cases where the jury has recommended death, this Court, in conducting proportionality review, has reduced death sentences to life imprisonment where, inter alia, "the killing, although premeditated, was most likely upon reflection of a short duration." Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). In the instant case, there was no evidence of any degree of premeditation.

was empty. Under these circumstances, the jury could reasonably have concluded that imposition of the supreme penalty was not necessary or appropriate. See Holsworth v. State, supra, 522 So.2d at 354-55; State v. Dixon, supra, 283 So.2d at 7.

Finally, the jury could reasonably have based its life recommendation on the extensive evidence of non-statutory mitigating circumstances introduced in the penalty phase. Welty; Gilvin; McCampbell; Herzog; Holsworth; Perry. Taking these factors more or less chronologically, the jury could reasonably have found as a significant mitigating factor that appellant had a traumatic and deprived childhood, brought up in a family dominated by an alcoholic, physically abusive father. In Holsworth v. State, supra, 522 So.2d at 354, this Court observed:

> The physical abuse appellant suffered as a child may also have been a factor in the jury's decision to recommend life imprisonment rather than death. The jury could have concluded that appellant's psychological disturbance was influenced in part by his difficult childhood. Childhood trauma has been recognized as a mitigating factor. Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Scott v. State, 411 So.2d 866 (Fla. 1982).

See also McCampbell v. State, supra, 421 So.2d at 1075-76 (jury could reasonably have been influenced to recommend life by valid non-statutory mitigating factors, including defendant's family background); Hansboroush v. State, 509 So.2d 1081, 1086 (Fla. 1987) (recognizing "difficult childhood" as a valid non-

statutory mitigating factor which contributed to the reasonableness of jury's life recommendation); Burch v. State, supra, 522 So.2d at 813 (jury could reasonably have found as mitigating factor defendant's "family history of physical and drug abuse"); Brown v. State, supra, 526 So.2d at 970-08 (jury's life recommendation could reasonably have been based on, among other things, defendant's impoverished background, disadvantaged childhood, and abusive parents).

In the instant case, the testimony of four of appellant's sisters, and appellant himself, established that their father was a brutal, abusive alcoholic, who never contributed in the slightest to provide for his wife and eight children - a "very mean man ... no two ways about it." He sexually molested the oldest child, and he did some time in prison for it. However, as Helen put it, "no one was spared." He habitually beat all of the children; the boys (including appellant) would be made to strip naked, and he would beat them with belts, electrical straps, and other objects. When the father would come home drunk, the children would hide under the house wrapped up on blankets and quilts, ***so*** he couldn't find them. Then, after he'd drank enough to have passed out, the children would have to bang on the house, because he locked the door ***so*** they couldn't get back in.

Linda also described their father as "mental", and said that she learned later in life that he had some kind of brain damage, possibly sustained during World War 11. During the years when the children were growing up, he would get his government

disability check on the first of every month, and would drink until it was gone. He would send the kids out to buy bootleg whiskey, and would beat them if they balked. Then he would lie in bed and drink, on a daily basis. Linda did not remember her father ever working. When he was drunk, in addition to the beatings, he would behave abusively in other ways. For example, as described by Linda, "[H]e would make us do things and like when we'd sit down to eat supper or something if he didn't want us to eat or something he would knock it all off the table and he would -- we used to just -- we would leave the house to get away from him, you know.''

Appellant testified that, when he was a child, his father would:

> put like up on the wall he'd draw a circle up on the wall and make you take your shoes off and, you know, stand up on your tiptoes and draw a circle and tell you to keep your nose in a circle, you know. And when he first started if you moved, you know, your nose from the circle he'd whoop you, which it didn't matter if it was boys or girls, he'd take your clothes off, put your head between your knees, your legs there, and he'd just beat you with a belt or whatever he could get his hands on.

