IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL MACK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 71,099

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On September 9, 1987, the Spring Term Grand Jury in and for Volusia County, Florida, indicted James Michael Mack for the first degree murder of Mary Eberhart. The grand jury also indicted Mack for one count of burglary of a dwelling, one count of robbery, and one count of sexual battery. (R783-784)

On April 2, 1987, the State of Florida filed a motion to consolidate Mack's case with that of co-defendant Robert Dewayne North, Jr., Case No. 86-3910-A. (R805-806) On May 15, 1987, the trial court rendered an order denying the state's motion to consolidate. (R809)

On June 9, 1987, Mack's trial counsel filed a motion for transcription of testimony or proceedings of the jury trial of Robert North held the week of May 26, 1987. (R810) On June 17, 1987, after a hearing, the trial court granted the motion as to the transcription of the testimony of all state witnesses but

denied transcription as to all other facets of Robert North's trial. (R811-812,958-974)

On July 2, 1987, Appellant filed a motion for individual voire dire and sequestration of jurors during voire dire. (R818-819) On that same date, Appellant filed a motion in limine regarding the state calling Robert North as a witness. (R820-822) Following a hearing on July 7, 1987, the trial court denied the motion in limine. The trial court granted the motion for individual voire dire concerning pre-trial publicity but denied the motion concerning death qualification of the jury. (R824-825,975-990)

This cause proceeded to a jury trial before the Honorable Edwin P.B. Sanders, Seventh Judicial Circuit of Florida, in and for Volusia County. (R1-723)

During jury selection, the trial court sustained the state's objection to James Mack personally questioning the venire. (R28-29,45)

The trial court overruled Appellant's objections and allowed the state to introduce certain photographs of the victim. (R288-294)

Over Appellant's objection, the trial court allowed a state witness to testify concerning the value of certain property. (R496)

At the close of the state's case-in-chief, Appellant moved for a judgment of acquittal. The trial court granted the motion as to the charge of sexual battery but denied the motion as to each of the other three charges. (R636-643) Appellant

presented four witnesses during the defense case-in-chief. (R550-607) The trial court denied Appellant's attempt to introduce the verdict and judgment of Robert North, Appellant's co-defendant. (R647-648) After Appellant rested, the trial court denied Appellant's renewal of the motion for judgments of acquittal. (R647)

Appellant's defense counsel waived jury instructions as to all lesser included offenses. Defense counsel did this in chambers without the presence of James Mack. (R693)

Following deliberations, the jury returned with verdicts of guilty on each of the three remaining counts. (R719-720,912-913,915)

On July 25, 1987, this cause proceeded to a bifurcated penalty phase. (R726-781) During this proceeding the Appellant sought to introduce evidence that another jury, in a separate proceeding, recommended that Robert North, Appellant's co-defendant, be sentenced to life in prison. The trial court rebuffed Appellant's attempts in this regard. (R753-755)

The state presented the testimony of three witnesses at the penalty phase. (R727-743) The Appellant presented the testimony of Mack's step-grandmother and the testimony of Jody Tipton, a friend. (R743-756) Following deliberations, the jury returned with a majority of ten recommending that the trial court sentence James Mack to death. (R775-778,916)

The state prepared a sentencing guidelines scoresheet for the non-capital offenses. The scoresheet resulted in a recommended guideline sentence of seven to nine years in state

prison. (R928) The trial court adjudicated James Mack guilty of each of the three offenses. (R929-930) The trial court sentenced James Mack to fifteen years in prison for the robbery. The trial court also sentenced Mack to a concurrent fifteen year period of incarceration for the burglary. The trial court allowed credit for 352 days previously served, but ordered that both of these sentences run consecutive to the sentence imposed for the first degree murder. The trial court orally stated that it imposed the departure sentence based on the fact that Mack was concurrently found guilty of first degree, premeditated murder which was not scored. (R951)

The trial court sentenced James Michael Mack to death on that offense. (R933,949-950) The trial court filed written findings of fact in support of the death penalty wherein the judge found five aggravating circumstances and rejected all mitigating circumstances. The trial court found that the capital crime was committed while James Mack was under sentence of imprisonment; that Mack was previously convicted of another felony involving the use and threat of violence; that the murder was committed during the commission of a burglary; that the murder was committed for pecuniary gain; and that the murder was especially wicked, evil, atrocious or cruel. (R917-918)

On September 3, 1987, Appellant filed a notice of appeal. (R936) This brief follows.

STATEMENT OF THE FACTS

Guilt Phase

Allen Aslinger and Robert Dwayne North were good friends and housemates. Aslinger dated the daughter of Joyce Sharps, North's girlfriend. (R431-433,435) During the afternoon hours of August 10, 1986, Aslinger and North took Aslinger's car and went out to "drink and party". (R434) The pair consumed a large quantity of alcohol throughout the day. (R467) The pair returned home briefly before venturing out again that evening to continue their carousing. They arrived at the American Room, a popular night spot in Deland, where they stayed through the shank of the evening. (R434-435) Aslinger incorrectly combined his intoxicants resulting in his adjournment to the parking lot where he passed out in the back seat of his car. (R435-436) Aslinger estimated that he regained consciousness between 5:00 and 6:00 a.m. North and another man sat in the front seat of the car. Apparently, North had driven the car to a different location while Aslinger slept. Aslinger identified James Mack, the Appellant, as the passenger in the front seat with North. That was Aslinger's first encounter with Mack. (R437-438)

Since he had been asleep during the drive, Aslinger was not sure of the group's new location. (R439-440) North gave Aslinger some money and instructed him to drive away but to return shortly. (R443) North and Mack got out of the car and walked down the road as Aslinger drove away. (R444) Aslinger drove a short distance before he recognized the vicinity. He considered forsaking his promise to return but feared North's

wrath. The sun was just beginning to rise when Aslinger returned to the spot where he had dropped off North and Mack approximately thirty minutes earlier. (R443-446) Although Aslinger had driven North to the victim's house in the past, Aslinger was not sure where the house was located in relation to the spot where he regained consciousness. (R447,468)

Aslinger spotted North and Mack walking down the road toward the prearranged destination. Aslinger noticed that North and Mack were carrying a blanket and a shoe box but could not remember who had which. (R446) The pair got into the back seat and requested a ride to Highway 11. (R446) Along the way, the trio stopped at a convenience store where North purchased some beer. While Aslinger and North went into the store, Mack used the phone outside. (R447) The trio then went to a nearby gas station where North bought a small amount of gas for Aslinger's car. North also purchased a six-pack of beer. (R448) The trio then got back into the car and left the Gate Station at approximately 6:30 a.m. They drove north on State Road 17-92 for a couple of miles. North and Mack were passing jewelry back and forth in an attempt to determine its authenticity. Aslinger noticed a ring with two to three rows of diamonds as well as a man's wedding band. He also noticed a couple of ladies' rings and some necklaces. North and Mack threw several pieces of costume jewelry out of the car window. This procedure continued for approximately twelve miles. The group then took Highway 11 to Reynolds Road until they reached DeLeon Springs. They proceeded North on 17-92 to Spring Garden Ranch Road where they

turned right. They took Reynolds Road again back to Highway 11 thus completing a large geographical loop. (R449-452) They eventually arrived at Highlands Fish Camp Park near the St. Johns River. (R452-453) The trip from the Gate Station to the fishing camp had taken approximately thirty minutes. (R453) Once they reached the camp, they cleaned out the car and burned the garbage, beer cans, blanket and shoe box. (R453-454) They also burned a small metal jewelry box with a felt covering. (R454-455) They threw the remaining unburned metal portion into the river. (R455)

