IN THE SUPREME COURT OF FLORIDA

ANDREW WILLIAMS, :

Appellant, :

:

vs. : Case No. 71,122

STATE OF FLORIDA, :

Appellee. :

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On October 8, 1986 an indictment was filed in the Circuit Court of Hillsborough County charging Andrew Williams in Count One with first degree murder and in Count Two with armed robbery pursuant to sections 782 04 and 812 13 (1)(2)(a) of the Florida Statutes. (R. 1777-1778) He was tried with co-defendant Carlton Myles.

A trial was held before acting Circuit Judge Robert H. Bonnano on June 29 through July 10, 1987 (R. 1-1328) and the jury found Mr. Williams guilty of first degree murder and armed robbery. (R. 1317, 1955, 1956) Mr. Myles was acquitted. (R. 1317) The jury, by a vote of 9-3, recommended that a sentence of death be imposed. (R. 1988) The trial judge proceeded to sentence Mr. Williams to death with a consecutive sentence of life imprisonment on the armed robbery conviction. (R. 1707, 2002-2004) Appellant's motion for New Trial was filed on July 22, 1987, (R. 1989), and denied.

A timely Notice of Appeal was filed on September 8, 1987. (R. 2017) Court-appointed counsel was permitted to withdraw and the Public Defenders for the Tenth and Thirteenth Judicial Circuits were appointed for the purpose of appeal. (R. 2043) Due to a conflict by the Office of the Public Defender of the Tenth Judicial Circuit, this Court thereafter remanded this case to the Circuit Court of Hillsborough County for appointment of private counsel. Present Counsel was appointed to represent Mr.

Williams in this case on April 28, 1988.

Pursuant to Article V, Section 3 (b)(1) of the Florida Constitution and Fla.R.App.P. 9.030 (a)(1)(A)(i), Andrew Williams now takes appeal to this Court.

STATEMENT OF THE FACTS

Andrew Williams was charged with killing Pearl Fisher and robbing the Columbia Bank on September 20, 1986. He was tried with co-defendant Carlton Myles.

Defense counsel filed a motion to disqualify acting circuit court judge Robert H. Bonnano on the basis that his "temporary" appointment was invalid and that, as a result, he was without jurisdiction and authority to hear this capital case. (R. 1795) The motion was denied. (R. 1852)

Before and during voir dire at trial, defense counsel made repeated verbal and written requests to limit the panel of prospective jurors. (R. 3,5,70,1651,1846-1847) Requests for individual voir dire and voir dire in groups of 12 and then 30 were each denied. (R. 5,6,71)

During voir dire defense counsel objected to the State's challenge for cause of jurors based on their feelings on the death penalty. (R. 446-459) The judge excused seventeen jurors for cause, based on their alleged feelings on the death penalty. (R. 467-470)

Defense counsel also objected to the prosecutor's use of peremptory strikes to excuse Black prospective jurors. (R. 492, 497, 510, 516) Having required the prosecutor to state reasons for the excusal of only four of the five challenged Black jurors, the court ruled that there was no systematic exclusion of Black jurors. (R. 494-495,497,510,516-518)

Testifying for the State, Ruth Speakman said she was a

teller at the Columbia Bank at Adamo and 21st Street in Tampa on September 20, 1986. (R. 579) On that date, two black men, whom she did not recognize, entered the bank around 10:40 or 10:45 a.m. and spoke to the guard, Pearl Fisher. (R. 580-583) Ms. Speakman heard a gun go off and saw the two men backing away from the guard. (R. 583) The taller of the two men was directly in front of her and the shorter of the two was directly behind him. (R. 583-584) The shorter of the two men then came to Ms. Speakman's station, pointed a gun at her and told her to quickly give him all her money, which she did. (R. 584) She said the taller man threw a bag to the shorter man but the money was simply scooped up. (R. 584)

The witness said the taller of the two men also came to her station and said she should give him all her hundred packs or she was dead. (R. 585) She said the men took over $27,000. (R. 587) Photographs taken of the inside of the bank after the two men had left were viewed and identified by the witness. (R. 588-592) Photographs depicting the guard's nightstick, gun belt and holster were admitted into evidence. (R. 589-596) Ms. Speakman identified Mr. Williams as the taller of the two men who entered the bank that Saturday, (R. 586), but admitted to being nervous at the time of the robbery, (R. 613), and unable to identify anyone until questioned by law enforcement for the third time after the robbery. (R. 618)

Also testifying for the State, Hazel Wells said she was a customer of the Columbia Bank on September 20, 1986 at

approximately 11:15 a.m. (R. 650) She said a robbery took place and a man she recognized pulled a gun and shot the guard with his gun to her chest, the gun having clicked twice and not fired. (R. 651-654) She identified Andrew Williams in court as the person who had fired the gun but admitted that she could not identify anyone on the day of the robbery. (R. 655,665) She said she saw the man in the bank for two seconds and was scared. (R. 672)

Ms. Wells' live-in companion, Theodore Day, was sitting in a chair in the bank the day of the robbery and said he was not paying attention to what was happening and did not have a good recollection of that day. (R. 796-797, 802, 806) He said the taller of the two men in the bank shot the guard in the chest and he said Andrew Williams looked like that man. (R. 800) Other than the fact that he was tall, he could not describe the man as he did not see his face very well. (R. 804, 811) Mr. Day had previously been convicted of two felonies. (R. 801-802)

Officer Kevin Lee Jackson of the Tampa Police Department went to the Columbia Bank in response to an alarm call at approximately 10:55 a.m. that day. (R. 573) The victim was taken to Tampa General Hospital and pronounced dead at 11:25 a.m. (R. 575) Officer Jackson took the victim's clothing to the Medical Examiner's office. (R. 576)

The Associate Medical Examiner, Lee Robert Miller, examined the victim on September 21, 1986 and found one gunshot wound to the left chest. (R. 1000, 1005-1006) Photographs of the victim's clothing were introduced into evidence, over the objection of

defense counsel on the basis that the enlarged photograph of the wound would be inflammatory. (R. 1012-1013) The cause of death was bleeding from the gunshot wound to the chest, the Associate Medical Examiner testifying that death ensued "very quickly." (R. 1024-1026)

Testifying for the State was a woman named Sharon Napier, although she admitted to using many different names. (R. 691,726) At the time of testifying for the State against Andrew Williams, the witness was about to go before the court on a violation of probation. (R. 730) She had already been convicted of five felonies. (R. 693) Napier identified Andrew Williams and said she went with him to the Hayes Motel on East Hillsborough in Tampa on September 19, 1986. (R. 694) She said she was up all that night smoking "rocks." (R. 712) She had smoked almost daily for a year and had done heroin and cocaine before that, causing memory problems. (R. 713-715)

