IN THE SUPREME COURT OF FLORIDA

JAMES DAILEY, :

Appellant, :

vs. : Case No. 71,164

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

On January 22, 1986, a Pinellas County grand jury indicted the Appellant, JAMES DAILEY, for the first-degree murder of Shelley Boggio on May 5-6, 1985. (R. 7-8) Dailey was extradited from California on February 12, 1986, and booked into the Pinellas County Jail. (R. 9)[1] His first trial commenced on May 19, 1987, and resulted in a mistrial during voir dire. (R. 95)

Dailey was tried by jury June 23-30, 1987, Judge Thomas E. Penick presiding, and found guilty as charged. (R. 96-103) The jury recommended the death penalty. (R. 156, 1433)[2] At sentencing on August 7, 1987, the judge sentenced Dailey to death by electrocution. (R. 231, 1446) Written findings supporting the death sentence were filed on September 2, 1987. (R. 233-37)

On September 4, 1987, Dailey filed a Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Rule 9.030(a)(1)(A)(i) of the Florida Rules of Appellate Procedure. (R. 243-K) The Public Defender for the Tenth Judicial Circuit was appointed on September 8, 1987. (R. 243-M)

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[1] On April 27, 1987, defense counsel filed a motion to suppress statements and admissions allegedly made by the Appellant to inmates of the Pinellas County Jail. The motion alleged that the affidavit supporting the Appellant's arrest warrant was based on self-serving allegations by codefendant Jack Pearcy which did not merit belief; therefore, the Appellant's incarceration, which produced the statements and admissions, was illegal. (R. 77-78) The motion was denied at a pretrial hearing held on May 19, 1987, and again during trial on June 26, 1987. (R. 1606-07, 99)

[2] A Motion for New Trial was filed on July 7, 1987. (R. 157-58) There is no evidence that it was ever heard or ruled on.

STATEMENT OF THE FACTS

Guilt Phase

At about 8:20 on the morning of May 6, 1985, Jay Hoff, a bridge tender at the Indian Rocks Bridge in Pinellas County, Florida, spotted a woman's body floating in the water. The area where the body was found, a peninsula north of the Indian Rocks Bridge, is called "the Loop" and is known as a "lovers lane" where people park to engage in sexual activity. (R. 776-91) Hoff notified the authorities. (R. 761)

Officer Kathleen Buchaus, Indian Rocks Beach Police Department, responded immediately. (R. 766) When the bridge tender showed her the body, she waded out about knee deep and carried it into shallow water. (R. 766-68) The nude body was later identified as that of Shelley Boggio, age 14. (R. 760-61, 802-03, 896)

Terry Buchaus, the lead detective for the Indian Rocks Beach Police Department, arrived at the scene about 9:12 that morning. He took photographs of items found in the area. (R. 775-77, 794-95) The Pinellas County Sheriff's Department was called in to help with the investigation because the Indian Rocks Beach Police Department was small. (R. 794-95)

Terry Buchaus identified crime scene photographs depicting the victim's body, her clothing on the shore and in the water, and blood and vomit on the shore. (R. 783-87) Buchaus also identified the physical evidence collected at the scene. (R. 788-790) The tide had washed away a lot of footprints and no casts were made of what remained. (R. 795-96)

Joan Wood, the medical examiner, testified that Shelley Boggio died from stabbing, choking, and drowning. (R. 851) Because the drowning occurred last, this was the actual cause of death. (R. 877) She estimated the time of death as between 1:30 and 3:30 on the morning of May 6th. (R. 879) Over defense objection, Dr. Wood identified a number of photographs taken at the scene and at the autopsy. (R. 862-63) By use of the photographs, she described the various wounds to the victim. (R. 864-66)

Shelley sustained 31 stab wounds and 17 other cutting wounds. (R. 866) Dr. Wood described the 18 defensive wounds to Shelley's hands as the worst she'd ever seen or read about. (R. 873-77) She said it would take a few minutes to inflict the wounds but could not say exactly how long. (R. 876) Shelley was alive when she was choked and drowned but may have lost consciousness from the choking. (R. 867, 882) Dr. Wood could not tell whether her head was held under water or whether the drowning resulted from the unconscious body floating in the water. (R. 883-84)

Dr. Wood testified that Shelley's blood alcohol level was .06. (R. 869) Although no sperm was found, she would not expect to find sperm because they would have been washed away in the water. (R. 870-71) She found no evidence of trauma to the vaginal area. (R. 884) Dr. Wood did not believe the vomit found at the scene was that of the victim. (R. 830) A shirt belonging to Jack Pearcy (the codefendant) showed evidence of blood although the amount was insufficient to be tested for type. (R. 813-15)

Stacey Boggio, Shelley's twin sister, testified that, on

May 5, 1985, she, Shelley, and Stephanie Forsythe were hitchhiking in Pinellas Park, Florida. They were picked up by the Appellant, James Dailey, known to them as "Jimmy D"; Jack Pearcy; and another man whose name she did not remember. (R. 895-99) Although she and Stephanie did not know the men, Shelley had known them for awhile. (R. 908) They picked up wine coolers at a convenience store and went to the Driftwood Bar on Sunset Beach. They then went to the nearby Quarterdeck Lounge but were denied admittance because they were underage. (R. 900-01)

The group then went to Jack's house in Seminole. Jack's girlfriend, Gayle Bailey, was there. (R. 901-02) After smoking four joints of marijuana (R. 907-08), they decided to go to a bar called Jerry's Rock and Disco in St. Petersburg.[3] (R. 902-04) Gayle loaned Shelley an ID. (R. 909) Stacey and Stephanie did not want to go so the others dropped them off at Stephanie's house. (R. 904-05) Shelley was in the back seat with Jimmy D. (R. 906)

Gayle Bailey testified that she lived with Jack Pearcy and James Dailey in Seminole, Florida, in May of 1985. (R. 950-52) Oza Dwaine Shaw, from Olathe, Kansas, was staying with them temporarily because of marital problems. (R. 953) Gayle was then pregnant with Jack Pearcy's baby and had subsequently given birth to the child -- a boy who was almost two years old at the time of the trial. (R. 953, 965) Gayle said she had testified at Pearcy's

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[3] Indian Rocks Beach, Sunset Beach, Seminole, and Pinellas Park are all communities located in Pinellas County just north of St. Petersburg and on the adjacent beaches.

trial and continued to visit him in prison occasionally. (R. 965)

Gayle testified that, on May 5, 1986, she, Pearcy, Jim Dailey and Dwaine Shaw went to the beach, returning about 5:00 or 6:00 that evening. (R. 954) After dinner, the three men left for a few hours, returning with three women. (R. 954-55) They rolled and smoked a joint. Gayle reluctantly loaned Shelley Boggio her identification card and they all went out, with the exception of Dwaine Shaw. (R. 955-56) They dropped off two of the girls but Shelley remained, riding in the back seat with Dailey. (R. 956)

They went to Jerry's Rock Disco and stayed about an hour. Shelley declined to dance with Jim but danced once with Jack, with Gayle's permission. They returned home late, probably about midnight. (R. 957-58, 975) Shaw was still there. (R. 953) When they went in the house, Shelley slumped in the chair as though she were "drunk or something." (R. 971)

Gayle went to the bathroom and when she came out, Jack, Jim, and Shelley were gone. Shaw was still on the couch. Gayle did not look in Dailey's bedroom to see if he was there. (R. 972) She was angry because Jack brought the girls home, danced with Shelley, and left without her to take Shelley home. (R. 968-70)

Gayle stayed up until Jack and Jim returned at about 2:00 or 3:00 in the morning. (R. 976, 959) Jack was wearing the same clothes he was wearing when he left earlier. (R. 959) Jim wore only a pair of pants and they were wet. He was carrying a bundle of something. (R. 960)

The following morning Gayle discovered bottles, beer

cans, and women's clothing in her car. She also found an earring which she recognized as belonging to Shelley Boggio. Gayle said that Jack and Jim had used the car the night before. (R. 961) Later in the morning, the men went to the laundromat. When they returned, they told Gayle to pack to go to Miami. (R. 963)

They stayed in Miami about a week. Gayle shared a room with Jack. (R. 963) Shaw shared a room with Dailey. (R. 979) The morning after they arrived, however, Dailey left with his guitar and duffle bag and Gayle did not see him again. (R. 964)

Oza Dwaine Shaw testified that he was presently incarcerated in the federal penitentiary in Elreno, Oklahoma. (R. 993) He recalled that on May 5, 1986, he, Jack, and Jim rode around most of the day drinking beer. (R. 995) They spotted three girls hitchhiking at about three or four o'clock in the afternoon. The girls recognized the car and knew Jack and Jim. The six of them rode around drinking for another hour or two. Afterwards, they all went to the house in Seminole where they drank more beer. (R. 996)

Eventually, the others left and Shaw fell asleep on the couch. When he awoke, they had returned and Jack was leaving with Shelley. Shaw asked Jack and Shelley for a ride to the phone booth where he called his ex-wife and his girlfriend. (R. 997, 999) Dailey did not go with them. (R. 1007) Shaw walked home after about an hour and found only Gayle there. (R. 998) He did not look in Dailey's bedroom. (R. 1006) After talking to Gayle, he fell asleep until 2:00 or 2:30 in the morning when Jack and Jim returned. (R. 998) He noticed that Jim seemed to walk a little bow

legged and the inside of his pants were wet. (R. 998) There was no conversation and everyone went to bed. (R. 1000)

When Shaw awoke early the following morning, everyone was packing. Jack told him they were "going for a ride for a couple of days." No one explained to him why they were taking the trip. (R. 1001) In Miami, he shared a room with Dailey the first night, after which Dailey left. (R. 1001, 1007)

Detective John Halliday, Pinellas County Sheriff's Department, described to the jury how he developed James Dailey and Jack Pearcy as suspects. Shelley's sisters identified Pearcy's residence in the Largo/Seminole area. (R. 910-12) They set up surveillance and, on May 10th, Gayle Bailey showed up and was interviewed. They found a motel key from the Kent Motel in Miami in Gayle Bailey's car. (R. 913)

Detective Halliday went to Miami and found that James Dailey had stayed at the Kent Motel on the 6th and 7th of May. Pearcy, Bailey, Shaw, and Shaw's girlfriend, Betty Mingus, stayed at another hotel on the 7th and 8th of May. Detective Halliday then went to Kansas where he talked to Jack Pearcy's mother. (R. 914) Pearcy was ultimately returned to Pinellas County.[4] (R. 915)

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[4] Halliday testified that they found a knife sheath in the Walsingham Reservoir, east of where the body was found. (R. 918) Defense counsel moved for mistrial because the implication was that the sheath was found as a result of information learned from Pearcy upon his return from Kansas. The court denied the motion and allowed the prosecutor to continue with testimony concerning the recovery of the knife sheath. (R. 915-19, 926-27) At the end of the State's case, defense counsel moved to strike all testimony concerning the discovery of the knife sheath because there was no evidence linking it to the crime. The trial court overruled the objection and denied the motion. (R. 1199)