Aslinger noticed that North did not show any emotion, while Mack acted somewhat nervous. (R454) North and Mack whispered to each other during the burning. (R456) At one point Mack asked North if North thought that they should tell Aslinger. (R456) North stated that he had killed someone. (R474) Mack warned Aslinger that he could end up the same way. Aslinger believed that Mack was trying to scare him so that he would not go to the police. (R457) Aslinger noticed a scratch down the center of Mack's throat. When Aslinger inquired, Mack allegedly told Aslinger that, if anyone asked, Aslinger should say that North and Mack had been wrestling. (R457) Aslinger admitted that this could have been the truth. (R472-473) Subsequent evidence indicated that Mack sustained the scratch while playing with his kids the day before. (R591-606)

Since North needed to see his probation officer, the group went back to Deland and arrived at the probation office at approximately 8:00 a.m. (R458) While North met with his

probation officer, Mack got into the front seat and attempted to rub the inscription from inside one of the rings. Aslinger and Mack started out for the nearby Gold and Silver Exchange, before they thought better of it and returned to pick up North. (R459) Mack returned to the back seat and North got into the front seat. (R459)

Pursuant to North's request, the trio then went to the home of Bobby Lee, a long-time family friend whom North referred to as his uncle. (R459-460,476-477) North frequently used Lee to pawn items for cash. (R477) North introduced Mack to Lee. (R479-480) North pawned a plain gold band to Lee for forty dollars. (R478-479) Mack offered to sell Lee a gold, man's ring with four bars of diamonds (approximately sixteen diamonds in all) for three thousand dollars. Lee estimated the ring's value to be between eight and nine thousand dollars. Lee picked up the ring with a stick so that he would not leave any fingerprints. He eventually declined to buy the ring. (R480-482)

After leaving Bobby Lee's house, North, Mack and Aslinger drove to John's Drive-in Liquors and discussed buying a bottle. They went to another gas station where North bought Aslinger ten dollars worth of gas and some soft drinks. (R461) The trio then proceeded to Mack's father's house on Voorhis Avenue. (R462) At the house, Aslinger made Mack remove the jewelry from Aslinger's car. Mack complied and threw the bag of jewelry underneath some trees in the yard. (R462) After a short stop, the trio drove to Hamm's Bar in Deland where Aslinger

dropped off North and Mack. (R462-463) At Hamm's, they would soon encounter Karen Campbell.

Karen Campbell, a resident of Astor, came to Deland on August 11, 1986, for a day of shopping with her husband. Perhaps coincidently, Campbell wore a ring with three rows of diamonds at Mack's trial. (R516) At approximately 11:00 a.m., Karen and her husband stopped at Teet's Bar for a drink where they met some friends, and the day quickly degenerated into a drinking binge. Campbell admitted that she was drunk most of that day. She admitted that she did not drink often and was not good at keeping track of time when she did. (R488-490) During Campbell's day of bar-hopping, she encountered her friend Robert North, at Hamm's Bar. Mack accompanied North. Candy Croker, a friend of Campbell's, introduced Mack to Karen Campbell. (R485-493) Campbell and her husband both developed an aversion to James Mack as the afternoon wore on. (R501-502,537-538,579)

Mack showed Campbell a white-gold ring with a missing gem stone. Mack stated that it had belonged to a relative and that he wished to sell it. Campbell expressed no interest in buying that particular ring. (R493-494) Mack showed Campbell a second ring that appeared to be a large man's ring with three rows of stones that appeared to be diamonds. There were approximately five stones in each row. (R495) Campbell testified that Mack offered several explanations as to his acquisition of the ring, none of them consistent. (R495) Karen's husband, Donald, did not hear these inconsistencies. (R468) North and Mack alternated possession of the ring throughout the afternoon, but

Campbell did not remember North displaying the ring to anyone in the bar. Campbell testified that Mack showed the ring to her and several others in the bar. (R495-496) Campbell continued negotiations to buy the ring throughout the afternoon. The ring was worth approximately two to three hundred dollars to Campbell if her husband liked it. She estimated that it was worth at least that and possibly much more on the open market. (R496-497) Negotiations continued after Campbell's husband expressed interest in the ring. When the price reached $150.00, Campbell and her husband decided to purchase the ring. (R497-499) Donald Campbell left for their home in Astor to retrieve the necessary cash. (R499-500) Karen Campbell and Mack continued to haggle. (R501) Mack continued to show the ring to others in the bar. (R500).

Throughout the negotiations, Campbell and Mack continued to drink. Campbell believed that Mack was intoxicated. (R501) At one point during the negotiations, Campbell felt badgered by Mack concerning the price. She responded by hitting Mack. (R501-502) Campell also testified that during the negotiations, Mack stated simply that he had killed an old woman for the ring without stating any further details. (R502-503) Donald Campbell did not hear this admission. (R568) Karen was skeptical about Mack's boast. (R502-503) When she became convinced that the statement was true, she slapped Mack. She testified that the slap resulted from her abhorrence of violence. Mack asked if she would like a better shot at him as he stood up. She responded

with another slap. (R504) Campbell also resented Mack's low opinion of one of her former lovers. (R537-538)

At another point during the negotiations, Campbell snatched the ring without Mack noticing. (R505) Since she was wearing a denim skirt without pockets, Karen slipped into the ladies' room and hid the ring inside her vagina. (R506,520) Karen intended to secure the ring before reporting the matter to the police. (R503-531) Karen did not intend to pay for jewelry that the police would not let her keep. Unfortunately, she never seemed to find the time to call the police to inform them that she had purloined some critical evidence. (R508-509,531)

When Mack discovered that the ring was missing, he emptied his pockets in a frantic search. Mack met with no success when he asked North if he had the ring. (R506) Mack and North argued, blaming each other for the loss. (R507-508) Mack then confronted Karen who denied taking the ring. Mack became agitated and asked other patrons to empty their pockets. The management eventually asked Mack to leave the bar as a result of his non-physical excitement. (R507)

At some point during the afternoon, Karen Campbell advised her friend, Robert North, to turn himself in to the police. North was distraught that afternoon as he recalled his own mother's murder. Karen attempted to console North. (R515-516) She gave North a quarter and urged him to call the police. North eventually used the phone and then left the bar. (R509-510) Karen was not sure if she saw North again that day. (R509-510)

Investigator J.D. Brown of the Deland Police Department had known Robert North for almost ten years. Brown had arrested North once or twice in the past. Brown and North had a good rapport. At approximately five o'clock p.m. on August 11, 1986, Robert North called Investigator Brown at Brown's office. Following a short conversation, Brown met North behind a Deland restaurant. North had what Brown considered could be important information. However, since North had been drinking, Brown was skeptical. (R274-280) Investigator Brown enlisted the aid of John Bradley, another investigator, and the pair talked further with North. Following North's instructions, the three men drove to 815 South Montgomery. North knew the victim, having done yard work for her several times in the past. Eberhart paid North for the work by check. (R344-345,447,468)

As the trio approached the house by car, Brown observed that North became noticeably nervous and talkative. (R280-282) After receiving no response at the front door, the three men went to the back corner of the house. (R282) Brown entered the back door which was ajar, while Bradley and North remained outside. (R284-285) North remained outside during the investigation. (R309-313) The interior of the house seemed to be in order, until Brown reached the bedroom in the northeast corner. That particular room appeared to be in substantial disarray. (R285-287) Brown spotted the body of Mary Eberhart situated on the bed with her head hanging over the side. Brown noticed blood on the floor. (R288-297) Brown left the house without touching anything. Brown notified the Volusia County Sheriff's Office once

he determined that the house was located in the Deland city limits. (R299) Brown and Bradley turned Robert North and the investigation over to the deputies who arrived at the house shortly thereafter. (R300-301)