(1508)

While appellant (or his brother or sister) had his nose in the circle, the father would put tacks under his feet "if you stepped on the tacks, so you had to stay up there and he'd keep you up there for hours." (R1509)

Appellant's mother worked as a seamstress at a garment plant. She worked long hours during the week and on Saturdays, and was not able to spend much time at home. Linda remembered her bringing home only about ***50*** dollars a week. "[T]he welfare used to take us to get clothes and stuff like that."

Appellant quit school at age 14, when he was in about the sixth grade. He was described by his sisters an extremely slow learner, who did poorly in school. He never learned to read or write until he went to prison. [Testing conducted by Dr. Mark Zwingelberg indicated that while appellant's IQ is in the low average range, his reading ability fell below the third grade level].

In view of all this valid mitigating evidence, the jury's life recommendation could reasonably have been based, in part, on appellant's traumatic, deprived, and generally appalling childhood. McCampbell; Hansborouah; Burch; Brown.

Surprisingly, considering his upbringing, appellant did not grow up to be an abusive parent or a cold individual incapable of giving love. Instead, he appears to have tried very hard to be as unlike his father as possible. Each of appellant's four sisters (and his brother-in-law, a deputy sheriff) described him as a kind, soft-hearted, generous person. He was good with children, and spent time with his nephews like they were his own. When he got married and acquired a stepson, he "thought the world began and ended with [him] and that's all he could talk about was how he was going to raise this little boy, the little boy was not going to

grow up like his grand-dad." Appellant's ex-wife Linda testified that one of the qualities which first attracted her to appellant was his kindness. Linda had split up with her former husband, and she wanted to send her son Chris to St. Joseph's Catholic School, but she could not afford the monthly tuition. Appellant offered to pay the tuition; he did ***so*** even before he and Linda were married, and he continued to do ***so*** even after they divorced.

During his three and a half year marriage, appellant worked steadily at construction jobs, and his paycheck "went for the bills, not for trivial stuff." Also, he helped around the house; when Linda was on the late shift, appellant would pick up Chris and would cook dinner. Appellant had a lot of patience with his stepson, and he got involved in activities such as being an assistant coach at Little League and helping with the church carnival.

Although he was not a Catholic when he and Linda first met, appellant went to church with his family, and took catechism classes. Father O'Dorte testified that appellant struck him as being an essentially gentle and simple person. Father O'Dorte added that, if he were in a position to do ***so***, he would still offer him a job at his school.

The opinion of his sisters, his brother-in-law, his ex-wife, and his priest that appellant is by nature a kind, gentle, and generous man is illustrated by his relationship with his dying father-in-law. Linda testified that appellant was close with her whole family, but especially with her father, even after the

marriage broke up.

> It was like my dad was his dad. When my dad got sick and down where he had to go into a nursing home and even when he was at home when he was sick in bed Wayne would come by and feed him and talk to him. Dad couldn't read then because his eyes had gone. He had heart trouble and one of the first things that goes is your eyes. He'd read, you know, headlines to my dad out of the paper or an article or talk to him, just sit and talk to him, something that my mom had been with him all day and he just needed somebody to talk to and he would go to the nursing home when my father was there and feed him. He was there like clockwork at night.

The contrast between appellant's kindness and sensitivity toward his father-in-law, as opposed to the abusive and uncaring treatment he and his siblings received from their own father, could not be more apparent. Appellant is a man who has committed two armed robberies, one of which resulted in the needless death of Lewis Hunick, and undersigned counsel does not intend to minimize that. But, at the same time, the jury could reasonably have considered the totality of appellant's life and character, and found substantial mitigating factors weighing in favor of its conclusion that life imprisonment, and not death, was the appropriate penalty. In Rocrers v. State, 511 So.2d 526, 535 (Fla. 1987), this Court, citing Lockett v. Ohio, 438 U.S. 586, 604-05 (1978), recognized that "[e]vidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation." See

also Washinaton v. State, 432 So.2d 44, 48 (Fla. 1983); Fead v. State, 512 So.2d 176, 179 (Fla. 1987); Masterson v. State, 516 So.2d 256, 257 (Fla. 1987); Perry v. State, 522 So.2d 817, 821 (Fla. 1988).