Napier claimed that Carl Myles came to the motel room on the morning of September 20, 1986 and one of the two men said, "Let's go." (R. 696-697). She said the two men came back to the room about noon with a gun each and a gym bag full of money which they dumped onto a bed. (R. 698-700) The money was placed into two piles, according to Napier who said she took about $3,000. (R. 701, 708) Andrew Williams allegedly threw the gym bag by a dumpster and took Napier with him to buy a car. (R. 702) He bought a car later that day. (R. 703) She claimed that the money was used for the car, luggage, jewelry and cocaine. (R. 707)

Napier had the gun that she said Williams earlier had in his possession when she went to the projects that night. (R. 717) She picked up her friend Angie, bought some "rocks" and smoked them, then went to Brooksville with Angie, Williams, Myles and his girlfriend and smoked crack cocaine all night in a motel. (R. 718-719) When Napier went to Brooksville, she gave $500 to her grandmother and $100 to each of her four children. (R 723)

Napier was with Andrew Williams when he was arrested at her grandmother's house in Brooksville on September 25, 1986. (R. 704) She identified her daughter's purse in which the gun was found in Napier's grandmother's room, claiming that she saw Williams put the gun in the purse. (R. 706, 739) She stated that Williams was not staying in the room in which the gun was found. (R. 707) She also identified a bag containing money which was found at the house. (R. 705) Napier also claimed that Williams told her after his arrest about killing the guard. (R. 744)

Angela Bellamy, the "Angie" whom Napier had referred to, also testified for the State. She was also on probation, (R. 757) was currently charged with violating probation, (R. 765), and also used many aliases. (R. 789) She also said she smoked cocaine on a daily basis and that it affects her memory. (R. 768) She identified both Williams and Myles, (R. 758) and said she remembered what happened on September 20, 1986 only because people were always talking to her about it. (R. 777) She went with Napier, who had over $3,000 on her, to the Hayes Motel on that day. (R. 760-761) Williams was there and she saw a gun

and a packing case with money, both of which she identified in court. (R. 763-764) Bellamy was smoking cocaine while she was at the motel, (R. 763), and throughout the day with Napier. (R. 767) Although Napier had denied while testifying that she had bought anything but a personal amount of cocaine, Bellamy said Napier bought, at one point, fifteen hundred dollars worth of cocaine. (R. 768)

Having told Williams that she had talked to a police officer who had earlier been enquiring about the bank robbery, Bellamy felt that she was being forced to go to Brooksville with them that night because she "knew too much." (R. 770) She never heard about the robbery from Williams, Myles, or Napier. (R. 789) She went back to Tampa the next night and voluntarily went to talk to the police thereafter. (R. 790, 764) She stated that Napier had asked her whether the police had been asking questions about the robbery. (R. 786-787)

Detective James Noblitt of the Tampa Police Department testified to his involvement in investigating the incident. (R. 834) Over the objection of defense counsel, he recounted statements by Ruth Speakman, the bank teller, Hazed Wells, and Theodore Day. (R. 836-839, 845-848) Having each identified one other man from police photo-packs, the three then identified Mr. Williams. (R. 842, 849,851) Noblitt also interviewed Angela Bellamy while she was under the influence of cocaine. (R. 843, 893) Over repeated objections by defense counsel, Detective Noblitt recounted the out-of-court statements of Speakman, Wells

and Day. (R. 836)

Mr. Williams was then arrested in Brooksville where he gave an alias, and the house in which he was arrested was searched. (R. 852,997) Over the objection of the defense counsel, a photograph was admitted into evidence depicting a gun inside a bag which was found in a chest of drawers in the house. (R. 855) The gun found was a Titon .38 caliber firearm, the firearm purchased for the victim by her husband and used in her work as a security guard. (R. 855,557,569)

Detectives Nobblit and Daniel John Grossi then interviewed Williams and he allegedly signed a rights waiver form which was admitted into evidence over defense counsel's objection. (R. 856-859) First saying that he had found the gun, gym bag, and money seized at the house in which he was arrested, Mr. Williams then said Sharon Napier owned the gun. (R. 859) When Grossi left and returned to the interview room and told Mr. Williams that Ms. Napier had just told her interviewer that the gun used in the robbery had come from "Ernie," Mr. Williams allegedly said, "I didn't mean to kill her." (R. 860) Noblitt then testified that Andrew Williams recounted his participation in the robbery, saying that he paid $300 for the use of a gun from "Ernie." (R. 861-863) No recording of the statement was made. (R. 889)

Detective Daniel John Grossi provided a similar account of the interview. (R. 909-912) According to Noblitt, $5,932 was found at the place of arrest. (R. 864) This was repeated by Detective Ricky Childers of the Tampa Police Department who was

with Detective Noblitt when Williams was arrested. He also said they found a shaving kit inside a gym bag. (R. 977-979) Sharon Napier's statements to him that evening were recounted, over defense counsel's objection. (R. 981) Detective Noblitt was also allowed to give his opinion, over defense objection, to the effect that one could touch something at a scene and not leave fingerprints. (R. 867)

The gun which was determined to be the likely murder weapon by FDLE firearms expert Joseph Michael Hall, (R. 952-954), was retrieved from Joyce Williams by Detective Kevin Durkin of the Tampa Police Department the following day. The gun was found to belong to the man "Ernie" from whom Williams had said he had borrowed it for $300. (R. 924) dOver objection of defense counsel, the State questioned Mr. Hall about a "trigger pull test" he conducted on the firearm. (R. 960) The defense counsel twice requested a Richardson hearing because he had not been provided a copy of the test results before trial. (R. 962,965) The court denied his motion to exclude Mr. Hall's testimony and his motion for a mistrial. (R. 968)

The State offered one further witness who claimed that Carl Myles had told him of the robbery and said that the other person involved had shot the guard, (R. 686), not mentioning anyone by name. (R. 690)

At the close of the State's evidence, Andrew Williams filed a Motion for a Directed Verdict which was denied. (R. 1029-1030)

Mr. Williams then testified to the sequence of events on September 20, 1986. (R. 1071) He said he was looking at used cars across from the Hayes Motel in the morning, then Carl Myles took him at 10:00 a.m. to Williams' brother's house. (R. 1072-1073) His brother-in-law, Samuel Guest, then took Williams and Napier to a car lot where he bought a used car at 11:00 of 11:30 a.m. (R. 1073-1074) The auto dealer who sold this used car, Tony Sosa, testified that although he could not remember the exact time of the purchase, it was not late in the day like 5:00 or 6:00 p.m. (R. 1063) He could not identify the purchasers of the car in court. (R. 1064) Another auto dealer across from the Hayes Motel testified to two Black men and a Black woman looking at his cars sometime before noon on September 20, 1986. (R. 1059)