Pursuant to a request by Captain Carroll of the Volusia County Sheriff's Office, Investigator Brown and Investigator Nibler, also of the Deland Police Department, went to a downtown bar in an attempt to locate a white female who allegedly was offered some jewelry to buy. (R301-302) They found Karen Campbell at Teet's Bar. Brown and Nibler talked to Karen and Donald Campbell briefly outside the bar. Donald Campbell drew a picture of the ring that North and Mack had in the bar that afternoon. (R510) After the Campbells related the events of that day, the police informed the Campbells that they would need to come downtown. (R510-511) At that point in time, Karen Campbell still believed that she had the ring in its safe hiding place. However, during a trip to the ladies' room at Teet's Bar, she discovered that, although she had taken the precaution of wearing underwear, the ring had mysteriously disappeared. (R511)

Karen Campbell went to the police station that evening. She testified at trial that she was unable to give any information that evening due to her state of intoxication and emotional state. Additionally, she associated unpleasant memories with the police station, since it reminded her of a rape that she had suffered ten years previously. (R512-514) She left the police station that night without giving a statement.

Karen Campbell returned to her home that evening. She went to bed without looking further for the ring. The next day, she examined herself but still could not find the ring. Her husband searched as well with no success. (R434-436) A subsequent trip to her gynecologist also failed to net the ring. (R536-537) Interestingly, Karen Campbell wore a ring with three rows of diamonds while she testified at Mack's trial. (R516)

After meeting with Karen Campbell, Brown returned to the scene of the homicide. (R302) Again at Captain Carroll's request, Brown participated in the surveillance of a house on West Voorhis where Mack's parents lived. (R302) When Brown learned that Mack was in the house, Brown summoned numerous law enforcement personnel who surrounded the house. (R302-303) The police encountered Mack's father in the back yard. In response to their questions, Richard told the police that his son was asleep on the couch. (R318) Mack woke up as the police grabbed his arms and handcuffed him. (R319) Police escorted Mack out of the house and proceeded to pat him down before placing him in a patrol car. (R320-321) In Mack's pocket, Tim Mattingly, a Deland patrolman, found a small, white-gold ring with a stone missing from the ring's setting. (R321-322) Karen Campbell tentatively identified this ring as the first ring that Mack showed to her at Ham's that afternoon (i.e. the ring that she had no interest in buying). (R493-494) Hearsay evidence indicated that this particular ring belonged to Mary Eberhart's brother, who lived in a nursing home at the time of the murder. (R339-341,411,414-415)

At approximately 9:00 p.m. that evening, an EVAC unit transported the body of Mary Eberhart from her home to Halifax Hospital. (R334-338) An autopsy revealed various bruises and lacerations in the vicinity of the head, arms, hands and upper body. These injuries were consistent with blows from a closed fist. (R354) The infliction of these blows could very well result in injury to the assailant's hands. (R366-367) Significantly, several law enforcement officers observed that Robert North's right hand was bruised and swollen at the time of his arrest. (R304,413-414,585,588). In fact, Deputy Page noticed that North grimaced during their initial handshake. (R585-588) Page took photographs of North's injury for evidentiary purposes. In contrast, no one noticed any injuries to James Mack's hands when he was arrested. (R322-323,327) A common steak knife protruded from the left side of the victim's neck. The cause of death was probably due to blood loss or excitement from the knife wound. (R347-355) The medical examiner also found some minor bruises in the buttocks region. (R356-357) The knife severed the jugular vein which undoubtedly caused rapid bleeding. This resulted in a quick drop in blood pressure culminating in fainting, a state of unconsciousness and followed by coma and death in very quick succession. (R359-360)

Mike Rafferty, a crime scene analyst with the Florida Department of Law Enforcement, processed the house at 815 South Montgomery Avenue. (R371-374) Rafferty surmised that the point of entry was apparently made by knocking out the screens on each side of the outside door so that one could reach in and open the

door from the inside. (R378) The Florida and dining rooms appeared normal as did the kitchen. A writing desk in the living room had several drawers open. The phone line in the living room had been cut. (R380-382) In the bedroom where the body was found, several drawers had been pulled out of the night stand and one of the dressers. Rafferty found jewelry located in a bedroom trash can. (R382) Since most of the house appeared normal, Rafferty focused his investigation on the bedroom where the body was found. (R386) The fact that only one room in the house had been ransacked was consistent with the theory that the intruder was familiar with the house and knew what he was looking for. (R379,386,400-401) On the floor of the bedroom Rafferty found pillows as well as items from Eberhart's purse. (R383) Rafferty processed the entire house as well as the knife found in the body for latent fingerprints. (R393) He found two latent fingerprints which he obtained from the dresser drawer in the bedroom. (R393-394) One of these prints matched the known print of Robert North. (R550-565) Rafferty also processed the scene of the fire at the fish camp and Aslinger's automobile. (R395-398) Rafferty found no tangible, physical evidence (fingerprint or otherwise) indicating that that James Mack was ever in Mary Eberhart's house. (R401,415,550-565)

Harry Hopkins, a serologist with the FDLE, analyzed the stains found at the crime scene and also as analyzed the clothing of Robert North and James Mack. Hopkins conducted much analysis but was unable to reach many helpful conclusions. Hopkins could only be sure that North's jeans and t-shirt contained small

stains consisting of human blood. Hopkins also found a small human blood stain on Mack's pants. Hopkins was unable to determine the blood type, nor could Hopkins determine the age of the stains. (R609-635)

Another jury had already found Robert North guilty of the first degree murder of Mary Eberhart and related crimes. (R484,587) North awaited sentencing at the time of Mack's trial. Allen Aslinger, originally charged with murder and related offenses, pled guilty to accessory after the fact to murder, burglary and grand theft. (R431-433,465-467) The state placed him on probation such that he suffered no incarceration.

Penalty Phase

During the bifurcated portion of the trial, the state introduced evidence that Mack had been convicted and sentenced in 1975 for committing an assault with the intent to commit a felony. (R736-743,920-921) Garfield Lear, an officer with the Florida Department of Corrections explained that Mack had been convicted and sentenced in January of 1986 for grand theft. (R727-729,922-925) Lear explained that the Florida Legislature established the Supervised Community Release Program in an effort the relieve overcrowding in the state prisons. The program allows inmates assigned to a work release center who are also within 90 days of their release date to go home and complete their work at home. (R727) Lear testified that the Department of Corrections placed James Mack in this Supervised Community Release Program on July 22, 1986.

In mitigation, Lear testified that James Mack's biggest problem was obviously alcohol. In Lear's experience, Mack's violent behavior occurred when he became intoxicated. (R731-735) Mack's grandmother also pinpointed Mack's problem with alcohol. Chisolm concluded that Mack simply could not "hold his liquor." (R746) She cited the fact that Mack's personality changed dramatically when he drank. Chisolm also blamed alcohol as the sole reason for Mack's divorce from his wife, Bridgette. (R747)

Chisolm further pointed out that James Mack is part of a family that includes a father, a step-mother, and three brothers. (R744) Mack is the proud father of Jennifer, age four and Robbie, age two. (R744-745) Chisolm called James a "very good"

father. She frequently watched Mack play with his children with great care and joy. (R745) James Mack loves his children and they love him. (R745-746)

Jody Tipton, a friend of Mack's, also testified in mitigation. (R748-752) She also detailed Mack's problems with alcohol reaching conclusions similar to Chisolm's. Tipton also related the details of the love between Mack and his two children. (R750-751)

The trial court did not allow Mack's jury to hear that another jury had recommended that North's life be spared. Mack's jury did hear evidence at the guilt phase that indicated that North might have been more culpable than Mack for the murder of Eberhart.