Outside the presence of the jury, Jack Pearcy was called to the stand. (R. 986) He invoked his right to remain silent pursuant to the Fifth Amendment. (R. 987) The judge ordered him to answer the questions but he again invoked his right to remain silent and was held in contempt of court. (R. 989) Pearcy did not testify in front of the jury.[5]

The prosecutor recalled Detective Halliday to testify about the Appellant's arrest in November of 1985. (R. 1165-66). Over defense objection, Halliday testified that he and the victim's sister, Stacey Boggio, went to California to identify Dailey. As a result, Dailey was returned to Florida. (R. 1169) Also over defense objection, the prosecutor introduced a photograph of Dailey taken during the jail book-in procedure (R. 1169-71) and two photographs showing Dailey at the beach where the homicide occurred. These latter photographs were taken at some time prior to the homicide and were found in Gayle Bailey's possession. (R. 1172-76)

James Leitner, an inmate at the Pinellas County Jail, testified concerning conversations with the Appellant and with Jack Pearcy in the jail's law library. (R. 1012-1070) Leitner admitted that he was awaiting disposition on charges of conspiracy to traffic and trafficking in cocaine. (R. 1014) Although the charges carried penalties of 15 (minimum mandatory) to 30 years, he was

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[5] At the suggestion of his attorney, the judge sentenced Pearcy at that time to serve five months and 29 days consecutive to a prior contempt sentence and to his sentence of life imprisonment for the instant offense. (R. 990)

promised a five-year sentence concurrent with a ten-year sentence in Colorado. (R. 1013-15, 1072) Leitner testified in a criminal case in Colorado in exchange for that sentence. (R. 1015)

Leitner testified that he and another inmate, Pablo DeJesus, became trustees and worked as law librarians at the Pinellas County Jail. (R. 1016-17) He said that Pearcy and Dailey frequented the library while in jail. (R. 1018-19) Leitner and DeJesus passed oral and written messages, called "kites" in the jail, back and forth between Pearcy and Dailey.

Prior to delivering the kites, Leitner read and made copies of them, allegedly to protect himself. (R. 1024-25) He testified that he reported the notes to the jail supervisor because he "didn't particularly enjoy having anything to do with inmates that were discussing a crime like that where someone was killed, especially a 14 year old." (R. 1026) Leitner gave copies of the notes to the prosecutor. (R. 1029) Following arguments by counsel, the trial court admitted two notes written by the Appellant but did not admit two notes written by Jack Pearcy. (R. 1052)

Leitner testified that he also relayed verbal messages between Pearcy and Dailey during December of 1986. (R. 1057-59, 1086) He related to Dailey what happened at Pearcy's trial. (R. 1060-61) He said that Dailey asked him to tell Pearcy that if Pearcy got a new trial on appeal, he would then testify and tell what really happened -- that he was the one that did it. (R. 1066) Leitner advised Dailey that it was imperative that he not testify at his trial because he would then be charged with perjury if he

testified differently at a retrial of Jack Pearcy. (R. 1069-70)

Leitner testified that Pablo DeJesus was also in the library during one of the conversations and asked Dailey why he had to kill the girl rather than just knock her out since she was only 14 years old. (R. 1066) Dailey allegedly responded, "Man, I just lost it." (R. 1067)

Pablo DeJesus was also jailed on a cocaine trafficking charge and was awaiting sentencing. His plea bargain was for ten years instead of fifteen because he testified against a codefendant under the "substantial assistance" provisions. (R. 1079-82) He said that his lawyer told him he would get only seven years if he testified in Dailey's trial. (R. 1082-83) His sentence was to run concurrently with an eight-year Maryland sentence. (R. 1099)

DeJesus related that he met Dailey in December of 1986 when he gave him a note from Jack Pearcy.[6] (R. 1085-87) He said Dailey asked him to tell Pearcy not to worry, that he was the only one that knew what had happened and, as long as he didn't break down, he could beat the case and then help Pearcy. (R. 1092) On another occasion, Dailey allegedly said that he and Pearcy were "fall partners." (R. 1093) On a third occasion, DeJesus related to Pearcy that Dailey said not to worry, that he would not take the

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[6] DeJesus said that, although he knew it was against jail policy to pass notes, he did not know whether it was against the law. (R. 1088-89) Defense counsel objected and moved for a mistrial because the prosecutor was intentionally trying to introduce evidence of other crimes. The judge denied the motion but advised the prosecutor not to go into the other crime aspect. (R. 1089)

stand and could beat the case. (R. 1095) Another time, Dailey allegedly asked DeJesus to reassure Jack that he would beat the case and then tell the truth -- that he killed the girl. (R. 1095)

Paul Skalnik, a former police officer, was also an inmate at the Pinellas County Jail. His pending charges were for parole violation and grand theft.[7] (R. 1107-09) He said that no one had offered him anything to testify in Dailey's trial. Skalnik admitted, however, that he had testified in other criminal cases over the past five years, approximately six to eight times. (R. 1108) Five or six of those were first-degree murder cases and all involved information he allegedly learned while in jail. (R. 1156) Skalnik said that he had been responsible for helping to put 30 persons in prison, and that he did this because he still had law enforcement in him. (R. 1157)

Skalnik testified that in April or May of 1987, Dailey asked him if he knew whether notes between friends were admissible in court. (R. 1112) He said that Dailey told him Pearcy had "done more than he had said, that he had stabbed [the girl] too." (R. 1114) On a second occasion, Dailey allegedly told Skalnik that

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[7] The State filed a motion in limine, attempting to get a pretrial ruling prohibiting defense counsel from cross-examining Skalnik concerning the fact that his victim was an elderly female, the amount of money he took, and how he took it from the victim. (R. 1609-10) The motion was heard on the morning of the May 19 mistrial but no ruling was made. Defense counsel promised not to mention it during voir dire and the court agreed to rule on it before anyone mentioned it at trial. (R. 1611) At trial, when defense counsel asked Skalnik if his crimes involved taking things from women under dishonest circumstances, the prosecutor objected. (R. 1118) The judge sustained the objection. (R. 1119-20)

Pearcy had actually held the girl "under." According to Skalnik, Dailey told him that the girl "kept staring at him (Dailey), screaming, and would not die. And he (Dailey) stabbed her and he threw the knife away." (R. 1116-17)

Prior to his alleged conversations with Dailey, Skalnik had given Detective Halliday information about Jack Pearcy. The information was of no use because Pearcy had already been convicted. Although Skalnik testified that Halliday did not tell him about the case or that anyone else was involved, he later contacted Halliday to report conversations with Dailey. (R. 1146-47)

Detective Halliday also described his meetings with the three state witnesses in the Pinellas County Jail. He said that he never promised them anything for their testimony. (R. 1177-84) Halliday had worked with Paul Skalnik on prior cases. He related that as a result of information from Skalnik, they recovered a ski mask worn by Richard Cooper, one of the perpetrators of the High Point murders. (R. 1186-87) They recovered a weapon in another case because of Skalnik's assistance. (R. 1188)

Halliday admitted that he had been to the jail trying to find witnesses against Dailey prior to December, 1986, and had not found any. In early December, he had interviewed fifteen or so inmates attempting to find statements Dailey might have made. He said that he does this routinely. (R. 1192)

The state rested. (R. 1195-96) The defense rested without presenting a case. (R. 1227) On June 27, 1987, the jury found Appellant guilty of first degree murder. (R. 1319)

Penalty Phase

Detective Halliday testified that he had investigated close to one hundred homicides and about one hundred sexual batteries over a six-year period. (R. 1342-43) Defense counsel objected to his being tendered as an expert on homicide investigation and sexual battery because his opinion testimony was based on nothing more than common intelligence and speculation. (R. 1351-52) Nevertheless, the judge qualified him as an expert. (R. 1353)

Halliday testified before the jury that the victim's nude body was found twenty feet off an embankment in the intracoastal waterway. Her jeans and shirt were nearby. The shirt was torn from the stabbing. Her black underwear was found about 140 feet away. There was a trail of blood from that location to the embankment where the body was found. (R. 1357)

Over defense objection, Halliday testified that it was his opinion that some of the stab wounds occurred after the shirt was removed. (R. 1359) Again over defense objection, Halliday said that, in his opinion, when clothing is found at a different location than the body, consensual sex is ruled out because, when sex is consensual, "[y]ou take [your clothing] with you." (R. 1360)

Halliday also testified that Dailey was found guilty of aggravated battery in Arizona in 1979. (R. 1360) He was sentenced to 170 days in jail. (R. 1362) Mary Kay Dollar, a defense witness, later testified that Dailey wrote to her explaining that he got into trouble in Arizona in 1979 while playing pool. Someone came at him with a pool stick and he hit the man in self

defense. (R. 1376) Dailey's mother later testified to essentially the same facts. (R. 1394) Over defense objection, the state introduced a certified copy of the judgment and sentence into evidence. (R. 1397-98, 1479)

Mary Kay Dollar testified that she was married to James Dailey for ten years. (R. 1364) They met in Kansas in 1962 and were married in 1966 when both were twenty years old. At the time of their marriage, Jim was in the Air Force. (R. 1365) Before entering the military, he attended Kansas State College for a short time and worked in electronics. He dropped out of college when his father died. While in the Air Force, Jim was in Vietnam three times and in Korea, Germany and the Philippines. (R. 1366-70)

Jim and Mary Kay had two children. James Michael, age 20, was in the Air Force at the time of the trial. Stacey Raye, age 18, was working as a nurse's aid. (R. 1368-69) Mary Kay identified a photograph of herself, Jim, and their son when he was six months old. (R. 1374, 1480) She said that Jim was good with the children and never hit her or the children. Although he was a very good husband, he had a drinking problem which finally caused their divorce. (R. 1370) The drinking problem was worse each time he returned from Vietnam. (R. 1374-75)

Mary Kay testified that the only times she had seen Jim get "in a scuffle" was when he was defending a woman. She recalled that, in 1970, he intervened in an argument between a girl and her boyfriend and was stabbed 11 times by the boy. He nearly died. (R. 1372) Mary Kay described other occasions, one of which was in the

Philippines, when Jim stood up in defense of a woman. (R. 1372)

Dailey is talented with wood and made his daughter's bed. He plays the guitar and sings. Mary Kay reported that he sang in the church choir and taught Sunday School when they were married. (R. 1373) Although he was raised in the Episcopal church, he converted to Catholicism before his daughter's birth. (R. 1373)

Mary Kay is presently married to Richard Dollar who worked with Jim Dailey in electronics while in the Air Force. When she met Richard and his first wife, both she and Richard's wife were pregnant. The two families became friends. (R. 1363, 1378) Jim Dailey and Dick Dollar are still friends. (R. 1373)

Richard Dollar testified that Dailey was a "billboard-type GI," a recruiter's dream. He was very good at his job. (R. 1379) Dollar identified a photograph of himself and Dailey in the military. (R. 1381, 1481) Years later, after Dollar was divorced, he began corresponding with Jim and Mary Kay Dailey. Some time later, after both couples were divorced, he married Mary Kay. (R. 1380-81) Dailey allowed Richard Dollar to adopt his two children because of his friendship with Dollar. (R. 1382)