According to Williams, he then took his niece shopping and went back to the Hayes Motel where he again saw Napier and Bellamy. Williams said Napier went to buy cocaine and that she had a lot of money. (R. 1076-1077) He said he, Napier, Bellamy, Carl Myles and a friend ended up in a motel in Brooksville that night. (R. 1077) They drove back to Tampa the next day but then returned to Brooksville according to Williams. (R. 1078-1079) He identified a gun as looking like the one he claimed Napier had that weekend. (R. 1079) Williams admitted to having three prior felony convictions and having done a little cocaine "every now and then." (R. 1080, 1086)

Williams' brother-in-law, Samuel Guest, also testified that Williams and Napier came to his house on the morning of September

20, 1986 and that they looked at used cars from about 10:00 a.m. until about 11:45 a.m. (R. 1045,1047) He said Williams paid cash for the car from a bundle of money he kept in a shaving kit. (R. 1049)

The defense then rested and filed a Motion for Directed Verdict which was denied. (R. 1090) The jury returned guilty verdicts on Counts One and Two against Andrew Williams and a verdict of not guilty on Count One for Carl Myles. (R. 1317)

At the penalty phase of the trial, held on July 13, 1987, three prior robbery convictions of Williams were discussed and copies of judgments of conviction were admitted into evidence. (R. 1355-1363) Two employees of a bank which was the location of one of these robberies testified that Williams placed a gun at the head of a teller. (R. 1367,1373) A Vice-president of the Columbia Bank which was the location of the crime in the case at bar testified that Williams threatened physical harm to him if he did not do as he was told. (R. 1375)

An expert in forensic psychology, Robert Berland, testified to examining Andrew Williams and concluded that he suffered from a mixture of psychological disorders, including "a major thought disorder, a paranoid disturbance," (R. 1387), and "a chronic psychotic disturbance." (R. 1394) He detected brain impairment and concluded that Williams had an impaired ability to conform his conduct to the requirements of the law and was under the influence of a mental and emotional disturbance at the time of the offense and for quite some time before that. (R. 1396-1397)

Williams' natural mother and foster mother both testified on his behalf, as did his sister. (R. 1402,1404,1407) It was stated that Williams lived with his mother only from birth until two, that he had problems with his heart as a baby, and that while he lived with a foster mother from seven to fifteen years of age, he had open heart surgery. (R. 1402-1403,1406) His foster mother said that when he was young he would put meat and canned goods under trees in the woods, "like a mentally child_would do." (R. 1406)

Andrew Williams testified on his own behalf and recounted aspects of his life. (R. 1438)

Over objection of defense counsel, the jury was then instructed on several statutory aggravating circumstances, including that the defendant "knowingly created a risk of death to many persons," [921.141. (5)(c)], (R. 1423,1468), that the crime was "especially heinous, atrocious and cruel," [section 921.141 (5)(h)], (R. 1424-1426,1467), and that it was committed for the purpose of avoiding arrest. [section 921.141 (5)(e)] (R. 1426,1467) They were also instructed on the factor of Williams' prior felony convictions involving violence, the fact that the capital felony was committed during a robbery, and the mitigating factors of capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, that the capital felony was committed under the influence of extreme mental or emotional disturbance,

and any other aspect of the defendant's character or record and any other circumstance of the offense. (R. 1468) Eight non-standard jury instructions on mitigation were offered by defense counsel and denied by the court. (R. 1431)

The jury then recommended by a vote of nine to three that Andrew Williams be sentenced to death. (R. 1472) At a subsequent hearing, and in a written order, the judge proceeded to impose a sentence of death and consecutive sentence of life imprisonment on the robbery conviction. (R. 1707) He cited as support all of the aggravating and mitigating factors on which he issued instructions to the jury as well as the age, 27 years, of the defendant. (R. 1704-1706) He concluded that the aggravating circumstances "vastly outweigh" those in mitigation. (R. 1706) A motion to mitigate sentence was filed on August 31, 1987 and denied. (R. 1746-1747, 2015-2016)

SUMMARY OF ARGUMENT

The acting circuit court judge who presided over this case exceeded his authority as his appointment by administrative order was not sufficiently temporary and restricted.

The defendant's right to an impartial jury was violated where blacks were systematically excluded, alleged death penalty opponents were improperly excluded and there was general confusion and inaccuracy due to the large venire questioned at one time.

The trial judge failed to conduct a Richardson hearing requested by the defense counsel because he had not been provided the results of a test performed by a State expert.

The defendant's case was severely prejudiced by the trial court's error in allowing into evidence inadmissable hearsay and opinion testimony of State witnesses.

A defense request for jury instructions relating to aggravating and mitigating circumstances was improperly denied by the trial court during the penalty phase of the case.

Three statutory aggravating circumstances used by the trial court in the present case to support the sentence of death were either invalid as a matter of law or unsupported by the record and the sentence of death was proportionally unwarranted.

The Florida death penalty statute is unconstitutional.

ISSUE I

THE TRIAL JUDGE IN THE PRESENT CASE EXCEEDED HIS JURISDICTION AS A COUNTY JUDGE AND WAS WITHOUT AUTHORITY TO HEAR FELONY OR CAPITAL CASES SINCE HE WAS NEITHER ELECTED BY THE VOTERS OF THE JURISDICTION NOR APPOINTED BY THE GOVERNOR TO FILL A VACANCY ON THE CIRCUIT COURT.

Judge Robert H. Bonnano is a county court judge in Hillsborough County, Florida. (R. 1795) He was appointed by Chief Circuit Judge Guy Spicola to be Acting Circuit Court judge from July 14 through August 15, 1986. (R. 1798) He was then appointed, in a new order, from July 14 through December 31, 1986. (R. 1802) Yet another order re-appointed him to the circuit court from January 6 through June 30, 1987. (R. 1806) An amended order was then filed, appointing him through February 1, 1987, stating that the appointment was temporary, namely for no more than 60 days, and he was assigned to hear a limited class of cases. (R. 1811)

When Judge Bonnano continued past February 1, 1987 to preside over cases in Hillsborough County Circuit Court, defense counsel in the present case filed a Motion to Disqualify him from hearing the case. (R. 1795) In his denial of the defendant's motion, Chief Judge Spicola obviously sought to satisfy the requirements of this Court's decision in Crusoe v. Rowls, 472 So.2d 1163 (Fla. 1985). The judge stated that the assignment was

temporary and not to exceed 60 days, Judge Bonnano would hear only a limited class of cases, and that he had at this point resumed certain county court duties. (R. 1852) Judge Bonnano was obviously still sitting on the Circuit Court bench in July of 1987 when Mr. Williams' trial took place, (R. 532), and in late August when sentencing took place. (R. 1699)

This Court has been willing to engage in a determination of whether the acting circuit judge in question has time to fulfill both circuit and county court responsibilities. State ex rel. Treadwell v. Hall, 274 So.2d 537 (Fla. 1973) It is clear from the exhibits attached to the defendant's motion to disqualify the judge that he was extremely busy with circuit court matters and it would have been difficult for him to engage in county court duties of any substantive nature. (R. 1795-1835)

The appointment of acting circuit court judges, in the manner stated above, on anything more than a strictly temporary basis is invalid under the Florida Constitution, Article V section 10(b) which requires that they be elected by the eligible voters in the jurisdiction or appointed by the Governor to fill a vacancy. There is good reason to be vigilant in this matter.