SUMMARY OF ARGUMENTS

POINT I: The charge conference was held off the record without the presence of James Mack. During a brief conference in chambers, (also outside the presence of Mack), defense counsel waived the lesser included offenses of first degree murder. This left the jury with a choice of finding James Mack not guilty or guilty of first degree murder. This clearly violates the holding of Harris v. State, 438 So.2d 787 (Fla. 1983), wherein this Court held that the record must clearly reflect a personal, knowing and intelligent waiver by the defendant. Such a waiver cannot be made by counsel outside the presence of the defendant, unless the record reflects a subsequent knowing and intelligent acquiescence by the defendant.

POINT II: At the penalty phase, the trial court denied Appellant's proffer of the certified copy of the life recommendation returned by the jury at Robert North's trial. Robert North, Mack's co-defendant and accomplice, was tried in a separate proceeding and had not been sentenced at the time of Mack's trial. The exclusion of this pertinent evidence violated the dictates of Skipper v. South Carolina, 476 U.S. __ (1986) and Eddings v. Oklahoma, 455 U.S. 104 (1982). The exclusion of any evidence relevant to mitigation cannot be excluded at the penalty phase. Since the treatment of accomplices is relevant in a capital setting, reversible error occurred. A critical issue at Mack's trial was the comparative culpability of North and Mack.

POINT III: The death sentence imposed by the trial court was improper for a variety of reasons. Appellant initially attacks the perfunctory nature of the written findings of fact contending that the absence of detail precludes meaningful review. The trial court also impermissibly doubled the aggravating circumstances relating to pecuniary gain and felony murder. The trial court also erred in finding that the crime was committed while Mack was under sentence of imprisonment. Appellant contends that Supervised Community Release is more analogous to probation than to parole. The evidence does not support the finding that the murder was especially heinous, atrocious or cruel where the victim did not suffer for any length of time. The trial court also failed to apply the proper standard relating to mitigating evidence set forth by this Court in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987). The mitigating circumstances outweigh the aggravating circumstances. When compared to other capital crimes, Mack's offense does not justify the death penalty.

POINT IV: The trial court imposed a departure sentence on the non-capital offenses without providing written reasons. An oral pronouncement is insufficient. State v. Jackson, 478 So.2d 1054 (Fla. 1985).

POINT V: This point urges reconsideration of constitutional attacks on Florida's death sentence and procedure. This Court has already rejected these issues which are raised here for preservation purposes.

POINT I

PURSUANT TO HARRIS V. STATE, 438 So.2d 787 (Fla. 1983) THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY OMITTING JURY INSTRUCTIONS IN A CAPITAL TRIAL REGARDING NECESSARILY LESSER INCLUDED OFFENSES WHERE THE DEFENDANT DID NOT PERSONALLY, KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO SAID INSTRUCTIONS, THEREBY DEPRIVING JAMES MACK OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW.

Following final summation by defense counsel and prior to final summation by the state at the guilt phase, the trial court called a brief recess. (R692) During that recess, the trial court held a short conference in chambers outside the presence of James Mack whereupon the following transpired:

> MR. ROBBINS (defense counsel): Your Honor, at this time, the defense would waive the lesser included offenses of first-degree murder being included in the jury instructions and read to the jury.
>
> MR. MARSHALL (prosecutor): Would that waiver also include lesser includeds as to burglary of a dwelling with an assault and robbery?
>
> MR. ROBBINS: Yes, it would.
> Your Honor, yesterday, July 23rd 1987, the Defendant James Michael Mack represented to me, his defense attorney, that he would waive his appearance at the charge conference. (R693)

Afterwards, the state presented its final summation. The record on appeal reveals that James Mack did not personally express a knowing and intelligent waiver of his constitutional right to the necessarily lesser included offenses contained in the charge of

first degree murder charge. This point is controlled by Harris v. State, 438 So.2d 787, 797 (Fla. 1983), wherein this Court held:

> But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

This Court affirmed Harris' conviction and sentence where defense counsel waived the instructions on any lessers under the charges of first degree murder, burglary and armed robbery. Defense counsel announced that the waiver was pursuant to conversations with Harris. The trial judge then conducted a personal colloquy with Harris in open court on the record:

> THE COURT: Mr. Harris, have your lawyers explained to you what a lesser included offense is?
>
> THE DEFENDANT: Yes.
>
> THE COURT: For example, on the crime of murder, you understand the penalty is either death or life and there are certain lesser included crimes which include second-degree murder which is punishable by probation to life imprisonment; third-degree, probation to fifteen years, and manslaughter, fifteen years.
>
> Do you understand that? Your attorneys have indicated they do not request any lesser included crimes.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is that your choice?
>
> THE DEFENDANT: Yes, sir.

Id. at 795-796. This Court held that Harris knowingly and intelligently waived his right to instructions on necessarily lesser included offenses.

Such is clearly not the situation in the case at bar. The waiver as to the jury instructions as to the lesser included offenses was through defense counsel, in chambers, and outside the presence of James Mack. The trial judge never conducted the type of colloquy which this Court deemed to be necessary in Harris, supra. There was no subsequent, knowing acquiescence by James Mack. In Harris, this Court held that a capital defendant, as a matter of due process, is entitled to have the jury instructed on all necessarily lesser included offenses. While the right is capable of waiver by the defendant, this Court found the right sufficiently integral to due process in the capital context to require a personal, as well as a knowing and intelligent waiver established on the record. Jones v. State, 484 So.2d 577, 579 (Fla. 1986).

In Beck v. Alabama, 447 U.S. 625 (1980), the United States Supreme Court held that a state cannot prohibit the giving of lesser included offense instructions in a death case without violating the United States Constitution. However, a defendant may waive his right just as he may expressly waive his right to a jury trial. Patton v. United States, 281 U.S. 276 (1930); Davis v. State, 159 Fla. 838, 32 So.2d 827 (1947); Fla.R.Crim.P. 3.260. James Mack never waived this right of constitutional proportions.

As this Court stated in Jones, supra, the Harris holding was based in part on Beck v. Alabama, 447 U.S. 625 (1980). In Beck, the United States Supreme Court struck down an Alabama statute prohibiting a judge in a capital case from instructing the jury on lesser included offenses. The Beck Court pointed out the "significant constitutional difference between the death penalty and lesser punishments," 447 U.S. at 637, and reasoned that the failure to give the jury the "third option" of convicting of an appropriate lesser included offense, as opposed to either conviction or acquittal impermissibly enhanced the risk of an unwarranted conviction. Without a "third option," a conviction could indicate a jury's belief that the defendant had committed some serious crime deserving of punishment, while an acquittal could reflect a hesitancy to impose the ultimate sanction. The Beck Court held that such possibilities "introduce a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." 447 U.S. at 643.

In Jones v. State, 484 So.2d 577 (Fla. 1986), this Court declined to apply the formal requirement of Harris in a non-capital context. This Court also suggested that the facts in Jones were poor ones on which to carve out an exception to the general principle that a client is bound by the acts of his attorney performed within the scope of the latter's authority. Id. at 579. Jones was present at the charge conference where trial counsel asked Jones if he understood the consequences of the waiver. The trial counsel stated that he had conferred with

the defendant concerning this issue prior to the conference in chambers. The trial court instructed Jones' defense counsel to explain to Jones the definition of a lesser included offense. After a pause in the proceedings, the defense counsel stated that Jones understood and still wished to waive the lesser offenses. Jones, supra at 578.