Another valid non-statutory mitigating circumstance which was fully supported by the evidence is appellant's excellent employment record. See McCampbell v. State, supra, 421 So.2d at 1075 (jury, in recommending life, could reasonably have been influenced by non-statutory mitigating factors including defendant's exemplary employment record); Fead v. State, supra, 512 So.2d at 179; Holsworth v. State, supra, 522 So.2d at 353-54; Cooper v. Duaaer, 526 So.2d 900, 902 (Fla. 1988). Because of his family circumstances, appellant had to begin working for a living at the age of 14, with less than a sixth grade education and less than a third grade reading ability. Nevertheless, he maintained steady employment in construction work. Appellant's sisters, brother-in-law, and ex-wife all described him as dependable and a hard worker. His paycheck went to meet his family obligations, including payment of his stepson's tuition at St. Joseph's.

Still another significant non-statutory mitigating factor on which the jury's life recommendation could have been based is appellant's consistently good conduct and his productivity during his prior prison term; which could reasonably have convinced the jury that his future conduct, if he were sentenced to life imprisonment, would be similarly exemplary. See Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987) (testimony that defendant was

model prisoner during prior imprisonment, and that he would likely be a model prisoner in the future if sentenced to life, is valid mitigating evidence); Cooper v. Duaaer, 526 So.2d at 902 (evidence indicating defendant's potential for rehabilitation and productivity within prison system "is clearly mitigating in that it might serve as a basis for a sentence less than death"); Fead v. State, 512 at 179 (evidence that defendant was a model prisoner during previous commitment and a model parolee prior to homicide was a valid mitigating factor in support of jury life recommendation); Holsworth v. State, 522 So.2d at 353 (jury's life recommendation supported by mitigating factors, including defendant's "capacity for rehabilitation as demonstrated by his good prison conduct before and after the offense and his completion of several educational courses while in prison"); Brown v. State, 526 So.2d at 908 (potential for rehabilitation constitutes a valid mitigating factor in support of life recommendation).

In the present case, the evidence before the jury established that during the entire period (nearly four years) of his prior imprisonment, appellant had a spotless disciplinary record - no DRs, and not even any corrective consultations (or "speed tickets"), which are given for minor infractions of the rules. Appellant's attitude and adjustment toward other inmates and toward corrections personnel was consistently rated good or (more often) very good. In the Vocational Welding Program, his work progress was above average, his effort maximal to the level of his ability, and his behavior excellent. After graduating from

the program, he was used as a teaching aide in welding, and he received outstanding reports. During the last year of his imprisonment, he worked on the forestry squad, where he again earned outstanding reports from his supervisors. DOC official Joseph Crawford testified that vocational, educational, and peer counseling programs are available in prison for inmates serving lengthy sentences, and that appellant could participate in such programs if he were sentenced to life imprisonment. Based on this testimony, and on appellant's prison records, the jury could reasonably have concluded that appellant would be a model prisoner if sentenced to life. Fead; Holsworth; Brown; see also Valle; Cooper v. Dugger.

Not only was appellant a model prisoner, he then became a model parolee [see Fead] for three and a half years, until about a month before the bank robbery and shooting, when his life began to fall apart. He maintained steady employment, filed his reports and paid his costs of supervision "like clockwork", stayed out of trouble with law enforcement, and caused no problems to his supervisors. After two and a half years, because of his excellent behavior on parole, his supervision was reduced to minimum.

The jury could also reasonably have considered the emotional stress appellant was undergoing around the time of the crime. See Perry v. State, 522 So.2d at 821; Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985). In May, 1986, appellant and his wife separated, and the family life he had worked *so* hard to build began to slip away. Then, in late September and in October of that

year, his life basically fell apart. The divorce became final, and appellant lost not only his wife but his stepson. Linda, his wife, testified at trial

> Wayne really loved me. A lot of times you don't see stuff like this until its too late.
>
> . . . . . .
>
> He was depressed. He was upset. He tried, you know, to talk to me and I just wouldn't listen.