Reviewing courts pay great deference to the judgment and expertise of trial judges. Directly related to some of the errors claimed herein in Issue II, for example, the United States Supreme Court has addressed the ability of judges in capital cases to "death qualify" a jury by saying "...the trial court is hopefully imbued with a fair amount of common sense as well as an

understanding of the applicable law...." Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 858, 83 L.Ed.2d 841 (1985). The consequences of a judge not being experienced in such cases are indeed dire in a capital case.

If there are doubts regarding the validity of such an appointment, surely we must resolve those doubts in favor of the defendant, particularly in capital cases in which an entirely separate and additional body of law is applicable and where the consequences of possible judicial errors include the most severe punishment within our criminal justice system.

For the reasons stated above, Andrew Williams is entitled to have his conviction reversed and his case remanded for a new trial before a Circuit Judge of Hillsborough County.

ISSUE II

ANDREW WILLIAMS WAS DENIED HIS FUNDAMENTAL RIGHT TO AN IMPARTIAL JURY WHERE THE VOIR DIRE WAS REPLETE WITH ERRORS AND INFIRMITIES, INCLUDING THE SYSTEMATIC EXCLUSION OF BLACKS AND THE ERRONEOUS EXCUSAL OF PROSPECTIVE JURORS BASED ON THEIR VIEWS ON THE DEATH PENALTY.

The multiple errors committed during voir dire in the present case, as a matter of both fact and law, completely denied Andrew Williams his fundamental right to a fair trial. Prospective jurors were successfully but improperly challenged for cause based on their alleged feeling on the death penalty. The State also gave invalid reasons for using its peremptory strikes against nearly all Blacks remaining on the venire and at one point the trial court refused to require any explanation for such a strike even though a prima facie case of impermissable exclusion had been made and the court had earlier required an explanation on the same grounds. The procedures employed, the trial judge's apparent inexperience in selecting capital juries and the resultant confusion to all parties each contributed to a fundamentally unfair jury selection process and, therefore, an unfair trial. These issues will be addressed separately below.

A. The Trial Court Allowed The Systematic Exclusion of Black Prospective Jurors When It Failed To Require An Explanation For One Such Exclusion And Accepted An Explanation For Another Which Was Unsupported By The Record.

As the United States Supreme Court stated in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct 1712, 90 L.Ed.2d 69 (1986), if a prosecutor uses a peremptory challenge to remove members of the defendant's race from the venire, there is an inference that the challenges were used to impermissably exclude them because of their race. Once the defendant makes a prima facie showing, the burden then shifts to the State to give a "neutral explanation" for challenging such Black jurors. Batson v. Kentucky, 106 S.Ct at 1721.

As this Court has repeatedly held, once the burden shifts to the State, it must show that the challenges are not exercised solely on the basis of race. State v.Neil, 457 So.2d 481 (Fla. 1984) The State must provide a "clear and reasonably specific," racially neutral explanation of "legitimate reasons" for the challenge. In short, the reason must be reasonable, neutral and not pretextural. Slappy v. State, 522 So.2d 18, 22 (Fla. 1988). It is then the duty of the trial court to determine whether those reasons proffered were neutral and reasonable. Tillman v. State, 522 So.2d 14,17 (Fla. 1988). As will be seen in the following analysis, neither the prosecutor nor the trial court in the case

at bar met the burden established for them by this Court and the United States Supreme Court.

1. The trial court erred in failing to require an explanation for the use of peremptory challenges against Blacks following a prima facie case of racial bias.

During voir dire in the case at bar, the State struck three Blacks for cause, ostensibly due to their feelings on the death penalty. (R. 493) (See Issue II.B) When the State then sought to use a peremptory challenge against Juror #25, Arlene Williams, the defendant sought an inquiry under Neil. (R. 492) With the State mistakenly arguing that this was their first peremptory challenge of a Black member of the venire, the trial court denied the motion. (R. 493) When defense counsel pointed out that the State had actually already exercised two peremptory challenges to exclude Blacks, the court asked the prosecutor if he would like "to put anything on the record about the last lady that you just struck?" (R. 495) Instead, the prosecutor chose to explain his reason for peremptorily challenging the first Black, which was her feelings on the death penalty. (R. 495) Betty Byrd, who was Juror #51, was then found by the trial judge to have been properly challenged by the State. (R. 495)

However, when defense counsel then asked, "What about [juror] 25?", the trial judge said, "Let's move on." (R. 495) The trial court's conduct constitutes fundamental error and fails

to meet the burden established in Batson, Neil, and Slappy. If, as the federal authority states, it is an equal protection violation to strike a single black juror for racial reasons, U.S. v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987), it is certainly fundamental error for the judge to fail to require an explanation for the exclusion of a single Black juror if a prima facie showing of racial bias has been made by the defendant. Pearson v. State, 514 So.2d 374 (Fla.2d DCA 1987).

The Black defendant in the case at bar met his burden of proof, stating that the prosecutors challenged the first three Blacks for cause and then began to exercise their peremptory challenges to strike remaining Blacks. (R. 494) According to this Court, in determining whether this initial burden of showing racial bias has been met, the trial court should resolve doubts in favor of the defendant. Tillman v. State, 522 So.2d 14,16 (Fla. 1988). If there are any doubts in the case at bar, Mr. Williams is entitled to have them resolved in his favor.

As this Court stated in State v. Neil, 457 So.2d 481, 487 (Fla. 1984), "It may be that the State did not excuse those prospective jurors solely because of their race. The bottom line, however, is that we simply cannot tell." (emphasis added) This Court held that "if they (challenges) are based solely on race or if it cannot be determined whether they were based solely on race, the defendant must be granted a new trial before a new jury." (emphasis added) Neil, 457 So.2d at 487. Due to the trial court's omission in the case at bar, we cannot determine

the State's motives either.

In the case at bar it is difficult to find any race-neutral explanation for the State to want to strike juror number 25, Arlene Williams. Her answers to the few questions asked of her were straightforward. She answered general, innocuous questions about her family and employment, (R. 201), stated her opinion that the burden of proof on the State was not too heavy, (R. 145), and stated that she could recommend the death penalty under proper circumstances. (R. 112) We can only guess as to what the State's thinking was in striking this juror but since the court did not even request a race-neutral explanation, the defendant, Andrew Williams, is entitled to a new trial before a new jury.