The case at bar, unlike Jones, is a capital case without any troublesome scenario involving Mack's acquiescence in defense counsel's waiver of the instructions as to the appropriate lesser included offense. Harris, supra, is controlling. The requisite Harris colloquy is not present in the instant case. Harris, supra, indicates that an error such as this one can never be harmless. It certainly could not be considered in a case such as the one at bar. The jury heard voluminous evidence that pointed to Robert North as the actual culprit. The physical evidence was entirely consistent with a defense theory that James Mack remained outside the house while North entered and committed the burglary and murder. The jury could very well have returned with a verdict of guilt as to a more appropriate lesser included offense rather than first degree murder. It is therefore abundantly clear that this Court must reverse Mack's first-degree murder conviction and death sentence and remand for a new trial.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE AT THE PENALTY PHASE IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENTS AND CONTRARY TO THE DICTATES OF SKIPPER V. SOUTH CAROLINA, 476 U.S.__ (1986), AND EDDINGS V. OKLAHOMA, 455 U.S. 104 (1982).

At the conclusion of the guilt phase, the trial court allowed the record to reflect that defense counsel had previously asked for an opportunity to place a motion on the record relating to his request to offer into evidence a certified copy of the judgment and verdict form in Robert Dwayne North's case. (R647-648) North, Mack's co-defendant, was accused and convicted of the same offenses as Mack. (R484,587) The trial court refused to admit Mack's offer of evidence, "for, among other grounds -- reasons, that is, his conviction has already been introduced into the record by at least one witness and it's cumulative." (R648) During Mack's penalty phase, the defense counsel tendered the certified copy of the life recommendation returned by the jury at Robert North's trial. Defense counsel pointed out that this evidence had never been heard by the jury, since Mr. North did not testify at Mack's trial. Defense counsel argued that the evidence was relevant both as to the aggravating circumstances as well as to the mitigating circumstances. Defense counsel pointed out that the life recommendation for North was definitely a circumstance of the offense. (R753-754) The state objected by stating the following:

> MR. MARSHALL (prosecutor): Your Honor, the State objects to that. First of all, we've spent the entire week listening to the defense trying to keep out everything about Robert North and what he said and what he did now suddenly it looks like it's going to be to their advantage. Now they want to bring something in about Robert North.
>
> Secondly, the evidence presented to the Robert North jury was not the evidence presented to the James Michael Mack jury and for this jury to be confronted with some recommendation made by another jury based on other evidence would be improper and frankly I don't see how or what applies to Robert North, the recommendations made as to Robert North has anything to do with this Defendant's character and that's basically what this whole mitigating process is about, presenting to this jury anything in mitigation about this Defendant not what some jury thought about some other Defendant. (R754)

The trial court sustained the objection and refused to admit the evidence. (R755)

A trial judge should exercise the broadest latitude in admitting evidence during the sentencing portion of a capital case. Messer v. State, 330 So.2d 137 (Fla. 1976). There should not be a narrow application or interpretation of the rules of evidence at the penalty hearing, whether in regard to relevance or as to any other matter except illegally seized evidence. Alford v. State, 322 So.2d 533 (Fla. 1975).

As this Court well knows, evidence of non-statutory mitigating circumstances is admissible in a capital prosecution. Jackson v. State, 438 So.2d 4 (Fla. 1983). In Perry v. State, 395 So.2d 170 (Fla. 1980), this Court held that exclusion of the testimony of the defendant's mother in the sentencing phase

concerning the defendant's age, background and upbringing constituted reversible error. The probable sentence of an equally culpable accomplice could certainly be considered by a jury as a non-statutory mitigating circumstance.

In the determination of the appropriate sanction for a capital offense, the sentence of an accomplice is a factor which may be considered along with evidence of complicity. Malloy v. State, 382 So.2d 1190 (Fla. 1979). The sentence of an accomplice may greatly affect the possible imposition of the death sentence on a co-defendant. Gafford v. State, 387 So.2d 333 (Fla. 1980). In Brookings v. State, 495 So.2d 135 (Fla. 1986), this Court emphasized that treatment of accomplices (even less culpable ones) is an important consideration for the jury at the penalty phase. In the instant case, the jury heard (during the guilt phase) that Robert North had been convicted for the murder and related charges by another jury in a separate proceeding. (R484,587) The jury learned this through the testimony of two witnesses. The trial court denied Appellant's attempt to introduce a certified copy of Robert North's judgment and verdict form into evidence at the guilt phase. (R647-648) Since this evidence was cumulative at the guilt phase, Appellant does not now assert this particular point as error. However, the jury never learned anything concerning Robert North's punishment at either phase of the trial. Indeed, North had not been sentenced at the time of Mack's trial.

North's jury recommended life imprisonment rather than death. It was this fact that defense counsel sought to present

to the jury at Mack's penalty phase. A life recommendation is entitled to great weight in the consideration of the appropriate sentence. Tedder v. State, 322 So.2d 908 (Fla. 1975) In fact, a trial court cannot override a jury's life recommendation unless, under the facts, no reasonable man could differ as to the appropriateness of the death sentence. Id. It is therefore clear that the jury's life recommendation in Robert North's trial is indeed relevant evidence at James Mack's penalty phase. Mack's defense counsel sought to introduce this particular piece of evidence and undoubtedly would have strenuously argued this particular factor as a non-statutory mitigating circumstance, if the trial court had given Mack that opportunity. Appellant submits that the error therefore cannot be considered to be harmless. Certainly, the error is not harmless beyond a reasonable doubt. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987) and State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). If the evidence had apprised Mack's jury that North might get life rather than death, they could have been outraged at the potential injustice through sentence disparity. It would have played an important role in their consideration of the appropriate sanction for James Mack.

This Court should be especially wary of the exclusion of any evidence that a capital defendant proffers as non-statutory mitigating evidence. Any limitation on the consideration of mitigating evidence renders a death sentencing procedure to be constitutionally infirm. See Hitchcock v. Dugger, 481 U.S. __, 95 L.Ed.2d 347, 107 S.Ct. (1987). This Court should also

consider Skipper v. South Carolina, 476 U.S. __, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986), where the United States Supreme Court held that, in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. Appellant submits that the state cannot show beyond a reasonable doubt that this particular error was harmless. See Skipper, supra, (evidence that defendant had adapted well to prison life); and Eddings v. Oklahoma, 455 U.S. 104 (1982)(evidence of sixteen-year-old defendant's troubled family history and emotional disturbance).

Appellant submits that the exclusion of the proffered evidence resulted in a deprivation of his Sixth Amendment constitutional right to a fair trial. The resulting death recommendation and sentence are constitutionally infirm under the Eighth Amendment to the United States Constitution. The treatment of an accomplice by a separate sentencing jury is evidence relevant in mitigation. See Malloy v. State, 382 So.2d 1190 (Fla. 1979). Although the jury's recommendation is advisory, the recommendation is entitled to great weight. Tedder, supra. James Mack's sentencing jury never learned anything concerning the possible sentence of Robert North. North was a very active accomplice in the instant murder. In fact, the relative culpability of North and Mack became a significant issue at James Mack's trial. The only physical evidence at the scene of the crime pointed to Robert North rather than James Mack. (R558-561) Police found North's latent thumbprint on the victim's nightstand drawer. (R560-561) The physical evidence is consistent with the defense

theory that Mack remained outside, while Robert North burglarized the victim's home and murdered her when she awakened. This is also consistent with the fact that the victim knew Robert North from past yard work that he performed for her. (R344-355,468) The state offered no evidence that indicated that the victim knew James Mack. This evidence supports the argument that Robert North was more culpable than James Mack. The jury was entitled to see this relevant evidence proffered by the defense at the penalty phase. The trial court's exclusion of that relevant evidence constitutes reversible error.