Appellant visited his sister in Mississippi one weekend in late September. She testified that he was still very much in love with his wife and could not get over losing her. "[H]e would just sit there in a daze . . . he couldn't understand, you know, and he blamed it on himself."

When appellant returned home to Florida, a disastrous chain of events occurred. He wrecked his truck and lost his job; his father-in-law (to whom he remained very close) died; and, on the night of the funeral, he got drunk and got a DWI. Three of appellant's sisters testified that he became extremely depressed - even suicidal - during this period of time. In addition to everything else, the DWI, as appellant was well aware, was a parole violation, for which he could be sent back to prison, despite his otherwise outstanding conduct on parole. While no decision had yet been made as to his parole status, appellant was pessimistic; his ex-wife testified that he already had his suitcase packed. It was in this state of despair, with his judgment undoubtedly impaired by his misery, that appellant decided to commit the robbery which

resulted in the unplanned shooting of Mr. Hunick.

In Huddleston v. State, **475 So.2d 204, 206** (Fla. **1985),** this Court, in holding the trial court's override of the jury's life recommendation improper, noted, inter alia, that there was evidence that at the time of the homicide Huddleston "had just lost his job, his girlfriend was pregnant and wished to put the baby up for adoption contrary to his wishes, and his parents were on the verge of getting a divorce."

Similarly, in Perry v. State, **522** So.2d 817, **821** (Fla. **1988),** this Court (after noting that it agreed with the trial court there were no statutory mitigating circumstances) said:

> There was, however, substantial non-statutory mitigating evidence presented by the defense. Several witnesses who had known Johnny Perry over a long period of time testified that he was kind, good to his family and helpful around the home and that he had never shown any signs of violence. An attorney testifiedthat when he first met him in **1982,** Perry was a highly motivated and ambitious young man. He said that thereafter Perry's life had gone downhill and that by **1985,** Perry viewed himself as a total failure. The jury knew that Perry was unemployed, that his wife was pregnant and that the couple was trying to find a place to live. There was testimony that Perry had fully cooperated with authorities in another criminal case in which he was a witness. The jury may have considered the evidence of Perry's character, his psychological stress and his relatively young age of twenty-one to counterbalance the aggravating factors. Thus, it appears that the jury had a reasonable basis for recommending life imprisonment. We cannot say

> that no reasonable person could differ with a sentence of death, as we must to uphold an override of a jury recommendation of life imprisonment. Tedder v. State, **322** So.2d **908** (Fla. **1975).**

The evidence in the present case shows that appellant's life had fallen apart far more suddenly than Perry's, and far more completely than Huddleston's. In addition, the crimes in Perry and Huddleston were intentional, brutal murders of unarmed females, while the in the instant case, appellant did not fire at the security guard until after being hit by flying glass (and believing he had been shot) from the guard's first shot at him. See Norris v. State, supra, **429** So.2d at **690** (life recommendation reasonable because, inter alia, state produced no evidence of intent to kill); Brown v. State, supra, 526 So.2d at **908** (noting, in support of life recommendation, that Brown "was not a vicious or predatory type criminal and rehabilitation thus was likely").

In summary then, the record is replete with mitigating evidence to support the jury's life recommendation in this case, including (1) appellant's traumatic and deprived childhood, dominated by an abusive alcoholic father [Holsworth, McCampbell, Hansborouah, Burch, Brown]; (2) his character traits of kindness, gentleness and generosity, as testified to by his four sisters, his brother-in-law, his ex-wife, and his priest [Roaers, Washinaton, Fead, Masterson, Perry]; **(3)** his lifelong exemplary employment record [McCampbe11, Fead, Holsworth, Cooper v. Duaaer]; **(4)** his lack of educational opportunity, his low average IQ, and his less