Stacey Dollar (formerly Stacey Dailey), age 18, testified that she was about five years old when her parents were divorced. (R. 1383-84) She said that the Appellant was a good father. (R. 1384) She identified two homemade birthday cards she received from him on her seventeenth and eighteenth birthdays. (R. 1386-88, 1482-83) Stacey said that she'd been visiting her father once a week since he had been in jail. (R. 1388)

Grace Davies, the Appellant's mother, testified that Jim was her favorite of her four children because he was sweet, loving, and thoughtful. (R. 1389-90) She said that Jim was talented and sang in the church choir. His father was the choir director. (R. 1391) Mrs. Davies said that Jim's father died at age 43 from a heart attack. Jim, who had started college, did not adjust well to the loss. (R. 1391-92) She could not afford to keep him in college after his father's death. (R. 1392) Thus, Dailey left college and enlisted in the Air Force. (R. 1393)

The trial court judge instructed the jury on five aggravating factors: (1) the crime was committed while the defendant was engaged in a sexual battery or attempted sexual battery; (2) the crime was especially heinous, atrocious or cruel ("HAC"); (3) the crime was committed to avoid or prevent a lawful arrest; (4) the crime was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification ("CCP"); and (5) the defendant was previously convicted of a felony involving the use or threat of violence. (R. 1126-27)

He instructed the jury to consider the following in mitigation: (1) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired by alcohol or drugs; (2) the defendant was an accomplice in the offense but the offense was committed by another and the defendant's participation was relatively minor; (3) the defendant acted under extreme duress or under substantial domination by another person; (4) the defendant was

under the influence of extreme mental or emotional disturbance; and (5) any other aspect of his character or record or any other circumstance of the offense. (R. 1427-28)

The jury recommended the death penalty. (R. 1433, 156)

Sentencing

Sentencing was held on August 7, 1987. The Appellant made a statement to the court expressing his regret for the death of Shelley Boggio and his disillusionment with the criminal justice system. Although Dailey professed his innocence, he requested the death penalty rather than life imprisonment. (R. 1442-44) Thus, defense counsel did not argue for a life sentence and Dailey was sentenced to death in the electric chair. (R. 231, 1446) Judge Penick told Dailey that he also presided over the trial of codefendant Jack Pearcy and found Dailey most culpable. (R. 1445-46)

In his written order dated September 2, 1987, Judge Penick found the same five aggravating factors on which he instructed the jury. (R. 233-37) After discussing each of the mitigating factors read to the jury, he concluded that none of these factors mitigated the crime. (R. 237-39) The judge also discussed the disparity in sentencing between Dailey and Pearcy. He noted that he presided over the trials of both defendants accused of this murder and that Jack Pearcy, the codefendant, was found guilty of first-degree murder and sentenced to life in prison. (R. 232) His opinion was that Dailey "was clearly the dominating force behind the murder of Shelly Boggio." (R. 239)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial judge erred by permitting the prosecutor to introduce evidence at trial that the Appellant fought extradition from California. The evidence was not probative of flight or consciousness of guilt because there were other possible reasons for his refusal to waive extradition. Thus, it was irrelevant and prejudicial. Additionally, as with the right to remain silent, it is fundamentally unfair for the state to tell someone that he has the right to refuse to waive extradition and, when he chooses to exercise the right, to penalize him for doing so by using his exercise of the right against him at trial.

ISSUE II: Defense counsel objected when the prosecutor attempted to introduce into evidence a book-in photograph of the Appellant, because the photograph had not been provided to the defense in discovery. Although the trial judge offered to allow defense counsel to question the witness concerning the authenticity of the photograph, which was never questioned, he failed to hold the mandated Richardson hearing concerning the discovery violation. This is per se reversible error.

ISSUE III: The judge permitted the state to elicit hearsay testimony from two jail inmates concerning information passed between Dailey and the codefendant, Jack Pearcy, while in the Pinellas County Jail. Additionally, the court allowed testimony concerning the discovery of a knife sheath, obviously based on information received from Pearcy who did not testify at trial. The state attempted to circumvent the hearsay rule by not asking

the witnesses to reveal the source of their testimony. Nevertheless, it was apparent that the testimony was hearsay based on Pearcy's out-of-court statements. Thus, the spirit of the hearsay rule was violated and the Appellant was prejudiced.

ISSUE IV: The trial court permitted the state to introduce into evidence a knife sheath found in Walsingham Reservoir, located between the crime scene and the house where Dailey and the codefendant were living. Although there was testimony concerning its discovery, there was no testimony to connect the knife sheath to the Appellant or the crime. Thus, the court erred by allowing the state to introduce the sheath into evidence.

ISSUE V: Over defense objection, the trial court permitted the prosecutor to elicit hearsay from Detective Halliday about prior statements made to him by the three witnesses from the Pinellas County Jail. The statements were repetitive of statements made earlier during the trial. They were not admissible under the state of mind exception to the hearsay rule, as argued by the prosecutor, but instead were prior consistent statements. They were inadmissible because they were not made prior to the existence of the witnesses' motives to fabricate.

ISSUE VI: The trial court sustained the state's objection when defense counsel attempted to cross-examine Paul Skalnik, a key prosecution witness, concerning the nature of his present and prior felonies in which he conned women out of money. This was error for two reasons. First, defense counsel had an absolute right to question the witness concerning the facts behind his pending

charges. Second, the Appellant was denied his sixth amendment right to confront the witnesses against him. The state opened the door to this form of questioning when Skalnik vouched for his credibility as a state witness. Thus, the Appellant was denied his right to present a meaningful defense.

ISSUE VII: The trial court erred by instructing the jury on the final sentence of the "principals" instruction -- that the defendant need not have been present when the crime was committed to be guilty. Jury instructions should only be given when supported by the evidence at trial. There was absolutely no evidence to support such a theory and neither the defense nor the prosecution requested the instruction. It was particularly harmful because it encouraged the jurors to find the Appellant guilty even if they believed that he was at home in bed when codefendant Jack Pearcy killed the victim. The fact that the codefendants endeavored to protect each other from conviction after the offense may have misled the jurors to believe Dailey was guilty as a principal even if he had nothing to do with the murder.

ISSUE VIII: During her closing argument, the prosecutor made two comments which were "fairly susceptible" of being viewed by the jury as comments on the Appellant's failure to testify. The court overruled defense counsel's objection. The error may have contributed to the verdict because the prosecutor's argument might have persuaded the jurors that the Appellant would have testified, if he were innocent, to refute the circumstantial evidence and the testimony of the jail informants.

ISSUE IX: During penalty phase, the judge qualified Detective Halliday as an expert in homicide and sexual battery and allowed him to testify that, because the victim's body was found nude and her clothing scattered around the area, it was highly probable that a sexual battery or attempted sexual battery occurred. During prior voir dire of Halliday, he admitted that his testimony was merely common sense and a "fair assumption." It is error for the court to permit expert testimony when the subject of the testimony is within the common understanding of the jurors. Halliday's testimony, as he readily admitted, was only common sense and was, therefore, not helpful to the jury. In fact, it may have caused them to make findings without independent analysis.

ISSUE X: The trial court erred by instructing on and finding three statutory aggravating factors -- that the crime was committed during a sexual battery, to avoid arrest, and in a cold, calculated and premeditated manner. None of these factors were supported by the evidence. Additionally, the judge found a nonstatutory aggravating factor -- that the Appellant had been a drifter for twenty years. He buried that factor amidst his discussion of nonstatutory mitigation. The court is prohibited by statute from considering nonstatutory aggravating factors.

ISSUE XI: To support his instruction on the § 921.141 (b)(2) statutory aggravating factor -- that the Appellant had been convicted of a prior violent felony, the trial judge admitted a certified copy of Dailey's judgment and sentence in a 1979 conviction for aggravated battery. The document contained a notation that

another charge had been dismissed pursuant to the plea agreement. Although defense counsel objected to the document's admission without deletion of the notation, the court admitted it "as is." This was error because the dismissed offense was not a "conviction" as required by subsection (5)(b).

ISSUE XII: The trial court erred by failing to consider the mitigation presented by the defense during penalty phase. Although a sentencing judge may find that mitigation does not outweigh the statutory aggravation, he may not refuse to consider the mitigation at all. The trial court erred by failing to consider a statutory mitigator and various nonstatutory mitigation, including disparity in sentencing between the Appellant and the equally guilty codefendant.

ISSUE XIII: In his written findings of fact in support of the death penalty, the court erroneously considered facts not of record. These facts included all of the evidence presented at the trial of the codefendant, Jack Pearcy; the arguments of counsel in that trial; the codefendant's PSI; the prosecutor's sentencing memorandum which included facts not of record; and a victim impact statement in Dailey's PSI. It is well established that the trial court may not consider nonrecord information, documents that have not been furnished to the defense, statements of codefendants from other trials, and victim impact statements. Thus, the trial court violated Dailey's sixth amendment right to confront the witnesses and his eighth amendment right to a constitutional and reliable sentencing proceeding.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT THE APPELLANT EXERCISED HIS RIGHT TO AN EXTRADITION HEARING AND BY PERMITTING THE PROSECUTOR TO COMMENT ON THAT EVIDENCE DURING HIS OPENING ARGUMENT.

The Appellant was extradited from California on or about February 12, 1986, and booked into the Pinellas County Jail. (R. 9) During opening argument at trial, the prosecutor told the jury that Dailey fought extradition from California, and that Detective Halliday and the victim's twin sister had to go to California to identify him. Defense counsel moved for a mistrial, arguing that the Appellant exercised a constitutional right -- the right to remain silent. (R. 752) The prosecutor argued that it was relevant to show intent, denial of guilt, and flight. The court took the motion under advisement. (R. 752)

The prosecutor later called Detective Halliday to testify about the Appellant's arrest and extradition. (R. 1165-66) Defense counsel's motion for mistrial, made during the prosecutor's opening statement, was still pending. This time the prosecutor argued that Dailey's failure to waive extradition showed consciousness of guilt and flight from Pinellas County. Defense counsel argued that his client claimed a constitutional right not to waive extradition. (R. 1162) The trial judge denied the motion for new trial, overruled the objection, and granted defense counsel a continuing objection. (R. 1167-69)

Halliday first testified that Dailey was arrested in November of 1985, and that he took part in the extradition. (R. 1166) After the defense objection was overruled, he testified that he went to California with Stacey Boggio because she had to identify James Dailey.[8] As a result, Dailey was returned to Florida and incarcerated in the Pinellas County Jail. (R. 1169)

In State v. Henson, 221 Kan. 635, 562 P.2d 51 (1977), the Supreme Court of Kansas considered the very same issue we address here -- the admissibility of evidence that the defendant fought extradition. The court first noted that it found no Kansas case which dealt with the issue, and that other states differed in their treatment of it. 562 P.2d at 63. The Henson court determined that the better view was that such evidence was inadmissible because "waiver of extradition is no evidence of innocence, and resistance is no evidence of guilt." 562 P.2d at 64 (citing Commonwealth v. Woong Knee New, 354 Pa. 188, 47 A.2d 450, 467 (1946)); State v. Martin, 229 Mo. 620, 129 S.W. 881 (1910). The court reasoned that, under the Uniform Criminal Extradition Act and Compact,

> every accused person is afforded the right to have extradition adjudicated. . . . [T]he defendant was merely exercising his statutory rights . . . in refusing to execute a waiver of extradition. Refusal to waive statutory rights in connection with extradition is to be distinguished from an accused's refusal to

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[8] Dailey apparently raised the issue of identity in fighting extradition. The prosecutor agreed not to bring out at trial that Dailey denied he was the same person that was wanted for murder. (R. 1166-69) Actually, it would have been to his benefit if the jurors had heard this defense (once the extradition was in evidence) because it suggests that Dailey did not know that a murder occurred and assumed that the suspect was another James Dailey.