POINT III

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

INTRODUCTION

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation indicating that a majority of ten concluded that death was the appropriate sanction. (R916) In imposing the death penalty, the trial court found five aggravating circumstances: (1) the crime was committed while Mack was under sentence of imprisonment for grand theft of the second-degree; (2) Mack had been previously convicted of another felony involving the use or threat of violence; (3) the crime was committed while engaged in the commission of a burglary; (4) the crime was committed for pecuniary gain; and, (5) the crime was especially wicked, evil, atrocious or cruel. (R917-918) The trial court instructed the jury on only three of the statutory mitigating circumstances. (R918) Based entirely upon the jury recommendation, the trial court assumed that the jury rejected all mitigating circumstances. (R918)

Initially, Appellant objects to the form of the trial court's findings of fact. The findings fail to cite <u>any</u> facts in support of two of the aggravating circumstances that the judge

relied upon. (R918) The trial court states simply that the crime "was committed for pecuniary gain." (R918) As to the final aggravating circumstance, the trial court simply recites that the crime was "especially wicked, evil, atrocious or cruel." (R918) As a result of the sketchy language used by the trial court, Appellant is extremely handicapped in his argument concerning the finding of these two aggravating factors. Appellant submits that the court's findings are so inadequate that meaningful review by this Court is precluded. Holmes v. State, 374 So.2d 944 (Fla. 1979). Appellant contends that he is prejudiced in this argument on appeal as a result of the perfunctory nature of the findings. Appellant requests that this Court remand for a more detailed statement of findings of fact. Hall v. State, 381 So.2d 683 (Fla. 1978). Given the limited nature of the findings, Appellant will attempt to argue this point, but urges this Court to grant the requested relief.

The sentence of death upon James Mack must be vacated. The trial court relied upon aggravating circumstances that were not established beyond a reasonable doubt. The trial court also engaged in improper doubling in the consideration of the aggravating circumstances. The trial court also failed to consider and find highly relevant and appropriate mitigating factors. Additionally, the trial court accorded too much weight to the jury's recommendation of death and ignored the dictates of Proffitt v. Florida, 428 U.S. 242 (1976).

A. The Trial Court Failed to Find Mitigating Factors That the Defense Established Through the Presentation of Evidence.

The pertinent Florida Standard Jury Instruction provides:

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

This Court pointed out in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), that any consideration of mitigation must fall within certain established guidelines. Given the fact that the imposition of death by public authority is so profoundly different from all other penalties, an individualized decision is essential in capital cases. Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). Moreover;

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982)(emphasis in original, footnote omitted). See also Skipper v. South Carolina, 476 U.S. 1 (1986).

With these admonitions in mind, this Court set forth the guidelines that trial courts should use in the consideration of evidence offered in mitigation by a capital defendant. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987). The trial court must

first consider whether the facts alleged in mitigation are supported by the evidence. The court must then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. If such factors exist, the sentencer must then determine whether they are of sufficient weight to counterbalance the aggravating factors. Rogers, supra at 534.

It is clear that the trial court in the instant case failed to properly consider the evidence offered in mitigation by James Mack. The trial court made a blanket rejection of the statutory mitigating circumstances for which the jury was instructed. The trial court based the perfunctory rejection entirely on the jury recommendation. (R918-919) This is clearly improper since the trial court failed to follow the guidelines set forth by this Court in Rogers. As a result, we have no idea if the trial court found that the evidence failed to establish any mitigating factors, found that the established facts were not of the kind capable of mitigating Mack's punishment, or found that the established mitigating factors failed to outweigh the aggravating circumstances.

The trial court went further and specifically addressed several of the statutory mitigating factors on which the trial court did not instruct the jury. The trial court found that:

> . . . JAMES MICHAEL MACK, has a significant history of prior criminal activity as reflected by four (4) adjudications of Guilty (sic) and sentences imposed, copies of which are attached hereto and made a part hereof; that the victim was not a participant in the Defendant's conduct nor did she consent to the act; that the Defendant JAMES MICHAEL MACK, was not an accomplice in the offense for

> which he is to be sentenced but that the offense was committed by the Defendant and his actions were the causation of the death of one victim; that the age of the Defendant, JAMES MICHAEL MACK, to wit: 28 years has no particular significance and therefore, is not a mitigating circumstance. (R919)

The trial court concluded that the aggravating circumstances "far outweigh mitigating circumstances in this cause," and found Mack to be a menace to society thus justifying the death sentence. (R919)

In reaching the above conclusions, the trial court completely ignored James Mack's severe alcohol problem. The state failed to refute the defense evidence that established the fact that James Mack has a severe problem with alcohol. Mack's grandmother as well as a friend placed complete blame for Mack's problems on alcohol. (R746-747,749-751) Even Garfield Lear, one of the state's witness at the penalty phase, helped establish this mitigating factor. (R731-735) In fact, the same trial judge obviously recognized Mack's problem when he recommended alcohol treatment when imposing a sentence for grand theft in January of 1986. (R924-925) Even the state attorney conceded that Mack had a drinking problem. (R762)

In apparently rejecting the statutory mitigating circumstance relating to domination by an accomplice, the trial court stated in the findings of fact that Mack "was not an accomplice in the offense. . . that the offense was committed by the Defendant and his actions were the causation of the death of one victim." (R919) Appellant respectfully submits that this finding of fact is simply unfounded and without support in the

record on appeal. Since the trial court specifically enumerated the information on which he relied, it must be assumed that the court believed that some support for its contention is contained in the record on appeal. Appellate counsel can find no evidence that James Mack was anything more than a mere accomplice to the actual perpetration of the murder.

Appellant concedes that the state did present some testimony from Karen Campbell, the woman who stole a ring from James Mack at a bar. It should be remembered that Campbell was a friend of North's who met Mack only that afternoon. (R490-491,519) Additionally, Campbell took an immediate dislike to Mack. (R503,538) Mack and North both had possession of the ring that afternoon in the bar at various points in time. Mack was evidently doing much of the negotiations concerning the sale of the ring. Karen Campbell's testimony indicated that she was of the opinion that James Mack was in control of the situation in the bar that afternoon. (R510) To the best of Karen Campbell's judgment, James Mack's general attitude was one of authority over North. She testified that this was evidenced by the fact that Mack told North to go sit down several times that afternoon. (R510) Other than this unconvincing and unpersuasive testimony, (at least on this issue), there is no evidence that James Mack was any more culpable than was Robert North.

Most of the evidence at the guilt phase pointed to Robert North as the more active participant in the murder. North's fingerprints were found in the house, not Mack's. North's hand was injured at the time of his arrest, not Mack's.

This was consistent with North punching the victim, not Mack. North told Aslinger that he had killed someone, not Mack. North knew the victim prior to the murder, not Mack. North bought all the beer and gas during the criminal transaction, not Mack. North or Aslinger drove the car, not Mack. North rode in the front seat of the car, not Mack.