than third-grade reading ability; **(5)** his sincere efforts to learn about the Catholic religion, in order to adopt the religion of his new family; (6) his consistently good conduct and his productivity during his prior imprisonment, and the likelihood that he would be a model prisoner if sentenced to life imprisonment [Valle, Cooper v. Dugger, Fead, Holsworth, Brown]; **(7)** his three and a half years of outstanding conduct on parole [Fead]; **(8)** the emotional stress he was under for about a month prior to the crime, including his divorce, the loss (through the divorce) of his stepson, the death of his father-in-law, the loss of his job, and his fear of returning to prison because of the DWI which he got on the eve of his father-in-law's funeral [Huddleston, Perry]; and **(9)** and the fact that this was not an intentional or predatory type of murder, but rather a killing which occurred in the course of a robbery, and in which the actual shooting of the guard was done out of the instinct for self-preservation, after appellant had been shot at and wounded [Norris, Cannady, Brown].

The jury's life recommendation was patently reasonable. The trial court's override was, under the law and under the facts, plainly improper. The judge expressed no compelling reason for overriding the jury's recommendation, and it is evident from his sentencing order that he merely disagreed with the weight which the jury gave to the evidence in aggravation and mitigation. **(R1707)** That would not be a proper basis for an override even if the judge's findings were all legally sustainable [Ferry; see also Holsworth, Gilvin, Rivers, Burch], but in addition the reliability

of the judge's weighing process here was compromised by his consideration of two invalid aggravating circumstances. The jury was not misled or inflamed, and the judge had no information relevant to penalty which the jury did not have [Herzog, Smith, McKennon, Brown; contrast White, Porter]. Appellant's sentence must and should be reduced to life imprisonment, in accordance with the jury's recommendation.

ISSUE V

THE TRIAL JUDGE'S SENTENCING ORDER FAILS TO CLEARLY STATE WHICH MITIGATING CIRCUMSTANCES HE FOUND TO EXIST, AND IS THEREFORE LEGALLY INSUFFICIENT TO SUPPORT A DEATH SENTENCE, ESPECIALLY IN THE CASE OF A JURY OVERRIDE.

In his sentencing order (which, not coincidentally, he styled "Order Stating Aggravating Circumstances"), the trial judge delineated six aggravating factors, and rejected each of the statutory mitigating factors. (R1704-06) The judge's order then states:

> In considering nonstatutory mitigating circumstances and all other circumstances of mitigation, the Court has reviewed the entire list submitted by defendant: Defendant's good prison record, defendant's good parole record, defendant's family history and background, defendant's work record, defendant's non use of i1legal drugs and all the other circumstances listed by the defendant. These do not outweigh the aggravating circumstances in this case.

It can reasonably be assumed that the trial judge found that all or at least some of the mitigating circumstances proffered by appellant were established by the evidence, since (as this Court observed in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)), "[i]n order to have weiahed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter" (emphasis in opinion). However, in marked contrast to his detailed treatment of the aggravating factors, the judge did not

specify what mitigating factors he found. The judge's recitation of a "list" of some of the mitigating factors proffered by the defendant, and his statement that he has "reviewed" them, is inadequate to justify a death sentence, especially in the context of a life override. See Hall v. State, 381 So.2d 683, 684 (Fla. 1979) (Order for Clarification); Mann v. State, 420 So.2d 578, 581 (Fla. 1982); VanRoyal v. State, 497 So.2d 625, 628 (Fla. 1986). A "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that [the Supreme Court] can properly review them and not speculate as to what he found," Mann, 420 So.2d at 581. As this Court recognized in VanRoval, 497 So.2d at 628:

> written finding of fact as to aggravating and mitigating circumstancesconstitutesanintegral part of the court's decision; they do not merely serve to memorialize it. This is even more true when, as here, we are faced with a jury override. Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) and in Tedder v. State, 322 So.2d 908 (Fla. 1975). Thus, the sentences are unsupported.

In view of the numerous reasons why the life override was improper in this case, there is no need for a remand; appellant's sentence should simply be reduced to life. VanRoval.

ISSUE VI

THE TRIAL JUDGE ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES (ON THE NON-CAPITAL COUNTS), AND IN PURPORTING TO RETAIN JURISDICTION OVER PAROLE ON THOSE COUNTS.