> furnish handwriting exemplars or voice samples where no statutory rights are involved.

562 P.2d at 64 (citation omitted).

The issue would seem to be a case of first impression in Florida also. We believe, however, that Florida would agree with the Kansas Supreme Court, finding the evidence inadmissible, for several reasons. First of all, it violates due process to assure an individual that he has the right to contest extradition and, when he exercises the right, to use it as evidence against him. A fundamental principal of constitutional law is that the state may not penalize a defendant for exercising a legal right by using his exercise of that right as evidence against him at trial. See Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); State v. Burwick, 442 So.2d 944 (Fla. 1983), cert. denied, 466 U.S. 931, 104 S. Ct. 1719, 80 L. Ed. 2d 191 (1984). Doyle, Burwick, and other cases discussed herein, suggest that Florida would apply the same logic to the situation at hand. If it is error to use a defendant's exercise of his right to remain silent against him, it must also be error to use a defendant's exercise of his right not to waive extradition against him.

Secondly, as the Henson court noted, waiver of extradition does not evidence innocence nor does resistance evidence guilt. See Woong Knee New, 47 A.2d at 467 (many accused persons whose guilt is later established waive extradition). Thus, the evidence is irrelevant and prejudicial. Only relevant evidence is admissible. See § 90.402, Fla. Stat. (1987).

Requesting a pretransfer extradition hearing is clearly the exercise of a statutory right. It is also the exercise of a constitutional due process right because the hearing required by the Extradition Act is protected by the due process clause of the fifth and fourteenth amendments. See Cuyler v. Adams, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981) (prisoners transferred pursuant to Detainer Act must be afforded procedural safeguards provided by Extradition Act).[9] Accordingly, the introduction of evidence that Dailey exercised his due process right to contest his extradition penalized him for exercising a constitutional right.

In Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the United States Supreme Court held that a trier of fact may not draw adverse inferences from a defendant's desire to exercise his constitutional rights.

> [W]hen a person under arrest is informed. . . that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes . . . it does not

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[9] Cuyler v. Adams, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981) lends support to the argument that procedural rights under the Extradition Act are constitutional rights. Uniform acts such as the Detainer Agreement and the Extradition Act, adopted by the states, are sanctioned by Congress under the compact clause of the United States Constitution, article I, section 10, clause 3. The compact clause prohibits states from entering into agreements with other states without the consent of Congress. Id. By enacting the Crime Control Consent Act of 1934, 48 Stat. 909, as amended, Congress gave its consent to the states to enter into agreements or compacts for cooperative effort and mutual assistance in the enforcement of criminal laws. 449 U.S. at 444, 66 L. Ed. 2d at 649-50. Accordingly, the interpretation of these laws is a question of federal law. See Cuyler, 449 U.S. at 442, 66 L. Ed. 2d at 650. The Cuyler Court held that the Detainer Act must be read to incorporate the procedural safeguards, including right to a hearing, required by the Extradition Act. Id.

> comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Id. at 619 (quoting from United States v. Hale, 422 U.S. 171, 182-83, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975)(White, J., concurring)).

In Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), the Court found that the Doyle holding barred the prosecution from using evidence that the defendant exercised these constitutional rights to rebut an insanity defense. The Court held that because Miranda warnings carry an implied promise that "silence will carry no penalty," use of a defendant's post-Miranda silence as evidence of sanity violated due process. 474 U.S. at 295. The Greenfield Court noted that its decision was in accord with this Court's Burwick holding.

Citing Doyle v. Ohio, this Court noted that the defendant in Burwick was implicitly assured that he would not be penalized if he chose to exercise his Miranda rights.

> It is fundamentally unfair for the state to lure Burwick into remaining silent then impeach the man with this very same silence. To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the fourteenth amendment and article I, section 9 of the Florida Constitution.

Burwick, 442 So.2d at 948 (citations omitted); see also Garron v. State, 528 So.2d 353 (Fla. 1988)(following Greenfield and Burwick).

In Brannin v. State, 496 So.2d 124 (Fla. 1986), this Court explained and thereby expanded the scope of its Burwick

decision. Succinctly, the Brannin court stated that:

> Burwick stands for the proposition that testimony about an accused's exercise of constitutional rights, regardless of the nature of the defense raised, is error.

496 So.2d at 125.

Trial counsel first argued that the prosecutor's comment that Dailey fought extradition was a comment on his right to remain silent. In a sense, it was. Dailey was arrested in California in November of 1985. He was told that he had a choice. He could waive extradition and voluntarily return to Florida to face first-degree murder charges, or he could challenge the legality of the transfer. He chose the latter.

Refusing to waive extradition and requesting the procedural safeguards provided by law may be compared to remaining silent and requesting a lawyer rather than making admissions or statements after being advised of Miranda rights. As with remaining silent or requesting counsel, there are various reasons why Dailey may have exercised this right. Perhaps he was merely acting on advice of counsel. By refusing to waive extradition, Dailey "remained silent," forcing Florida to legally extradite him.

In Herring v. State, 501 So.2d 19 (Fla. 3d DCA 1986), the court dealt with an issue clearly analogous to the issue at hand. Herring was asked if he would submit to a "hand swab test for gunshot residue" but was not told that he was required by law to take the test or that his refusal could be used against him. When the officer arrived, armed with the equipment, the defendant

declined to take the test. The prosecutor introduced this evidence at trial, later arguing to the jury that his refusal was proof of his consciousness of guilt. 501 So.2d at 20.

The Third District Court of Appeal reversed the trial court's admission of this testimony. Citing State v. Esperti, 220 So.2d 416, 418 (Fla. 2d DCA 1969), the court noted that a defendant's behavior is circumstantial evidence of consciousness of guilt only when the behavior is "susceptible of no prima facie explanation except consciousness of guilt." 501 So.2d at 20. In Esperti, the court approved the admission of similar evidence because the defendant was told that he had no right to refuse the test. Thus, there were no circumstances other than consciousness of guilt to explain his behavior. The Esperti court noted, however, that, had the defendant been told he had the right to refuse, it would have been unfair to admit the evidence of his refusal.

> The unfairness, of course, is that a defendant who is told he may refuse and is told of no consequences which would attach to his refusal may quite plausibly refuse so as to disengage himself from further interaction with the police or simply decide not to volunteer to do anything he is not compelled to do. In contrast, if a defendant knows that his refusal carries with it adverse consequences, the hypothesis that the refusal was an innocent act is far less plausible.

Herring, 501 So.2d at 20. Examples of refusals that do carry consequences are failure to take a blood alcohol test or a breathalyzer. Refusal to take these tests may result in the loss of one's driver's license. South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983); Herring, 501 So.2d at 21,

n.2; § 316.1932(1)(a), Fla. Stat. (1982).

On the other hand, when a defendant is told that he has a right to refuse, and no consequences are mentioned, the implication is that no penalty is attached. It is then fundamentally unfair to use the individual's exercise of the right against him. See Herring, 501 So.2d at 20-21 (citing United States v. Hale, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975)).

Like the defendant in Herring, Dailey was told that he had the right to refuse to waive extradition. He was not told that a penalty was attached to this right. His exercise of the right to fight extradition is analogous to the exercise of the right to remain silent -- which carries no penalty. It is not like refusing a mandatory procedure such as fingerprinting, or like refusal to take a breathalyzer test which carries a penalty. Thus, Dailey's exercise of his right to contest extradition, like exercise of the right to remain silent, was not probative of consciousness of guilt because he had no reason not to exercise the right.

Evidence must be relevant to be admissible. § 90.402, Fla. Stat. (1987). The prosecutor argued that the evidence that Dailey fought extradition was probative of Dailey's consciousness of guilt and flight from Pinellas County. Evidence of flight is only admissible as evidence of the defendant's consciousness of guilt if there is sufficient evidence that the defendant fled to avoid prosecution for the charged offense. Merritt v. State, 523 So.2d 573 (Fla. 1988). Flight alone is no more consistent with guilt than with innocence. Id.

In the case at hand, the prosecution presented evidence that Dailey left Pinellas County on the day following the murder and traveled to Miami. He left Miami the next day. (R. 963-64) These facts indicate flight and could be construed as evidencing consciousness of guilt. They were admitted without objection.

On the other hand, the Appellant's refusal to waive extradition and return to Florida to face murder charges some six or seven months after the homicide is not probative of guilt or innocence. Just as there are many possible motives for remaining silent upon arrest, United States v. Hale, 422 U.S. at 180, 95 S. Ct. 2136 (post-Miranda silence has dubious probative value because of the many and ambiguous explanations for such silence), there are many possible motives for refusing to waive extradition. For example, Dailey may have sincerely believed that Florida was mistaken about his identity. Perhaps he decided not to do anything he was not required to do. Certainly, he would not voluntarily leave California, where he lived and worked, to return to Florida to face serious criminal charges. Thus, evidence that Dailey fought extradition six or seven months after the homicide was irrelevant.

The state's use of a defendant's exercise of a constitutional right may severely damage the accused's opportunity to present his case to the jury. Thus, it is "an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice." Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (citations omitted) (prosecutor argued

that defendant's exercise of right to counsel implied fabrication of defense).

This Court may not find the error harmless unless it is shown beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The burden of proof is on the state. Chapman, 386 U.S. at 26; DiGuilio, 491 So.2d at 1139. The error affected both the guilt and the penalty phase of Dailey's trial. The jury may have believed that Dailey must be guilty because he did not voluntarily return to Florida to profess his innocence. The trial judge used evidence of flight in sentencing as a reason for his finding that the crime was committed to avoid arrest. The exercise of legal rights must not be used to enhance statutory aggravating factors. See Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985).

It must be remembered that the prosecutor went to great lengths to get this evidence admitted. As this Court observed in Gunn v. State, 83 So. 511 (Fla. 1919),

> Then why was it offered by the state and admitted by the court? Surely not merely to consume time and swell the record? The state's attorney must have believed that the . . . testimony would tend to establish the guilt of the prisoner, and the court, in admitting it, considered it competent for that purpose. Having gotten it before the jury over the objection of the defendant, and a conviction obtained, the state cannot be heard to say it was harmless error. Who can say that the testimony that the court . . . permitted to go to the jury for consideration in determining the guilt of the defendant did not and could not have the effect that the state's attorney intended?

ISSUE II

THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE A BOOK-IN PHOTOGRAPH OF DAILEY THAT WAS NOT PROVIDED TO DEFENSE COUNSEL DURING DISCOVERY, WITHOUT HOLDING A RICHARDSON HEARING.