Karen Campbell also testified that on more than on occasion that afternoon, Mack supposedly informed her that he had killed an old woman for the ring. (R503) Although other individuals in the bar were apparently within listening distance, the state presented no evidence that anyone else heard these proclamations by Mack. (R530,568) The state presented absolutely no physical evidence that tied James Mack to the murder. The state certainly failed to produce any evidence that James Mack was more culpable than Robert North. The physical evidence supported a defense theory that Mack remained outside while North committed the burglary. (R560-561) When the victim awoke and recognized North, he had to kill her. The victim knew North, but was not familiar with Mack. (R344-345,468) The trial court therefore erred in rejecting the mitigating circumstance in the manner that it did. (R919) In essence, the trial court used this assertion (which is not supported by the record) as a non-statutory aggravating circumstance. Such a procedure clearly constitutes reversible error.

The trial court also completely ignored the unrefuted evidence that James Mack is a "very good" father who loves his children. (R744-746,751) The fact that a defendant is a father

in and of itself can be considered as a non-statutory mitigating circumstance. Rogers v. State, supra. Helen Chisolm, James Mack's "step-grandmother" and Jodi Tipton, a friend of Mack's, both testified to the close and loving relationship between James Mack and his daughter, Jennifer, and son, Robert. (R743-752) Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. See Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). As in Rogers v. State, supra, the state did not contest the testimony of Chisholm and Tipton that James Mack was a good father. Even the prosecutor conceded this point in final summation. Given this fact, this Court cannot say that there is no reasonable likelihood that the trial court would have still concluded that the aggravating circumstances were outweighed by these unrefuted mitigating factors. See Rogers, supra, and State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). This Court cannot therefore find the error harmless beyond a reasonable doubt.

Appellant submits that the mitigating circumstances outweigh the aggravating circumstances in the instant case. The murder at issue does not rise above the norm of capital crimes. Murders with surrounding circumstances far more heinous and aggravating have resulted in life sentences. This Court should reduce James Mack's sentence to life imprisonment with a minimum mandatory of twenty-five years. At the very least, this Court should remand this cause to the trial court for proper

consideration of the unrefuted mitigating evidence pursuant to the guidelines set forth in Rogers v. State, supra.

B. The Trial Court Erred in Finding That the Appellant Committed the Murder While Under Sentence of Imprisonment.

In finding that the capital crime was committed while Mack was under sentence of imprisonment (§921.141(5)(a) Fla. Stat.), the trial court stated:

> As to count IV, the crime for which the Defendant, JAMES MICHAEL MACK is to be sentenced was committed while he was under sentence of imprisonment for Grand Theft of the Second Degree. The Defendant was released from prison and placed under the Supervised Community Release Program on July 22, 1986, and while on the Supervised Community Release Program committed the crime herein on July 28, 1986, having only been released six (6) days. (R917-918)

The state presented the testimony of Garfield Lear, a corrections and probations officer with the Florida Department of Corrections during the penalty phase. Lear explained that Mack had been convicted and sentenced in January of 1986 for grand theft. (R727-729,922-925) Lear explained that the Florida Legislature established the Supervised Community Release Program in an effort to relieve overcrowding in the prison. The program allowed inmates already assigned to the work release center who were also within ninety days of their release date to go home to complete their work unfettered. (R727) Lear testified that the Department of Corrections placed James Mack in this Supervised Community Release Program on July 22, 1986. Lear concluded that people

in the program were still considered to be inmates under the supervision of the Department of Corrections. (R728)

Appellant candidly concedes that a finding of this particular aggravating circumstance is justified where the defendant was on parole at the time of the offense. See Straight v. State, 397 So.2d 903 (Fla. 1981). However, this Court has disapproved the finding of this aggravating factor where the defendant was on probation at the time of the offense. Ferguson v. State, 417 So.2d 639 (Fla. 1982). In Peek v. State, 395 So.2d 492, 499 (Fla. 1981), this Court held that:

> Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in Section 921.141(5)(a).

Ferguson was serving a two-year period of probation which followed an eighteen-month period of incarceration. This Court relied heavily on the above quote from Peek and concluded that, since Ferguson was not confined in prison at the time nor was he supposed to be, he was not within the parameters of this particular aggravating circumstance.

Chapter 33-9 of the Florida Administrative Code sets forth the general provisions providing for extension of the limits of confinement by the Department of Corrections. Specifically, supervised community release is provided for:

> Inmates who are within 90 days of their presumptive release dates shall be eligible for placement in a Supervised Community Release Program pursuant to Section 945.091, Florida Statutes, which will provide offenders with guidance and

> direction during the last days of their incarceration. . . .

Fla.Admin.Code Rule 33-9.021(1). Section 945.091, Florida Statutes (1985) provides the statutory authority for extension of the limits of confinement by the Department of Corrections. The pertinent portion of that particular statute enabled James Mack to leave the confines of incarceration to:

> Participate in a rehabilitative community reentry program on conditional release for a specified period not to exceed the last 90 days of confinement. While in supervised release status, the inmate shall not be considered to be in the care and custody of the department or in confinement, extended or otherwise. The inmate shall be under the supervision of the department in the community as prescribed by the department. . . . (emphasis added)

§945.091(1)(d), Fla. Stat. (1985).

Pursuant to the statute, Appellant contends that he was clearly not in the care and custody of the department nor was he confined, extended or otherwise. As such, Appellant submits that he was not under sentence of imprisonment. It appears that this particular aggravating circumstance does not apply. The language of the above statute indicates that Mack's status was more akin to the status of a probationer rather than than of a parolee. In this respect, Ferguson applies to the instant facts and Straight does not apply. This Court must resolve any ambiguity in the statute in favor of the defendant. §775.021(1) Fla. Stat. (1985). The rule of lenity applies with equal force to criminal penalties. Albernaz v. United States, 450 U.S. 333 (1981).

James Mack was not incarcerated at the time of the offense nor was he supposed to be. He did not escape from any secure facility. The state chose to release him from the Work Release Center (a facility less secure than state prison) into the community. He was free to complete his work apparently without restrictions. Regardless of Mack's status, the state failed to prove beyond a reasonable doubt that this particular aggravating circumstance existed at the time of the offense. State v. Dixon, 283 So.2d (Fla. 1973).

C. The Trial Court Engaged in Improper Doubling Where it Found That The Crime Was Committed During The Commission of a Burglary And Also That The Crime Was Committed For Pecuniary Gain.

The trial court made the following findings:

> 3. As to Count IV, the crime for which the Defendant, JAMES MICHAEL MACK, is to be sentenced was committed while he was engaged in the commission of the crime of burglary.
> 4. As to Count IV, the crime for which the Defendant, JAMES MICHAEL MACK, is to be sentenced was committed for pecuniary gain. (R918)

In dealing with the above findings, appellate counsel and this Court are hampered by the perfunctory nature of the language. As mentioned earlier, Appellant submits that the trial court's findings are so inadequate that meaningful review is precluded. Holmes v. State, 374 So.2d 944 (Fla. 1979).

In any event, it is clear that the trial court engaged in the impermissible act of doubling where it found that the crime was committed while Appellant was engaged in the commission of a burglary and also found that the crime was committed for

pecuniary gain. This point is controlled by Brown v. State, 473 So.2d 1260 (Fla. 1985); Maggard v. State, 399 So.2d 973 (Fla. 1981); and Provence v. State, 337 So.2d 783 (Fla. 1976). In Maggard, supra at 977, this Court found it improper to double the same two aggravating circumstances on facts legally indistinguishable from those in the instant case. Maggard, bitter over past employment disagreements, killed his employer, Hugh Fazende, by shooting him with a shotgun. Fazende died from the shotgun blast which was fired into his home through a window. Maggard then entered the house and stole approximately one hundred dollars. Maggard, supra at 975. See also Mills v. State, 476 So.2d 172, 178 (Fla. 1985).