2. The trial court erred in accepting the State's explanation for use of its peremptory challenge to strike a Black prospective juror.

This Court has placed an affirmative duty on trial courts to determine whether the State has provided a neutral and reasonable explanation for striking Black prospective jurors. Tillman v. State, 522 So.2d 14, 17 (Fla. 1988). If the court does not require the State to give facially valid reasons, there exists a violation of the Florida Constitution as well as the Equal Protection Clause of the Fourteenth Amendment to the United Sates Constitution. Tillman, 522 So.2d at 17.

As in Tillman, the prosecutor in the case at bar failed to provide an explanation which could be supported by the record. Following the exclusion of the two Black prospective jurors discussed above, the State went on to strike three more Blacks. (R. 497,510,516) The first two of these were arguably challenged on race-neutral grounds, namely their qualms about the death penalty. (R. 497,510) However, the State failed to provide a valid reason for challenging the third of this group, the fifth Black to be challenged peremptorily and the eighth Black to be struck in total.

When defense counsel renewed his Neil motion after the prosecutor challenged juror number 103, Raynell Gainey, the prosecutor first replied, "there is a Black on the jury now." (R. 516-517) He then said he thought that juror number 103 was unable to "comprehend some of the concepts of felony murder." (R. 517)

First of all, the fact that there may be one Black on the jury has no bearing on the determination of whether other Blacks have been challenged due to race. Tillman v. State, 522 So.2d 14,17 (Fla. 1988), Sappy v. State, 522 So.2d 18, 24 (Fla. 1988). As this Court held in Slappy, the question is whether any juror was excluded on the basis of race. The fact that Blacks may be on the jury, or that other Blacks have properly been struck, is not dispositive of the question of possible racial bias. U.S. v. Gordon, 817 F.2d 1538,1541 (11th Cir. 1987). As the United States Supreme Court has repeatedly held, the erroneous exclusion

of one juror constitutes reversible error. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), Gray v. Mississippi, 481 U.S.___ , 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). The harmless error rule is inapplicable. Gray, 107 S.Ct. at 2056.

Secondly, the prosecutor in the case at bar failed to provide an explanation supported by the record. Although the State tried to argue that Mr. Gainey was unable to comprehend some of the concepts of felony murder, the record of voir dire shows that Mr. Gainey had no problems whatsoever with legal concepts. The prosecutor, in attempting to explain his challenge, said,

> Judge, my recollection of his conversation with Mr. Ferlita was I just did not feel that he was really following some of the questioning, no reflection on the man. He's a truck driver or something, but I just don't think he was able to comprehend some of the concepts of felony murder.

(R. 517) Defense counsel strongly objected, claiming systematic exclusion of all Black jurors, and stated that that was not his recollection of his conversation with Juror Raynell Gainey. (R. 518) The conversation had gone as follows:

> Mr. Ferlita: Mr. Gainey, how long have you been with Yellow Freight?
>
> Prospective Juror # 103: Eight years.
>
> Mr. Ferlita: Who does your wife work for?

Prospective Juror #103: Busch Gardens

Mr. Ferlita: How old are your children?

Prospective Juror #103: Fourteen, thirteen, eleven, and five.

Mr. Ferlita: Thirteen, fourteen, eleven, and five?

Prospective Juror #103: Yes

Mr. Ferlita: Mr. Gainey, is there any reason why you feel you could not be a fair and impartial juror?

Prospective Juror #103: No.

Mr. Ferlita: Is there any reason why you feel could not follow the law the Judge gives you?

Prospective Juror #103: No

Mr. Ferlita: Thank you Mr. Gainey.

(R. 369-370) In response to another question put to him earlier, Mr. Gainey said that he could recommend the death penalty. (R. 128) His answers absolutely fail to support the State's proffered reason for wishing to strike him from the jury.

The prosecutor in Tillman v. State, 522 So.2d 14 (Fla. 1988), had similar problems. He said he thought the juror in question lacked sufficient educational background to carry out the duties of a juror. However, the record reflected that all prospective jurors had a high school education. This Court held that the State had failed to provide a facially valid reason for the exclusion. Tillman, 522 So.2d at 17. The State failed in a similar fashion in the case at bar.

The duty of the trial court is not only to request an explanation for the exclusion but also to critically evaluate that explanation to determine whether it is race-neutral. Slappy v. State, 522 So.2d 18 (Fla. 1988). This is a vitally important task that the trial court failed to perform in the case at bar. When the prosecutor proffered his explanation, the court said, "Okay." (R. 517-518) The defense counsel strongly objected to the exclusion of the juror. (R. 518)

When the explanation proffered for the peremptory challenge of a Black prospective juror is not supported by the record, the standards established by this Court are not met. Accordingly, Andrew Williams was denied his right to an impartial jury guaranteed by Article I, Section 16 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. He is entitled to a new trial before a new jury.

B. The Trial Court Made Mistakes Of Fact And Law In Allowing The State To Challenge Two Jurors For Cause Based On Their Alleged Views On The Death Penalty.

The test for determining whether a prospective juror has been properly excused for cause due to his views on the death penalty has been clearly established by the United States Supreme Court. The Court has held, and reaffirmed, that the test is "whether the Juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his

instructions and his oath." Wainwright v. Witt, 469 S.S. 412, 105 S.Ct 844, 852, 83 L.Ed.2d 841 (1985), Gray v. Mississippi, 481 U.S. ___ , 107 S.Ct. 2045, 2051,95 L.Ed.2d 622 (1987). This clearly places the burden of showing a prospective juror's lack of impartiality on the State. As will be shown below, the State failed to meet this burden on two occasions when it struck prospective jurors for cause.

1. A prospective juror was erroneously struck for cause where the State's reason was completely unsupported by the record.

The source of the State's proffered reason for challenging for cause juror number 4, Mr. Hope, remains a mystery. In challenging this juror for cause, the State offered the following explanation:

> He said that his religious feeling would interfere with his duty as a juror.
> * * *
>
> Someone in his family is a higher up in a religious organization and because of his religious feeling he would not be able to comport his duty as a juror.

(R. 447) Over the objection of defense counsel, the court excused the juror for cause. (R. 447,467) The problem with this exclusion for cause is that Mr. Hope's views on the death penalty are nowhere to be found in the record.

When all jurors were asked early on by the trial court to speak up if they had problems with the death penalty, Mr. Hope remained silent. (R. 56) At no time during the other four periods of questioning this juror did he make any comment about the death penalty. (R. 85-86,137,150,168-171) It is clear that the State was simply in error in stating that this juror had religious scruples against the death penalty and the court was in error in accepting the explanation as sufficient.