Over defense objection, the prosecutor introduced into evidence, through Detective Halliday, a photograph of Dailey taken when he was extradited from California and booked into the Pinellas County Jail. (R. 1171, 1478) Defense counsel objected because the photo was not provided during discovery. (R. 1170) The assistant state attorney did not contest defense counsel's assertion that the photograph was not provided during discovery and no Richardson hearing was held. Nevertheless, the trial court overruled defense counsel's objection and permitted the photograph to be introduced into evidence. (R. 1170-71) The bench conference went as follows:

> MR. ANDRINGA [defense counsel]: Never been provided before.
>
> MR. HEYMAN [prosecutor]: Discovery violation being alleged? Pretty common practice. Mr. Andringa practices criminal law in Pinellas County. He knows there is a booking photograph taken of everyone booked into Pinellas County Jail.
>
> MR. ANDRINGA: I can't remember very many times they have been placed into evidence.
>
> THE COURT: Here's what I am going to do. I will ask the jury to step out. If you desire special voir dire of this witness, you may have it.
>
> MR. ANDRINGA: I don't desire special voir dire. I don't doubt for a second that was the booking photograph.

THE COURT: Your objection is noted for the record and I am overruling it. (R. 1170-71)

When the prosecutor proceeded to introduce the photograph into evidence, the trial court noted the objection for the record and received it into evidence. (R. 1171, 1478) It was then published to the jury. (R. 1171)

Florida Rule of Criminal Procedure 3.220(a)(1)(xi) requires the prosecutor to disclose to defense counsel, within fifteen days after written demand by the defendant, "[a]ny tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused." On March 3, 1985, defense counsel filed a comprehensive demand for discovery of everything to which he was entitled under Florida's procedural rules. (R. 19) The prosecutor did not deny that the book-in photograph had never been furnished to defense counsel in discovery. (R. 1170)

The prosecutor attempted to circumvent the real issue - the discovery violation -- by arguing that defense counsel knew that photographs were routinely taken during booking procedure. (R. 1170) As defense counsel pointed out, this was not the issue. He did not doubt the authenticity of the photograph. His objection was that the prosecutor had not disclosed the photograph and that the state intended to introduce it into evidence.[10] Without

[10] The judge apparently believed, following the prosecutor's argument, that authenticity of the photograph was the only issue. When defense counsel explained that he had no doubt this was the booking photograph and did not need to voir dire the witness, the

notice, defense counsel was unprepared to challenge its admission.

Richardson v. State, 246 So.2d 771 (Fla. 1971), requires that the trial judge hold a hearing when the state has failed to comply with the discovery rules. The hearing must cover at least the following three questions: (1) whether the violation was inadvertent or willful; (2) whether it was trivial or substantial; and, most importantly, (3) whether it affected the defendant's ability to prepare for trial. Id. at 775. This Court has repeatedly found that failure to hold a Richardson hearing is per se reversible error without regard to the harmless error rule. See e.g., Brown v. State, 515 So.2d 211, 213 (Fla. 1987).

The trial judge did not ask any of the questions required by Richardson. The purpose of a Richardson hearing is to determine whether a violation is harmless. Smith, 500 So.2d 125, 126 (Fla. 1986). It ferrets out procedural, rather than substantive, prejudice. Wilcox v. State, 367 So.2d 1020, 1023 (Fla. 1979). The judge must decide whether the discovery violation prevented the defendant from properly preparing for trial. Id. A reviewing court cannot determine whether the error was harmless unless the defense had an opportunity to respond to the Richardson questions. Smith, 500 So.2d at 126.

The book-in photograph depicted Dailey as a derelict, contrasted to his appearance in the courtroom.[11] After seeing the

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trial court immediately overruled the objection. (R. 1170-71)

[11] There were actually two photographs, a front view and a side view. (R. 1478)

photograph, the jurors could better picture Dailey committing such a dreadful murder.[12] Presumably, this is why the state introduced the photograph because it was clearly unnecessary to prove that Dailey was booked into jail. No other relevance was suggested. (R. 1170) Had he been forewarned, defense counsel might have been prepared and successfully precluded its admission.

In Haya v. State, 489 So.2d 829 (Fla. 3d DCA 1986), the court reversed the defendant's convictions because the judge admitted a photograph of the defendant which had not been supplied to the defense in pretrial discovery. Conversely, in Huffman v. State, 472 So.2d 469 (Fla. 1st DCA 1985), the court refused to find a Richardson violation because, unlike the instant case, the state introduced the defendant's book-in photograph only as rebuttal.

In Huffman, the driver of a vehicle involved in a hit-and-run accident was wearing a dress shirt. Defendant Huffman testified that he was wearing a t-shirt on the night of the accident and did not own a dress shirt. The prosecutor did not have the book-in photograph in his possession and sent the witness, a state trooper, to the sheriff's department to get it. 472 So.2d at 472. The book-in photograph showed the defendant wearing a dress shirt on the night of the accident. The trooper identified

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[12] The prosecutor argued in closing: "Mr. Dailey sits there in front of you, clean shaven, coat and tie on, looking sort of like a stockbroker. I ask you to think about what he looked like on the night of May 5th, the early morning hours of May 6th, 1985, on that strip of land north of the Indian Rocks bridge with a knife in his hand, Shelly Boggio's blood on him, standing over there probably after that girl had been sexually assaulted, after 31 stab wounds, 17 cutting wounds." (R. 1285)

the photograph as portraying Huffman as he saw him that night.

Huffman is clearly distinguishable from our case for three reasons. First of all, Huffman's prosecutor did not intend to use the book-in photograph -- he did not have it with him. Thus, the discovery violation was not intentional. Second, the photograph was used only in rebuttal. The defendant was responsible for its introduction. Finally, the photograph was clearly relevant and necessary to prove that the defendant was the driver of the car that left the scene of the accident.

In the case at hand, we have none of these factors. The prosecutor had the book-in photograph with him and obviously intended to introduce it into evidence. It was introduced during direct examination of a state witness and not as rebuttal. It was not relevant to prove any issue in the case.

Failure to hold a Richardson hearing when a discovery violation is alleged is per se reversible error. Brown, 515 So.2d at 213; Smith, 500 So.2d at 125. Failure to hold such a hearing is particularly egregious here because the Appellant's life was at stake. See Cooper v. State, 336 So.2d 1133, 1137-38 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed. 2d 239 (1977) (where complex trial involving human life is scheduled to begin in one week, immediate disclosure is dictated by rule). Accordingly, Dailey must be given a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE BASED ON OUT-OF-COURT STATEMENTS BY THE CODEFENDANT WHO DID NOT TESTIFY AT TRIAL, THUS VIOLATING DAILEY'S RIGHT TO CONFRONTATION.

Detective Halliday testified that, while investigating the crime, he went to Kansas where Jack Pearcy was arrested. (R. 914-15) Although the jury was never told whether Pearcy made any statements, he gave a video-taped deposition when he was arrested in Olathe, Kansas, and a statement implicating Dailey when he was returned to Pinellas County. (R. 159-60)[13] He also made admissions to inmates in the Pinellas County Jail. (R. 1057-61, 1085-87, 1146-47) Three of these inmates testified at Dailey's trial.

Jack Pearcy did not testify at Dailey's trial. When he was called to the stand outside the presence of the jury, he invoked his right to remain silent and was held in contempt of court. (R. 986-89) Thus, the jury never saw or heard Pearcy.

Nevertheless, the prosecutor continually tried, often successfully, to introduce Pearcy's out-of court statements through other witnesses. To circumvent the hearsay prohibition, the prosecutor avoided asking the witnesses where they obtained the information. In this manner, the state elicited testimony from Detective Halliday about a knife sheath found in the Walsingham Reservoir, somewhere between Indian Rocks Beach where the body was

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[13] This information was in the prosecutor's sentencing memorandum. (R. 159-60)

found and Seminole where Pearcy and Dailey lived. (R. 918) The state also elicited hearsay information from two inmates who passed notes between Dailey and Pearcy in the jail. (R. 1026, 1060-61)

The state cannot evade the hearsay rule by the simple expedient of not asking the witnesses the source of their information or the basis of their testimony. The Third District Court of Appeal rejected this

> wooden application of the hearsay rule and the confrontation clause of the Sixth Amendment. [The court held] that where . . . the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

Postell v. State, 398 So.2d 851, 854 (3d DCA) (footnote omitted), rev. denied, 411 So.2d 384 (Fla. 1981); accord Beatty v. State, 486 So.2d 59, 60-61 (Fla. 4th DCA 1986) (officer repeated information received from anonymous caller); Davis v. State, 483 So.2d 11 (Fla. 3d DCA 1986) (inescapable inference from officer's testimony that he developed a lead from interviews with witnesses at the scene).

In Postell, the trial court permitted an officer to testify that he had a conversation with a witness at the scene of the crime. As a result of this conversation, he and two other officers "responded" to the defendant's residence where they found and arrested the defendant. 398 So.2d at 853. Reversing, the Postell court held that "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying

witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." 398 So.2d at 855.

In Jimenez v. State, 535 So.2d 343 (Fla. 2d DCA 1988), a police officer was permitted to testify that he conversed with an unidentified informant who had conversed with the defendant and his brother who had agreed to deliver the cocaine. The state never produced the informant. Citing Postell, the Second District held that "[t]he introduction of the informant's testimony through other witnesses effectively deprived appellant of the right to confront witnesses against him." 535 So.2d at 345 (citations omitted).

The same is true of course when the non-testifying witness is the codefendant who does not testify at trial but has implicated the defendant. Id. at n.8 (citing State v. Chernick, 278 S.W.2d 741 (Mo. 1955) and State v. Niesbbalski, 82 N.J.L. 177, 83 A. 179 (1912)); Molina v. State, 406 So.2d 57 (Fla. 3d DCA 1981). In Molina, the investigating officer was permitted to testify, over objection, that "after interviewing two co-defendants who did not themselves testify, they arrested Molina and then placed his picture in a photo lineup for identification by the victim." 406 So.2d at 57 (footnote omitted). The appellate court held that the defendant's right to confrontation was violated. 406 So.2d at 58.

The case at hand is the same. The first of the erroneous hearsay admissions was the introduction of testimony leading to the introduction of the knife sheath found in Walsingham Reservoir.[14]

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[14] The next issue deals with the erroneous admission of this exhibit even though no evidence connected it to the crime.

Detective Halliday testified that he went to Olathe, Kansas, where he interviewed Pearcy's mother who gave him Pearcy's shirt and pants. The state introduced the shirt into evidence. (R. 913-15) Halliday testified that after Pearcy was returned to Pinellas County, they "collected shoes from him and . . . found a sheath at the Walsingham Reservoir . . . . " (R. 915)

Defense counsel objected and moved for a mistrial because of the obvious implication that the sheath was found as a result of information learned from Pearcy upon his return from Kansas. Defense counsel argued correctly that using Pearcy's statements against Dailey raised a confrontation problem. The state of course argued that it "did not rise to the level of proof" and that it "implicated Pearcy." (R. 916) The court denied the motion and allowed the prosecutor to continue with testimony concerning the recovery of the knife sheath.[15] (R. 916)

If the testimony about the knife was intended to implicate Pearcy rather than Dailey, it was not relevant.[16] Moreover, the prosecutor used the evidence against Dailey during her closing argument. She argued that Skalnik's testimony that Dailey acknowledged he threw away the knife "in the reservoir" linked Dailey to

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[15] After the objection was overruled, the prosecutor elicited more testimony as to where and how the sheath was found. (R. 917) The judge agreed that defense counsel had a continuing objection but admitted the sheath into evidence. (R. 926-27).