In the instant case, Mary Eberhart was killed during the course of a burglary and robbery during which certain jewelry was stolen. Indeed, the indictment alleged that the underlying intent for the burglary offense was solely to commit a theft. (R783) The robbery is separately alleged in the indictment. (R783) It is clear that the pecuniary motive for the burglary is identical to the pecuniary motive for the murder. This aspect of the crime under these facts is necessarily contained in both aggravating circumstances. See Blanco v. State, 452 So.2d 520, 525 (Fla. 1984)[where this Court found no error in using burglary and pecuniary gain as one factor (instead of doubling)].

This Court reached a different result in Brown v. State, 473 So.2d 1260 (Fla. 1985), where additional proof independently satisfied each of the two aggravating circumstances. This Court pointed out:

> The evidence showed, however, that the offense of burglary had a much broader significance than simply being the vehicle for a theft. The victim was beaten, raped and strangled. While she was tormented her home was ransacked. Thus the burglary had a broader purpose in the minds of the perpetrators than a burglary seen merely as an opportunity for theft.

Brown at 1267. The facts in the instant case are distinguishable from those in Brown. The state failed to prove any broader purpose to the murder. The evidence indicates that the murder was committed merely to facilitate the burglary and robbery.

The evidence in the instant case does not establish beyond a reasonable doubt the independent finding of both of these two aggravating circumstances. Since the same aggravating aspect of the murder has erroneously been duplicitously considered by the trial judge in imposing James Mack's death sentence, this Court must reverse the sentence and remand for the imposition of a life sentence.

D. The Trial Court Erred in Finding That the Crime was "Especially Wicked, Evil, Atrocious or Cruel."

In finding that Section 921.141(5)(h), Florida Statutes applied to the instant crime, the trial court stated simply:

> 5. As to Count IV, the crime for which the Defendant, JAMES MICHAEL MACK, is to be sentenced was especially wicked, evil, atrocious or cruel. As to Count IV, the Defendant, JAMES MICHAEL MACK, did kill and murder MARY EBERHART while engaged in the commission of Burglary by stabbing MARY EBERHART in the neck. (R19)

Once again, Appellate counsel is of the opinion that the trial court's language in finding this particular aggravating factor is so lacking in detail that meaningful review by this Court is precluded. Holmes v. State, 374 So.2d 944 (Fla. 1979) and Hall v. State, 381 So.2d 683 (Fla. 1978).

Additionally, the state has failed to meet their burden of proof in establishing this factor beyond a reasonable doubt. Since the trial court failed to cite any factors in support of this finding, Appellant will concentrate on the circumstances surrounding the offense. The evidence, taken in the light most favorable to the state, indicated that Mary Eberhart died as a result of blood loss or excitement from the knife wound in her neck. (R353) The knife severed the jugular vein causing rapid bleeding and a corresponding drop in blood pressure. The medical examiner testified that she would have lost consciousness very quickly as a result of the lack of blood to the brain. (R359) Doctor Schwartz testified that even a very slight drop in blood pressure to the head results in fainting followed by unconsciousness and coma. (R360) Death followed within a very few minutes and certainly within ten to fifteen minutes. (R360) The victim also suffered bruises around her face and head region. There were also bruises on various other portions of her body. Additionally, the medical examiner noted a small laceration on one arm and several small wounds on the fingers of that same hand. (R351,357) The state failed to prove that a sexually battery occurred and the trial court granted Appellant's motion for judgment of acquittal as to that charge. (R642,914)

Appellant submits that, in light of this evidence, there is insufficient evidence to prove this aggravating factor beyond a reasonable doubt. This Court defined "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) as such:

> 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.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious and cruel.

It is clear from the evidence that the victim did not endure prolonged suffering. According to the medical testimony, she would have fainted within a few seconds of the neck wound. This would have been followed shortly by unconsciousness, coma, and finally death. The medical examiner testified that this would have occurred very rapidly since the jugular vein was completely severed. Being unconscious, the victim's feelings and sensations were affected such that there was no cognizance of pain. Therefore, the murder was not "unnecessarily torturous to the victim" as is required by Dixon, supra, and Tedder, supra.

Additionally, it is the duty of this court to review the case in light of other decisions and determine whether or not the punishment is too great. State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-79 (Fla. 1977). A

comparison to the other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was not more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977)(36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976)(severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976)(thirty-eight "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court vacated the death sentences. This Court must likewise vacate James Mack's death sentence. Were the imposition of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976), and Furman v. Georgia, 408 U.S. 238 (1972). See also Godfrey v. Georgia, 446 U.S. 420 (1980). Since

the evidence failed to show that the murder in the instant case was especially heinous, atrocious and cruel under the Dixon and Tedder standards, this Court should strike the trial court's finding of this particular aggravating circumstance and reduce James Mack's sentence to life imprisonment.

POINT IV

THE TRIAL COURT ERRED BY IMPOSING DEPARTURE SENTENCES ON THE NON-CAPITAL OFFENSES WITHOUT PROVIDING WRITTEN REASONS.

The trial court committed error of a fundamental nature in sentencing James Mack to two concurrent fifteen year sentences as to the robbery and burglary. The state prepared a scoresheet for the non-capital offenses. Robbery was the primary offense at conviction and burglary was an additional offense at conviction. (R928) The recommended guideline sentence was seven to nine years imprisonment. (R928) The trial court chose to depart from the recommended guideline sentence and sentenced James Mack to fifteen years on each of the two counts. The judge ordered to sentences to run concurrent with each other but consecutive to the death sentence imposed for the murder. (R931-932) The trial court did not provide any written reasons to justify the departure.

In an attempt to justify the departure sentences imposed, the trial court orally stated at sentencing:

> Let the record reflect in sentencing Counts I and II the Court has exceeded the guidelines which were seven to nine years. The basis for exceeding the guidelines was the fact that the Defendant was concurrently found guilty of first-degree murder, premeditated murder, which crime was not scored as part of the score sheet. (R951)

The trial court should have reduced the reasons to writing. A transcript of oral statements is not sufficient. State v. Jackson, 478 So.2d 1054, 1055-56 (Fla. 1985).

POINT V

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

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

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

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

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

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

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

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

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

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

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

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

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

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly

demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

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

CONCLUSION

Based on the foregoing authority, argument and policy, Appellant respectfully requests that this Honorable Court grant the following relief:

As to Point I, reverse the murder conviction and death sentence and remand for a new trial;

As to Point II, vacate the death sentence and remand for imposition of a life sentence or for a new penalty phase;

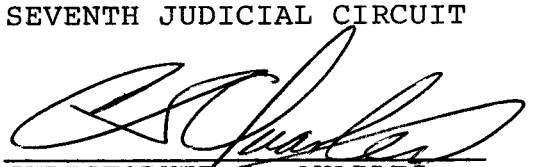
As to Point III, vacate Mack's death sentence and remand for imposition of a life sentence;

As to Point IV, remand for resentencing as to the non-capital offenses;

As to Point V, declare Florida's death penalty statute unconstitutional or remand for the imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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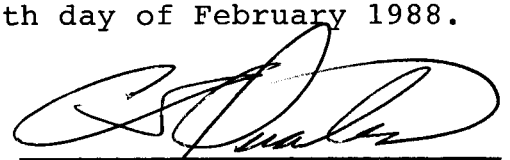
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert Butterworth, Attorney General, 125 N. Ridgewood Ave., Daytona Beach, Fla. 32014, in his basket at the Fifth District Court of Appeal and mailed to Mr. James Michael Mack, #B050813, P.O. Box 747, Starke, Fla. 32091 on this 12th day of February 1988.



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