As the United States Supreme Court stated in Dennis v. United States, 339 U.S. 162,168, 70 S.Ct. 519,521,94 L.Ed. 734 (1950), and reaffirmed in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct.844,855,83 L.Ed.2d 841 (1985), "the trial court has a serious duty to determine the question of actual bias... In exercising its discretion, the trial court must be zealous to protect the rights of an accused." The court in the present case erred in accepting the State's reasons for striking Mr. Hope for cause when those reasons were completely unsupported by the record. As a result, Andrew Williams was denied his constitutional right to an impartial jury and he is entitled to a new trial.

2. The trial court erred in accepting the State's reason for striking another prospective juror because of his views on the death penalty where the reason did not meet the standard for such exclusion.

The State's exclusion of another prospective juror, again

based on his views on the death penalty, did not meet the standard established by Witt and Gray. Before striking juror number 55, Arthur Whaley, for cause based on his views on the death penalty, the following interchange between the prosecutor and the juror took place:

> State: Could you recommend to the Court that the death penalty be imposed?
>
> Juror: I don't think so.
>
> State: Is that because you have feeling against the death penalty?
>
> Juror: Yes.
>
> State: Now, Mr. Whaley, are those feeling such that you think that may be (sic) they would prevent you from...
>
> Juror: Well, I probably wouldn't sleep thinking about it.
>
> State: Are those feeling such that they would prevent you from carrying out your duty as a juror if you were convinced that that is the law?
>
> Juror: Sure, but I would really have to think about it.

(R. 119,121) This last statement by Mr. Whaley must be taken in conjunction with the fact that he did not profess any opposition to the death penalty when the trial court had earlier asked any jurors having problems with the death penalty to speak up. (R. 56-57) He also stated that he thought he could be a fair and impartial juror. (R. 282) This makes it clear that his views did not render him ineligible under the standard established by the United States Supreme Court in Witt and reaffirmed in Gray v.

Mississippi.

The juror's views in the case at bar are very similar to those of a juror excluded for cause in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In that case, the juror said "Well, I think it probably would [affect my deliberations] because after all [sic], you're talking about a man's life here. You definitely don't want to take it lightly." Adams, 100 S.Ct. at 2529, n.7. The United States Supreme Court held that the juror was improperly excluded based on that statement, that it showed merely that the juror "would view [his] task with greater seriousness and gravity," not that he would be unwilling to follow the law. Adams, 100 S.Ct. at 2528. The same conclusion may be drawn in the case at bar.

As the Court held in Gray v. Mississippi, 107 S.Ct. at 2051, to permit the exclusion of prospective jurors whose views on the death penalty do not render them unable to fulfill their duties as jurors, "unnecessarily narrows the cross section of the venire members. It stacks the deck against the [defendant]." The court in the present case erred in allowing the State to strike for cause a juror whose views did not render him incapable of performing his duties. Since the erroneous exclusion for cause of a single juror constitutes reversible error, Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, So L.Ed.2d 339 (1976), Andrew Williams is entitled to a new trial.

C. Voir Dire In The Present Case Was So Fundamentally Flawed As To Deny Andrew Williams A Fair Trial.

Voir dire of the prospective jurors in the present case was conducted with all 125 members of the venire at one time. Defense counsel requested individual voir dire and, alternatively, voir dire in groups of 12 or 30, but each request was denied. (R. 3-6, 70-71) Acting Circuit Judge Robert H. Bonnano, despite his lack of expertise in circuit court and capital cases, decided to question prospective jurors in a group of 125. A sample of comments from the attorneys and the judge follows:

> Defense Counsel: Unfortunately because of just the sheer numbers now I really don't have any independent recollection of Mr. Wright. (R. 452-453)
>
> * * *
>
> Defense Counsel: Are you sure that's her name because I'm confused. (R. 507)
>
> * * *
>
> Court: I'm not sure who we excused out of the box. I should have rewritten it and I didn't.

These sample quotations, as well as the evidence of substantive errors in excusing Black prospective jurors and those allegedly opposed to the death penalty, (See Issue II. A. and B.), portray a confused and inaccurate voir dire. This Court has held that a "fundamental right to a fair trial can never be overridden by convenience and expediency..." Kritzman v. State,

520 So.2d 568, (Fla. 1988). Further, the United States Supreme Court has repeatedly reminded us of the "significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments." Gray v. Mississippi, 481 U.S. _ 107 S.Ct. 2045, 2056, 95 L.Ed.2d 622 (1987). Since Andrew Williams was denied that fundamental right to an impartial jury, as evidenced from the jury selection process, a new trial must be ordered.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING REQUESTED BY THE DEFENSE COUNSEL.

When the State sought to question FDLE firearms expert John Michael Hall on the results of a "trigger pull test" he had conducted, defense counsel objected and requested a Richardson hearing which was denied. (R. 960-962) Defense counsel told the court that the results of the test, although obviously in the constructive possession of the State, were not provided to him before trial, and renewed his objection and request for a Richardson hearing which was again denied. (R. 966)

At a conference at the bench, the court asked defense counsel whether he was notified of the test results, (R. 966), and how he was prejudiced by the failure to notify him. (R. 967) Defense counsel for Mr. Williams' co-defendant was notified by the State of this evidence but felt no duty to inform defense counsel for Mr. Williams. (R. 966) Further, Mr. Williams' counsel stated on the record that he was prejudiced by "not being able to appropriately cross-examine...." the expert. (R. 967) The court concluded by stating, "I don't find that there is any substantial violation of any rule of discovery that would require

anything additional being done by the Court." (R. 968)

The Florida Rules of Criminal Procedure, section 3.220 place an " affirmative duty on the State to disclose to defendant information within the State's possession or control, including the results of ... scientific tests..." Raffone v. State, Knighton v. State, 483 So.2d 761 (Fla. 4th DCA 1986). The test results in the present case would fall into this category. Failure of the State to provide these test results was a violation of the rules of discovery.

This Court has established a very specific inquiry trial courts must make in the face of a discovery violation. Richardson v. State, 246 So.2d 771 (Fla. 1971). The court must inquire whether the violation is "inadvertent or willful," "trivial or substantial," and whether it affects the defendant's ability to prepare for trial. Richardson, 246 So.2d at 775. No such inquiry was made in the case at bar.

The burden of proof is squarely on the State in situations such as these to show that a discovery violation has not prejudiced the defendant. Hill v. State, 406 So.2d 80 (Fla. 1981). Further, even if a reviewing court finds the violation to be harmless error, it must still remand the case for a new trial. Smith v. State, 500 So.2d 125 (Fla. 1986).

For the reasons stated above, Andrew Williams must be granted a new trial in light of the trial court's error in failing to conduct a Richardson hearing into the State's violation of the Florida rules of discovery.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT INADMISSABLE HEARSAY AND OPINION TESTIMONY FROM ITS WITNESSES.