[16] The state argued that it was relevant because, under the principals theory, Dailey was responsible for Pearcy's actions. (R. 927) The problem with this reasoning is that, if Pearcy committed the murder alone, Dailey was not a principal.

the knife. (R. 1275) Her facts were erroneous. Skalnik did not say where Dailey threw the knife. (R. 1199) Attempting to bolster Skalnik's testimony, the prosecutor later argued that Skalnik knew Dailey threw away the knife even without knowing of the sheath's recovery in the reservoir. (R. 1281)

We don't know, of course, whether Pearcy said there was a knife or knife sheath in the reservoir or whether he said it was his or Dailey's. We don't know whether it belonged to either of the defendants. Pearcy may have fabricated the story and the sheath found in the reservoir may have been thrown there long ago by the perpetrator of a different crime, or lost or discarded by an innocent party. It was never connected to the crime.[17]

Defense counsel also objected to testimony by Leitner, another jail inmate, based partially on hearsay statements of Jack Pearcy. Leitner said he reported notes passed between Dailey and Pearcy ("kites") because he "didn't particularly enjoy having anything to do with inmates that were discussing a crime like that where someone was killed, especially a 14 year old." (R. 1026) Defense counsel objected because the witness's motive depended on hearsay statements made by Pearcy as well as Dailey. The judge overruled the objection. (R. 1027)

Leitner's motive may also have depended on information from kites written by Pearcy rather than Dailey. The trial court

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[17] At the end of the state's case, defense counsel moved to strike all testimony concerning the discovery of the knife sheath because there was no evidence linking it to the crime. The trial court overruled the objection and denied the motion. (R. 1199)

refused to admit Pearcy's notes but admitted two notes written by Dailey. (1052) Nevertheless, Leitner read all of the notes.

Leitner also testified that he told Dailey that Pearcy asked him to explain what happened at Pearcy's trial. Defense counsel objected, on hearsay grounds, and moved for a mistrial. (R. 1060-61) The trial court judge denied the motion for mistrial but sustained the objection and told the jury to disregard the comments made by the witness "just before you left the room." (R. 1063-65)

It is unlikely that the jurors knew which comments they were supposed to disregard. Thus, the curative instruction was not of much help. Leitner's testimony clearly implied that Pearcy told him to tell Dailey what happened at Pearcy's trial. The importance of this testimony was its bearing on Pearcy and Dailey's plan that neither would testify against the other. The gist of the plan was that, once Dailey was acquitted and Pearcy was granted a new trial on appeal, Dailey would testify that he committed the murder to exonerate Pearcy. In this way, they would both get away with the crime.[18] This was extremely damaging evidence which certainly caused the jurors to want to prevent such a result. In fact, it may have made the jurors angry enough to find Dailey guilty solely to circumvent the plan.

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[18] Leitner testified that he relayed verbal messages between Pearcy and Dailey during December of 1986. (R. 1057-59, 1086) He said that Dailey asked him to tell Pearcy that if Pearcy got a new trial on appeal, he would then testify and tell what really happened -- that he was the one that did it. (R. 1066)

The right to confrontation is a fundamental constitutional right. The erroneous admission of hearsay resulted in an extremely prejudicial violation Dailey's sixth amendment right. "The essential principle of the hearsay rule is that for the purpose of securing trustworthiness of testimonial assertions, and of affording the opportunity to test the credit of the witness, such assertions are to be made in court, subject to cross-examination." Postell, 398 So.2d at 856 (citing Chernick, 278 S.W.2d at 747-48).

> Our system demands that the finder of fact determine the believability of any witness and the weight to be given that witness's testimony. That simply cannot be done when the jury is deprived of all opportunity to consider the demeanor of the witness; when the memory, intelligence, and candor of the witness is free from testing; when the bias or interest of the witness cannot be probed; when the witness's opportunity and ability to observe is insulated from questioning; and when, indeed, the witness's identity is totally concealed so as to make [the witness] totally unimpeachable. In short, the insidious diminution of the precious rights of confrontation and cross-examination, through some literal application of the rule against hearsay, cannot be tolerated.

Postell, 398 So.2d at 856.

In Postell, 398 So.2d at 856, and Molina, 406 So.2d at 58, the only other testimony linking the defendant to the crime was questionable eyewitness identification by the victim. In this case, we don't even have that. Instead, we have questionable testimony from three jailhouse "snitches" with reason to fabricate. Thus, the state cannot show beyond a reasonable doubt that these errors did not affect the verdict. State v.DiGuilio, 491 So.2d 1129, 1136-39 (Fla. 1986).

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING THE KNIFE SHEATH AS AN EXHIBIT, AND ACCOMPANYING EVIDENCE CONCERNING ITS DISCOVERY, BECAUSE THE KNIFE SHEATH WAS NOT CONNECTED TO THE APPELLANT OR TO THE CRIME AND, THEREFORE, WAS IRRELEVANT AND INADMISSIBLE.

To be admissible as evidence at trial, a physical object must be connected to the crime. Huhn v. State, 511 So.2d 583, 589 (Fla. 4th DCA 1987). The test for admissibility is relevance. Id. Relevant evidence is evidence that tends to prove or disprove a material fact. § 90.402, Fla. Stat. (1987).

An example is provided by Thomas v. State, 223 So.2d 318 (Fla. 1969), in which a knife was admitted into evidence. The knife blade was found on the front seat of a taxicab in which the driver had been stabbed to death. The knife handle was found nearby. Although the defendant argued that no evidence connected him with the knife, a state witness testified that he found a knife similar to the murder weapon and gave it to the defendant two days before the murder. Thus, the knife was connected both to the crime and the defendant and the defendant's argument was without merit. 223 So.2d at 323; see also Thomas v. State, 456 So.2d 454, 458 (Fla. 1984) (defendant's slightly bloodstained shirt was relevant, probative, and logically related to crime because evidence showed that defendant wore it on night of murder); Craig v. State, 168 So.2d 747, 748 (Fla. 1964) (screwdriver was positively identified by victim as weapon used by defendant).

If a weapon is introduced and is not connected to the crime, prejudice may occur by its display to the jury. In Williams v. State, 188 So.2d 320 (Fla. 2d DCA 1966), for example, the state placed in the jury's presence nine objects, including exploded gunshell casings and tire track photographs, that were related to the homicide. When defense counsel questioned why these objects were openly before the jury, the prosecutor assured the court that the objects were "subject to being connected up." 188 So.2d at 333. The prosecutor elicited testimony from numerous witnesses to build a foundation for the introduction into evidence of these exhibits. On the third day of trial, however, he announced that he was withdrawing all nine objects. Defense counsel moved for mistrial which the court denied. 188 So.2d at 334.

The Williams court found a "flagrant disregard of the defendant's rights and the rudimentary ground rules of fair play in a jury trial." It noted that the rules are "aimed at insuring that the jury sees and hears only such evidence as is legally admissible." Id. In the instant case, the rudimentary ground rules of fair play were violated two steps further. Not only was the knife sheath not connected to the Appellant -- it was not even connected to the crime. And it was admitted into evidence.

The Huhn case is even more helpful. In Huhn, the trial court admitted into evidence a pistol found in the defendant's glove compartment even though there was no evidence that it was used during the crime charged. Although the prosecutor argued that weapons had been used in the offense charged and the defendant was

in possession of a weapon, the appellate court held that the gun should not have been admitted because there was nothing to connect that particular gun to the crimes for which Huhn was on trial. 511 So.2d at 589. Thus, the gun was not relevant. Id.

The case at hand is worse. As in Huhn, a weapon was used in the offense. In fact, a knife was used. Unlike Huhn, however, Dailey was not in possession of a knife. Nor was he in possession of the knife sheath introduced into evidence. The knife sheath was found in a reservoir somewhere in Pinellas County between Indian Rocks Beach, the scene of the crime, and the house in Seminole where Pearcy and Dailey were living. The state introduced no evidence concerning its ownership and failed to connect it to the murder of Shelley Boggio. No evidence was introduced to explain why the officers went to the reservoir in search of a knife or a knife sheath. The implication, however, was that the officers had information linking Dailey to the sheath and the sheath to the crime. Why else would it have been introduced at trial?

The court's error in admitting the knife sheath into evidence was compounded by the myriad of testimony and argument concerning the knife. First, Detective Halliday testified that "they" collected shoes from Jack Pearcy and found a knife sheath at the Walsingham Reservoir. He did not say why they looked there or what they expected to find. (R. 915-16) After the court overruled defense counsel's objection, the prosecutor elicited more testimony about the search for the sheath (R. 917) but still failed to explain how it was connected to the crime. The court then

allowed the state to introduce the sheath into evidence. (R. 927).

At the close of the state's case, defense counsel moved to strike all testimony concerning the knife sheath because there was no evidence linking it to the crime. He correctly argued that the knife sheath was irrelevant and was not "tied up." The state's response was that it "goes to the weight of the evidence" and that Paul Skalnik testified that Dailey said he threw the knife away. The court denied the defense motion. (R. 1199)

If Skalnik's testimony that Dailey threw the knife away was reason to admit the knife sheath, then the officers could have admitted any knife or knife sheath they found in northern Pinellas County. Skalnik never said where Dailey threw the knife. The Walsingham Reservoir was not the scene of the crime but is located somewhere between Indian Rocks Beach and Seminole, Florida.

That it "goes to the weight of the evidence" is clearly erroneous reasoning. Using that logic, any unconnected, irrelevant object could be admitted into evidence. It would have "no weight." The danger, of course, is that because the jurors would logically assume there must some relevance, they would speculate that there was a connection between the object, the defendant, and the crime.

When the state failed to connect the sheath to either the Appellant or the crime, the jurors must have been very confused concerning its relevance. They probably guessed that the prosecutor and the judge knew the connection but the rules of evidence would not permit the the jury to hear the necessary evidence; thus, they would have to assume that the sheath was probative of the

Appellant's guilt in some way.

During her closing argument, the prosecutor suggested an erroneous connection between Dailey and the knife sheath. She told the jury that Skalnik testified that Dailey said he threw away the knife in the reservoir, and that this testimony linked Dailey to the knife. (R. 1275) This was error. Skalnik did not say where Dailey threw the knife. (R. 1199) Later, while attempting to bolster Skalnik's testimony, the prosecutor noted that Skalnik knew Dailey "threw the knife" and that he did not know the sheath was recovered in the reservoir. (R. 1281) Thus, the prosecutor implied that the recovery of the knife sheath supported Skalnik's testimony that Dailey told him he threw the knife away.

In reality, there was absolutely no connection. Even if Skalnik was telling the truth when he said Dailey told him he threw the knife away, there was no reason to connect the sheath found in the reservoir with the knife Dailey allegedly threw away. The knife, of course, was never found. Accordingly, the trial court erred by allowing the state to introduce the knife sheath into evidence and by allowing testimony concerning its discovery.