The reasons stated by the trial judge in departing from the guidelines on the remaining counts of the indictment[21] were as follows:

> 1. Defendant induced a minor (Scott Anderson) to participate in acts of juvenile delinquency, to-wit; taking or stealing a firearm from his parents.
>
> 2. The offense for which defendant was sentenced was committed in a premeditated, and calculated and preplanned manner without pretense of moral or legal justification.
>
> 3. In committing the offenses for which defendant was sentenced he knowingly created a great risk of injury or death to a large number of persons.
>
> 4. Defendant committed the offense for which he was sentenced for the purpose of avoiding or preventing a lawful arrest or effecting an escape, to-wit; armed kidnapping, armed kidnapping, grand theft, first degree murder.

(R1703)

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[21] The guidelines recommended range for these offenses was 22-27 years. (R1701) The judge imposed three consecutive life sentences, and a consecutive five year term. (R1689, 1696-99, 1707)

The first reason given by the trial judge essentially amounts to contributing to the delinquency of a minor (see Section 827.04(3), Fla. Stat.), a crime for which appellant was neither charged nor convicted. See e.g. Fla.R.Cr.P. 3.701(d)(11); Scurry v. State, 489 So.2d 25 (Fla. 1986); Minninger v. State, 517 So.2d 758 (Fla. 2d DCA 1987); Brown v. State, 509 So.2d 1342 (Fla. 1st DCA 1987). The second reason is invalid because planning or calculation is common to nearly all cases of robbery and kidnapping. See e.g. Hansborouah v. State, 509 So.2d 1081 (Fla. 1987); State v. Fletcher, 530 So.2d 296 (Fla. 1988). Moreover, the evidence does not support any finding of "heightened" premeditation as to any of the crimes. Regarding the kidnapping of Vernon Warren and the taking of his car, the evidence indicates just the opposite; it was done on the spur of the moment as appellant - wounded in the chest and back - was desperately trying to get away from the scene. The third reason, great risk of death or injury to a large number of persons, is not supported by the evidence. The fourth reason, that the crimes were committed to effect an escape, is factually true as to the Warren kidnapping and theft, but does not apply to the kidnapping of Gloria Strahan or the robbery of the Savings and Loan. Even as to the Warren offenses, this is not a sufficient basis for departure. As none of the reasons given by the trial judge support a departure from the guidelines, this Court should vacate the sentences on the non-capital counts and remand for resentencing within the guidelines. Scurry. Even assuming arauendo that the fourth reason can be

considered valid, the state cannot show beyond a reasonable doubt that the improper reasons did not affect the sentencing decision.[22] Albritton v. State, 476 So.2d 158 (Fla. 1985). In that event, this Court should vacate the sentences and remand for resentencing by the trial court, without consideration of the improper reasons. Albritton.

Finally, the trial court erred in purporting to retain jurisdiction over parole for the first one-third of the sentences, since parole is no longer available under the guidelines. See e.g. Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986); McPhaul v. State, 496 So.2d 1009 (Fla. 2d DCA 1986). The retention of jurisdiction should be stricken. Roseman; McPhaul.

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[22] The offenses were committed on October 22, 1986, prior to the effective date (July 1, 1987) of the amendment which allows a departure sentence to be affirmed if any of the reasons given are valid. That amendment can not be applied retroactively. McGriff v. State, 537 So.2d 107 (Fla. 1989).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his death sentence, and remand for imposition of a sentence of life imprisonment, without possibility of parole for twenty-five years, in accordance with the jury's recommendation.

On the non-capital counts, appellant requests that this Court vacate the departure sentence and remand for imposition of a sentence within the guidelines range. Appellant further requests that the retention of jurisdiction be stricken.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
FLORIDA BAR NUMBER 0143265

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender

Public Defender's Office
Tenth Judicial Circuit
Polk County Courthouse
P. O. Box 9000
Drawer PD
Bartow, FL 33830
(813) 534-4200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 2 day of June, 1989.

Steven L Bolotin

STEVEN L. BOLOTIN

SLB/an