The trial court in the present case repeatedly overruled defense counsel's objections to continuous hearsay testimony of State witnesses and overruled an objection to inadmissable opinion testimony.

A. The Defendant Was Severely Prejudiced By The State's Continued Hearsay Testimony.

The State in the present case was allowed by the court to elicit continual hearsay testimony from its witnesses, severely prejudicing the defendant.

It is clear that hearsay evidence is inadmissable unless it qualifies as a statutory exception. Section 90.802, Fla. Stat. (1987). The hearsay testimony of Detective Noblitt regarding statements by Ruth Speakman, Hazel Wells, and Theodore Day, (R. 836-851), fell within no such exception. Similarly, the hearsay testimony of Detectives Grossi and Childers regarding statements made by Sharon Napier, (R. 911, 981), were inadmissable because they did not come under any exception to the rule.

These hearsay statements are inadmissable at trial even if the declarant testifies also. Blue v. State, 513 So.2d 754 (Fla. 4th DCA 1987), Wells v. State, 477 So.2d 26 (Fla. 3rd DCA 1985). The simple fact that Speakman, Wells, Day and Napier testified at trial does not render these hearsay statements admissable. Indeed, these statements, or, more accurately, lengthy and detailed commentaries, are all the more prejudicial when admitted in a case in which credibility of the witnesses is of extreme importance. Bricker v. State, 462 So.2d 556 (Fla. 3rd DCA 1985). Such was the case at Andrew Williams' trial.

For these reasons, the admission of these statements cannot be deemed harmless. We are not faced with a very brief replication of the statement of the declarant who also happens to be testifying. Compare, Brunelle v. State, 456 So.2d 1324 (Fla. 4th Dca 984). These statements constituted an attempt by the State, obviously successful, to bolster the credibility of their witnesses' testimony.

The trial court's reversible error in admitting these hearsay statements requires that Andrew Williams be granted a new trial.

B. The Trial Court Erred In Admitting The Opinion Testimony Of A State Witness Not Qualified As an Expert In The Pertinent Field.

Over three objections by defense counsel, State witness Detective James Noblitt was allowed to testify to a matter on which he was never qualified as an expert. (R. 866-867) After stating that the Columbia Bank had been tested for fingerprints after this offense, the witness stated that one could touch a surface and not leave fingerprints. (R. 866) Although Detective Noblitt described, briefly and in rather basic terms, the possible types of fingerprint impressions, he was never qualified as an expert in this area.

This Court has made it clear that if a police officer testifies regarding an area in which he is not an expert, he should demonstrate his knowledge of the area in some way. See, Jackson V. State, 497 So.2d 863 (Fla. 1986).

Based on the Florida Evidence Court, one court held that an expert witness "... must be qualified by knowledge, skill, experience, training or education to express an opinion." Wright v. State, 348 So.2d 26 (Fla. 4th DCA 1977). This was clearly not done in the case at bar.

The trial court's cumulative errors in allowing hearsay and opinion testimony were highly prejudicial to this defendant. As a result, his convictions should be reversed and his case remanded for a new trial.

ISSUE V

THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS RELATING TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE WEIGHED DURING THE PENALTY PHASE OF A CAPITAL CASE.

During the penalty phase of the case at bar, defense counsel requested eight non-standard jury instructions relating to the jury's rights and responsibilities in weighing statutory and non-statutory aggravating and mitigating circumstances. (R. 1431) Each instruction was denied by the trial court.

The defendant requested an instruction to the effect that the jury must consider as mitigating factors, if evidence supports their conclusion, the fact that Andrew Williams co-operated with the police, and that his family history involved foster care, hospitalization as a young child and brain damage due to open heart surgery. (R. 1971) He also requested instructions to the effect that the jury may consider "...any other circumstances relating to the case or to Andrew Williams as reasons for imposing a sentence of life imprisonment," (R. 1972), and that the jury is not limited to considering only statutory mitigating circumstances. (R. 1976)

Since this Court has held that the jury is indeed not limited to statutory mitigating circumstances, Lewis v. State, 398 So.2d 432 (Fla. 1981), the requested jury instruction on this topic should have been given.

Further requested instructions stated that a fact may be used to support only one aggravating circumstance, (R. 1970), that mitigating circumstances must be considered if one statutory aggravating circumstance is found, (R. 1969), that life imprisonment is presumed to be the appropriate sentence, (R. 1975), and that before the jury returns a sentence of death they must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances and that it is "the only justified and appropriate sentence in the circumstances." (R. 1974)

The defendant also sought an instruction on the jury's duty to not merely add up the number of aggravating and mitigating circumstances but rather to assign them whatever value the juror deems appropriate. (R. 1973) This is supported by Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), in which this Court held that "the jury shouldn't add up the aggravating and mitigating circumstances in a mechanistic and wooden fashion but weigh the totality of the circumstances...." The requested instruction would have clearly informed the jurors of their duty in this respect.

In the general spirit of the decisions on the death penalty from this Court and the United States Supreme Court, all of the instructions mentioned above should have been given. The United States Supreme Court has repeatedly held that the sentencing jurors should hear and carefully consider all relevant evidence

in mitigation of punishment. E.g., Skipper v South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 LEd.2d 1 (1986). The requested instructions in the present case would have merely required the jury to consider and weigh the evidence properly.

The trial court erred in failing to give the requested instructions and Andrew Williams is entitled to a new trial as a result.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THREE STATUTORY AGGRAVATING CIRCUMSTANCES, IN USING THESE AS SUPPORT OF A DEATH SENTENCE, AND IN CONCLUDING THAT THE SENTENCE OF DEATH WAS APPROPRIATE IN THIS CASE.

The trial court in the case at bar instructed the jury on five statutory aggravating circumstances and three mitigating circumstances. (R. 1465) When the jury returned a recommendation of a death sentence based on those instructions, the trial court used these circumstances to justify the imposition of a sentence of death upon Andrew Williams. (R. 2002-2004) It erred in doing so.

A. There Being No Support For Such A Finding In The Record, The Trial Court Erred In Applying The Aggravating Circumstance Of "Heinous, Atrocious And Cruel" To The Present Case.

The written findings in support of the death sentence in the present case state that the crime was especially heinous, atrocious or cruel because,

> the Defendant physically restrained Pearl Fisher and prevented her from removing her holstered weapon, then he pulled the trigger three times in a deliberate fashion, the gun misfired on

> the first two occasions and finally fired on the third attempt, shooting Pearl Fisher in the chest; the wound from which she died by bleeding to death and the expert testimony being that she could have taken several minutes to finally die.