ISSUE V

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO ELICIT HEARSAY EVIDENCE OF PRIOR CONSISTENT STATEMENTS MADE TO DETECTIVE HALLIDAY BY THE THREE INMATE WITNESSES.

After the three jail inmates testified about the admissions that Dailey allegedly made while in the Pinellas County Jail, the prosecutor recalled Detective Halliday and asked if he met with these witnesses at the jail. (R. 1176, 1183) Over defense objection, the trial court allowed Halliday to repeat what Leitner, DeJesus, and Skalnik told him were their reasons for reporting their conversations with Dailey. The judge also allowed Halliday to testify about the substance of information Leitner allegedly learned from Dailey, hearsay statements Skalnik made to Halliday about abuse he received because of his testimony, and information Skalnik provided law enforcement in nonrelated criminal cases. (R. 1177, 1179, 1186-88)

When defense counsel objected on hearsay grounds to Detective Halliday's testimony concerning the informants' reasons for "coming forward," the prosecutor argued that the evidence showed "state of mind." The judge overruled defense counsel's objections. (R. 1177, 1979) Halliday repeated basically the same statements the witnesses made earlier in the trial.

A prior consistent statement may not be introduced to corroborate or bolster the credibility of the witness. Jackson v. State, 498 So.2d 906, 909 (Fla. 1986); Van Gallon v. State, 50

So.2d 882 (Fla. 1951). Section 90.801(2)(b), Florida Statutes (1987), provides an exception to the general rule when a prior consistent statement is used to rebut an express or implied charge of improper influence, motive or recent fabrication.[19] It is essential, however, that the prior consistent statement have been made prior to the existence of the reason to falsify. Jackson, 498 So.2d at 910; Wise v. State, 14 F.L.W. 1353, 1354 (Fla. 2d DCA May 31, 1989); Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988). In the case at hand, the three jailhouse "snitches" had reason to testify falsely before they contacted Detective Halliday or other law enforcement authorities. Thus, the exception does not apply and the hearsay was inadmissible.

Leitner testified that he reported the Appellant's notes to the jail supervisor because he "didn't particularly enjoy having anything to do with inmates that were discussing a crime like that where someone was killed, especially a 14 year old." (R. 1026) Over defense objection, Halliday testified that Leitner told him that he felt badly because Dailey and Pearcy were "joking about this matter, that they were talking about walking out of the jail, beating the charge." (R. 1177) Halliday then said that Leitner told him "both individuals were involved in the crime." (R. 1178)

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[19] Section 90.801(2)(b) provides that "[a] statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . [c]onsistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication."

DeJesus testified that he came forward because "it was against my morals as a father, and as a human and . . . it was beginning to effect [sic] me." (R. 1105) Again over defense objection, Halliday said that DeJesus told him he had a daughter and couldn't stand the fact that Dailey might get out and do this to someone else. (R. 1179)

Skalnik testified that he reported his conversations with Dailey because "I still do have law enforcement inside of me. It's difficult to see people incarcerated . . . who when they walk up and down the hallways, laugh and joke about a murder that they have committed. They really think they can beat the system. No, sir, I don't appreciate it." (R. 1157) Halliday testified that Skalnik said he came forward because "he still has law enforcement in him and he cannot stand the fact that the inmates . . . are constantly talking about walking on their charges." (R. 1188)

Over defense objection, Halliday repeated other of Skalnik's statements which were consistent with Skalnik's earlier trial testimony.[20] Skalnik testified that he heard Dailey's lawyer tell Dailey that Skalnik would testify against him. (R. 1161-62) Immediately thereafter, other inmates threw batteries at Skalnik. (R. 1161) Even though defense counsel never attempted to impeach this testimony, Halliday was later permitted to testify that Skalnik reported to him that Dailey's attorney met with Dailey and,

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[20] Defense counsel argued that it was hearsay and "I don't know what his state of mind has to do with anything." The judge overruled the objection. (R. 1184)

immediately thereafter, other inmates in Dailey's "pod" began throwing nine-volt batteries at Skalnik. (R. 1188)

Skalnik said that he testified in five or six other murder cases about things he heard in the Pinellas County Jail. He reported that every individual he had testified against was convicted, and that every time he had given information to law enforcement about where a weapon or a piece of material could be found, it was there. (R. 1156) He admitted testifying in the "High Point" murders. (R. 1158) Again over defense objection, Halliday testified that as a result of information from Skalnik, they recovered a ski mask worn by Richard Cooper, one of the perpetrators of the High Point murders, and that they recovered a weapon in another case because of Skalnik's help.[21] (R. 1186-88) Halliday testified that the results of information received from Skalnik were "extremely positive." (R. 1187) He repeated Skalnik's earlier assertions that, as a result of his assistance in these cases, Skalnik was "not treated well" by the authorities. (R. 1158, 1188)

Halliday's testimony was inadmissible because the witnesses did not make these prior consistent statements before their motivation to fabricate existed. These informants came forward

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[21] Defense counsel argued that testimony concerning another case was immaterial. The trial judge apparently accepted the state's argument that defense counsel had "opened the door" by cross-examining Skalnik about testifying in other cases. Although the prosecutor argued that defense counsel "inferred that there was something improper about it," defense counsel denied having done so. (R. 1186) The judge again overruled defense counsel when he objected, on the same grounds (hearsay and materiality), to Skalnik's further testimony about other cases in which he had assisted Halliday. (R. 1187)

either because they thought they could get better deals in exchange for their testimony, as argued by the defense, or because of their moral indignation, as argued by the prosecution. Whatever their real motives were, they already existed when the inmates contacted law enforcement to offer their testimony.

In Jackson, 498 So.2d at 910, the defendant allegedly confessed the crime to a co-prisoner who testified against him. As in the instant case, defense counsel attempted to impeach the credibility of the witness. Defense counsel intimated while cross-examining the witness, however, that the witness had an improper motive to testify falsely from the moment he first heard about the robbery. Therefore, his prior consistent statements were made after, rather than before, the alleged motive to falsify arose and the exception to the hearsay rule was not applicable. Id.

The same is true in the case at hand. Although defense counsel questioned Leitner, DeJesus, and Skalnik concerning promises of leniency by law enforcement officers and the prosecutor's office, his primary emphasis was on the motives that caused them to contact prison officials and Detective Halliday in the first place. As defense counsel brought out on cross-examination, all three had sentencings pending and had snitched before. (R. 1014-15, 1079-82, 1107-09) They knew the value of their testimony without being offered deals. Although defense counsel implied that they were fabricating testimony to get lesser sentences, he did not imply that they changed their stories between the time Halliday interviewed them and the trial.

Halliday did not seek out these three witnesses. By his own testimony, all three contacted jail officials or Halliday to report information.[22] Even if they were eventually promised better deals (which two of them denied), they all had motives to falsify before any promises were made.[23] Otherwise, they would not have contacted Halliday with the information. Halliday testified that he never promised them anything for their testimony. (R. 1179-84)

The trial court admitted Halliday's testimony about Skalnik's assistance in prior cases because the defense allegedly "opened the door." Nevertheless, Halliday merely expounded upon what Skalnik had already told the jury about his valuable assistance in other cases, thus buttressing his credibility. None of the details were relevant to the instant case. Moreover, defense counsel had not inferred that Skalnik's testimony about his prior assistance to law enforcement was false. Thus, Halliday's testimony did not rebut allegations of recent fabrication.

The rule against the use of prior consistent statements is apparent upon reflection. Without the rule, a witness's testimony could be blown out of proportion. If the witness told the same story out of court to a group of reputable citizens, they

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[22] The inmates were aware, however, that Halliday was seeking informants in the jail. Halliday testified that he had been to the jail in early December, 1986, and had interviewed fifteen or so inmates in an unsuccessful attempt to find evidence against James Dailey. (R. 1192) Additionally, Skalnik had given Halliday information about the codefendant earlier. (R. 1146)

[23] DeJesus admitted that his attorney told him he might get only seven instead of ten years if he testified against Dailey. (R. 1082-83)

could then "parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens." Allison v. State, 162 So.2d 922 (Fla. 1st DCA 1964). The danger is particularly acute when the out-of-court statement is repeated to the jury by a law enforcement officer. Allison, 162 So.2d at 924.

In Lamb v. State, 357 So.2d 437, 438 (Fla. 2d DCA 1978), the trial court permitted an investigating officer to testify regarding statements made by the victim which were consistent with the victim's testimony at trial. The Lamb court reversed, noting that the law enforcement officer's testimony "had the immediate effect of putting a cloak of credibility" upon the testimony of the witness. 357 So.2d at 438; see also Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979) (when corroborating witness is law enforcement officer who is generally regarded by jury as disinterested, objective, and highly credible, danger of improperly influencing jury becomes particularly grave and error cannot be harmless).

The state of mind exception to the hearsay rule, under which the judge admitted the prior consistent statements, was not applicable. That exception allows extrajudicial statements only if the declarant's state of mind is at issue in the case or to prove or explain the declarant's subsequent conduct. State v. Correll, 523 So.2d 562, 565 (Fla. 1968); § 90.803(3)(a), Fla. Stat. (1987). If it is intended to explain or prove subsequent conduct, that conduct must be relevant to the issues in the case. Morris v. State, 487 So.2d 291, 292-93 (Fla. 1986).

Although the credibility of the three witnesses was at issue, their state of mind was not. Furthermore, the hearsay did not prove or explain any subsequent conduct of the witnesses. See e.g., Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L. Ed. 706 (1892) (statements of intent admissible to prove the person did the act which he said he did); Jones v. State, 440 So.2d 570, 577 (Fla. 1983) (testimony that seven days before murder of police officer, defendant threatened to "kill a pig," admissible to prove subsequent conduct of defendant). In the case at hand, no subsequent conduct of the witnesses was at issue.

Furthermore, Halliday's testimony about the reasons the informants gave for coming forward did not evidence state of mind and certainly were not probative of credibility. The self-serving statements did not show the true state of mind of these witnesses at the time Halliday interviewed them, but only what they told him. Halliday's repetition of their self-righteous and self-serving statements offered no new evidence, but served only to improperly bolster their credibility.

Section 90.803(3), Florida Statutes (1987), the state of mind exception to the hearsay rule, contains two exceptions to the exception. The rule does not make admissible (b)(1) "[a]n after-the-fact statement of memory or belief to prove the fact remembered or believed . . . or (2) [a] statement made under circumstances that indicate its lack of trustworthiness." § 90.803(3)(b), Fla. Stat. (1987). Even if Halliday's testimony showed state of mind, either exception would preclude its admissibility in this case.

The first exception to admissibility appears to be the codification of the second half of the definition of the state of mind exception in Correll, 523 So.2d at 565. (See discussion on page 56, supra). The prosecutor was offering the hearsay to prove that the informants reported Dailey's alleged admissions out of moral indignation rather than for better "deals." What the informants told Halliday related to their prior rather than subsequent conduct, however. Therefore, Halliday's testimony consisted of "after-the-fact statements of memory offered to prove the facts remembered," and would be inadmissible under § 90.803(3)(b)(1).