(R. 2003) This Court has determined that, "...a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel." Lewis v. State, 398 So.2d 432, 438 (Fla. 1981). This Court had determined, for example, that a killing in which two shots are fired and then the victim dies is not "atrocious" within the meaning of Section 921.141 (5)(h). Lloyd v. State, 524 So.2d 396 (Fla. 1988). Indeed, the killing was not "atrocious" where two shots were fired at a jewelry store owner, despite the allegations that the position of the victims's arm indicated submission. Menendez v. State, 419 So.2d 312 (Fla. 1982). The fact that the defendant in the case at bar allegedly "physically restrained" the victim instantaneously while he shot her does not satisfy the test of "heinous, atrocious or cruel."

Similarly, the court's findings that the trigger was pulled three times before it fired and that the victim may have taken several minutes to die do not satisfy the test either. First of all,the assistant medical examiner testified that death ensued very quickly. (R. 1025) The State tried to demonstrate that this victim may have been conscious in the zero to three minutes it

took for her to die from bleeding. (R. 1026) The fact that the victim may have taken a short time to die cannot support the aggravating circumstance of Section 921.141 (5)(h). In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), this court held that even a killing in which the victim "lived a couple of hours in undoubted pain and he knew he was facing imminent death" was not heinous, atrocious or cruel for purposes of supporting the death penalty.

In summary, this Court has determined that instantaneous or nearly instantaneous death by shooting will not ordinarily be considered heinous for purposes of the death penalty. Brown v. State, 526 So.2d 903 (Fla. 1988). The trial court erred in applying this aggravating circumstance to this case. This factor, in its own right or in conjunction with erroneous application of other aggravating circumstances, requires that this case be remanded for a new sentence of life imprisonment.

B. The Trial Court Erred In The Present Case In Finding The Aggravated Circumstance Of Great Risk Of Death To Many People.

The trial court's written findings on the aggravating circumstance of great risk of death to many people are as follows:

> The Defendant in committing the crime of Murder for which he is going to be sentenced, knowingly created a great risk of death to many persons as the Columbia Bank had numerous customers in the vicinity of the defendant who were

> in great danger if there was any resistance as evidenced by his threat to one of the bank employees.

(R. 2002) The fact that people were "in the vicinity" of a killing does not support the aggravating circumstance contained in Section 921.141 (5)(c). Firstly, it is unclear from the record how many people were, in the words of the trial court, "in the vicinity" of the killing. We do know from this Court's ruling in Lucas v. State, 490 So.2d 943 (Fla. 1986), that three people do not constitute "many" under the statute. This Court has also made it clear that a defendant should not be sentenced to death based on mere speculation or possibility of what could have occurred at the scene but only a great risk of death which was likely or highly probable. Lusk v. State, 446 So.2d 1038 (Fla. 1984). Anything less than this will not satisfy the statute or support a sentence of death.

In the present case, where the only relevant and definite evidence is to the effect that there were two customers, one teller and a vice-president of the bank " in the vicinity" of the killing and that only two were allegedly threatened, there was no support for this aggravating circumstance and the trial court erred in applying it. For this reason and those stated in Issue VI.A,C and D, Andrew Williams' sentence of death must be vacated and a sentence of life imprisonment imposed.

C. There Was No Evidence To Show That The Killing In The Present Case Was Committed For The Purpose Of Avoiding Arrest And The Trial Court Erred In Using This As Support For A Sentence Of Death.

The trial court found the aggravating circumstance enunciated in Section 921.141 (5)(e) as reflected below in its written findings:

> The murder was committed for the purpose of avoiding or preventing a lawful arrest as evidenced by the fact the victim, Pearl Fisher, was a uniformed, armed security guard there in the bank to prevent robberies or apprehend and detain perpetrators of crime.

(R. 2003) The trial court's written findings suggest that it derived from the facts only one explanation for the killing in the present case, namely to shoot the guard to prevent arrest. In a case of felony murder, particularly in cases of robbery or burglary, there may be many possible explanations for the killing, for example, panic or an accident during a struggle. This Court has held that if avoiding arrest is only one of several possible explanations for the killing, reliance on this aggravating circumstance to support a sentence of death is

improper. Jackson v. State, 502 So.2d 409 (Fla. 1986). There is a dearth of evidence in the present case to support a conclusion that this killing was committed for the purpose of avoiding or preventing arrest.

Andrew Williams is entitled to a vacation of his sentence of death and imposition of a sentence of life imprisonment based on the trial court's error in relying on this and two other aggravating circumstances.

D. Where The Trial Court Found Three Mitigating Circumstances And Three Of The Five Aggravating Circumstances Were Invalid, The Sentence Of Death Must Be Vacated In The Present Case And A Sentence Of Life Imprisonment Imposed.

The trial judge accepted the testimony of an expert forensic psychologist and used it and other testimony to support the finding of two statutory mitigating circumstances. Andrew Williams was found to have committed the offense under the influence of an extreme emotional disturbance and with an impaired capacity to conform his conduct to the requirements of the law. (R. 2002-2004) Further, as shown in Issue VI. A,B and C, three of the five aggravating circumstances cited by the trial court were invalid as a matter of law or unsupported by the record.

This Court has not hesitated to vacate sentences of death when the trial court has improperly applied aggravating circumstances. Blair v. State, 406 So.2d 1103,1109 (Fla. 1981).

In Blair, the trial court was found to have erred in applying the aggravating circumstances of premeditation, great risk of death to many persons, and heinous atrocious or cruel. The Court held that, "because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must vacate the death sentence." (emphasis added) Blair, 406 So.2d at 1109. A similar remedy is required in the case at bar.

This is also a case in which the death penalty is proportionately unwarranted. A comparative analysis has frequently been carried out with regard to cases in which death has been imposed. This Court has required that a life sentence be imposed even in cases in which aggravating circumstances are found and no mitigating circumstances. Wilson v. State, 493 So.2d 1019 (Fla. 1986), Rembert v. State, 445 So.2d 337 (Fla. 1984). The two very strong mitigating circumstances in the present case provide an even stronger argument for imposition of a sentence of life.

Three aggravating circumstances were improperly applied in the case at bar. For this reason and those stated in Issue VI. A, B and C, Andrew Williams' death sentence must be vacated and a sentence of life imposed.

ISSUE VII

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 aggravation circumstances listed in 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). This is particularly true in the application of the aggravating circumstance of heinous, atrocious and cruel. See Issue VI.A. See Maynard v. Cartwright, ___ U.S. _____, 108 S. Ct. 1853, ____ L.Ed.2d___ (1988).

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, SS9 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 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. (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, 357 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

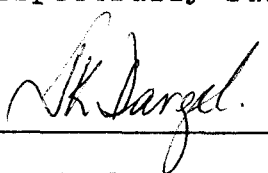
(Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 317 (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 statue 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 Eight and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Andrew Williams, the defendant appellant, respectfully requests that this Court vacate his convictions and grant him a new trial, (Issues I through IV), vacate his sentence of death and impose a sentence of life imprisonment, or remand his case for resentencing, (Issues V through VII).

Respectfully submitted



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