That the informants gave Halliday the same reasons they gave at trial does not make the reasons any more likely to be true. They had good reason to lie to Halliday about their motivation. Surely these witnesses who had assisted law enforcement before would not tell Halliday that they were making up testimony to get better deals. Their statements were made under circumstances that indicated a lack of trustworthiness. Thus, even if the statements had shown state of mind, they would have been inadmissible under § 90.803(3)(b)(2). The prosecutor's state of mind argument was nothing more than a ruse to get otherwise inadmissible hearsay into evidence to buttress the testimony of the three key witnesses.

The erroneous introduction of these prior consistent statements was far from harmless. The repetition of the self-serving testimony by a law enforcement officer placed a cloak of undeserved credibility upon the testimony of the witnesses whose credibility had been severely impeached. There was no conclusive

testimony nor any physical evidence linking Dailey to the crime. It could just have easily been Pearcy who killed the girl. Only the testimony of the three inmates made it appear that Dailey killed her or that the defendants killed her together.

The testimony of Paul Skalnik was especially damaging in penalty phase. Halliday's repetition of Skalnik's alleged moral reasons for testifying and the abuse he suffered for it made his testimony seem more credible. Skalnik told the jurors that Dailey said that the girl kept screaming and wouldn't die. This testimony made the crime more heinous, atrocious and cruel, and more premeditated. The idea that the crime was so atrocious that convicted criminals were morally indignant made it seem even worse.

The defendant has an absolute right to cross-examine the state's witnesses to impeach their credibility. Fulton v. State, 335 So.2d 280, 283-84 (Fla. 1976). When the credibility of the witnesses is crucial, as in this case, the improper admission of self-serving hearsay, in the form of prior consistent statements, violates the defendant's right to confrontation as surely as if he had been denied the right to cross-examine the witnesses to impeach their credibility. See Chambers v. Mississippi, 410 U.S. 284, 92 S. Ct. 1038, 35 L. Ed. 2d 279 (1973) (right to cross-examination explicit in sixth amendment right to confrontation); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). It was reversible error.

ISSUE VI

THE TRIAL COURT ERRED BY RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF PAUL SKALNIK ABOUT THE NATURE OF HIS PAST AND PENDING FELONY CHARGES FOR TAKING MONEY FROM WOMEN UNDER DISHONEST CIRCUMSTANCES.

The state filed a Motion in Limine requesting that defense counsel be ordered not to mention the facts of the charges pending against inmate witnesses Paul Skalnik, James Leitner, Pablo DeJesus, and Gary Dolan, without first obtaining permission of the court outside the presence of the jury. (R. 88) At a pretrial hearing held the same date, the prosecutor argued that, although the defense was entitled to impeach these witnesses with their charges and any benefit promised for testifying, he should be precluded from asking about the circumstances of their pending cases. (R. 1609-10) As to Paul Skalnik, who was facing a violation of parole and two new grand thefts, the prosecutor requested that the court prohibit defense counsel from getting into "the fact that his victim was an elderly female and the amount of money that was taken and how he took the money from the victim." (R. 1610)

Defense counsel told the judge he just received the state's motion that morning and thought there was an appellate decision favorable to his side. He said that he would like to look for it and respond to the motion. (R. 1610) The trial court agreed to allow defense counsel to research the matter after he promised not to bring up the subject during voir dire. (R. 1611)

At trial, when defense counsel asked Skalnik if his

crimes involved taking things from women under dishonest circumstances, the prosecutor objected.[24] (R. 1118) Defense counsel cited the case of Patterson v. State, 501 So.2d 691 (Fla. 2d DCA 1987),[25] in which the court held that the defendant has an absolute right to bring out pending criminal charges in cross-examination of a prosecution witness, even when the charges relate to a different offense. 501 So.2d at 692. Nevertheless, the trial court sustained the state's objection. (R. 1119-20) The court ruled that defense counsel could ask only if Skalnik had been convicted of a felony, if the felonies involved "honesty and integrity," and how may times he'd been convicted. (R. 1120)

Although the state's motion in limine referred specifically to charges pending against the inmates, and this was the subject of the motion hearing, defense counsel did not distinguish between pending and prior felonies when arguing at trial that he should be permitted to cross-examine Skalnik concerning the circumstances of his felony offenses. Patterson, the case defense counsel cited, involved pending criminal charges. Based on Patterson and other cases discussed herein, the defense had an

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[24] The hearing was held on the morning of Dailey's first trial which ended in mistrial during voir dire. Thus, the question was not addressed again until the second trial.

[25] This case is identified in the trial transcript only by the name "Patterson." Defense counsel told the judge that it was an opinion from the Second District, and that the judge was B.J. Driver. The opinion reveals that B.J. Driver was the trial court judge. The appellate opinion was authored by Justice Grimes, then Acting Chief Judge in the Second District Court of Appeal.

absolute right to cross-examine Skalnik about his pending charges.

Paul Skalnik admitted that he had pending charges for parole violation and two new grand thefts. (R. 1107-09) He testified that the parole violation was for four prior theft charges. When asked how many times he had been convicted of a felony, he responded "[f]ive or six, if I am not mistaken." (R. 1107)[26] Accordingly, all but one or two of his prior thefts were pending for sentencing at the time of Skalnik's testimony because of his parole violation. With the two new pending theft charges, Skalnik had six thefts pending sentencing and only one or two priors. Defense counsel was clearly entitled to cross-examine Skalnik as to the nature of the six pending charges. Fulton v. State, 335 So.2d 280, 283-84 (Fla. 1976) (when prosecution witness is under criminal charges at time he testifies, defense has an absolute right to bring out circumstances on cross-examination).

Additionally, counsel should have been permitted to impeach Skalnik concerning the nature of his criminal behavior because the Appellant had a constitutional right to confront the witnesses against him and to develop and present his theory of defense. A further reason was because the state opened the door to this impeachment testimony. Evidence of the nature of Skalnik's theft offenses was central to his credibility and tended to rebut Skalnik's testimony inferring that he was a reliable witness.

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[26] When asked on cross how many times he had been convicted of a felony involving moral turpitude, Skalnik also said five or six times. (R. 1120) He said that he did not remember exactly how many times he had been convicted of a felony. (R. 1121)

Jurors are entitled to hear the circumstances of actual or threatened pending charges so that they will be fully apprised of the witness's possible self-interest. Blanco v. State, 353 So.2d 602 (Fla. 3d DCA 1977). These circumstances include the details of the crimes. Kelly v. State, 425 So.2d 81 (Fla. 2d DCA 1982). The nature of the crimes is admissible evidence because it shows the jury how serious the charges are and, correspondingly, the depth of the witness's motivation to testify for the prosecution. Blanco, 353 So.2d 602; see also Lusk v. State, 531 So.2d 1377, 1382 (Fla. 2d DCA 1988) (evidence of pending charges shows witness's "possible bias in attempting to curry favor with the state through his testimony"); Watts v. State, 450 So.2d 265, 268 (Fla. 2d DCA 1984) (such evidence demonstrates "witness's bias or motive for testifying for any reason other than to tell the truth").

Additionally, the trial court's restriction of defense counsel's cross-examination violated the Appellant's Sixth Amendment right to confront the witnesses against him. A primary interest secured by the confrontation clause is the right of cross-examination, which includes the right to examine a witness as to matters affecting his credibility, including a possible motive for testifying. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Limiting the scope of cross-examination in a manner which keeps from the jury relevant facts bearing on trustworthiness of crucial prosecution testimony is improper, especially if directed at a key prosecution witness. Mendez v. State, 412 So.2d 965, 966 (Fla. 2d DCA 1982) (citations omitted).

In Davis v. Alaska, the trial court refused to allow evidence of a key prosecution witness's prior offenses for which he was on probation at the time of trial. The defense wanted to show that the witness "acted out of fear or concern of possible jeopardy to his probation." Id. at 311. The Supreme Court held that this refusal was reversible error, citing "the petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." Id. at 319.

The present case is the same. Skalnik was a key prosecution witness. He had even more reason to lie than the defendant in Davis v. Alaska because he was charged with parole violation and two new theft charges. His history of providing "snitch" testimony showed his familiarity with the benefits of such testimony.

Kelly v. State is also similar to the case at hand. In Kelly, the evidence showed that the prosecution witness had been arrested and charged for soliciting a bribe and carrying a firearm. During cross-examination, defense counsel asked the witness what he had done that led to the arrest. The witness invoked his fifth amendment right. The trial court denied a defense motion to strike the witness's testimony. 425 So.2d at 82-83.

The Second District Court of Appeal reversed. It held that the defendant's inability to impeach the witness constituted a violation of his right to confront the witnesses against him. Citing Beaudine v. United States, 368 So.2d 417 (5th Cir. 1966), the court stated that "it is almost always the case when cross-examination directed to its main objective -- destruction of

credibility -- is unduly restricted, [that] the record, of necessity, does not and cannot reflect what would have been developed; appropriate cross-examination could only be accomplished by an adroit, penetrating, relentless cross-examination searching deeply into the motivation of the witness." Kelly, 425 So.2d at 84. Like Kelly, the Appellant herein was denied his right to confront the witness concerning his credibility.

The state opened the door to the introduction of the impeachment evidence when Skalnik, a former police officer, testified that no one offered him anything to testify in Dailey's trial, that he had helped the state put 30 criminals in prison,[27] and that he testified only because he still had law enforcement in him. (R. 1108, 1156-57) His history of dishonesty was relevant to impeach this self-serving testimony. Evidence that Skalnik habitually conned women out of money by trickery and dishonesty would have suggested to the jury that Skalnik might be lying about Dailey's alleged admissions to gain another personal benefit.

In Lusk, 531 So.2d at 1382, a key prosecution witness testified that he was basically a nonviolent person. The Second District Court of Appeal held that the state had opened the door to the introduction of impeachment evidence showing that the witness had committed various batteries on his wife and was on probation for battering another person. The court found the evidence relevant to show the witness's lack of truthfulness

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[27] Prior to his alleged conversations with Dailey, Skalnik had given Halliday information about Jack Pearcy. (R. 1146-47)

regarding his violent nature. The evidence was also admissible as specific instances of conduct showing the witness's character for violence, once that character trait had been placed at issue. In our case, the state placed Skalnik's credibility at issue when he attested to his pure motives for testifying --inferring reliability -- and to his history of success as a prosecution witness.[28]

Similarly, in McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1981), this Court held that the state was entitled to interrogate the defendant concerning the nature of his prior felony to negate innuendoes of his counsel that the felony was not serious. The court noted that one of the objects of cross-examination is "to elicit the whole truth of transactions which are only partly

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[28] The cross-examination would also have tended to impeach Detective Halliday's later testimony that Skalnik's information had proven reliable in the past; that as a result of his help, they recovered a ski mask worn by one of the perpetrators of the High Point murders and a weapon in another case. (R. 1186-88) It would have tended to rebut Halliday's remark that most of the witnesses he interviewed at the jail that became state witnesses were very reliable. Although the trial court sustained an objection to that remark (R. 1182), the prosecutor brought it up again during closing argument. She said,

> I am not asking you to like them . . . . I am asking you to believe them. And there is no reason why you shouldn't . . . . (R. 1277-78) They were each honest with you about what they expect or hope to receive. (R. 1279) Not once did [defense counsel] rebut or impeach what they said. Not once. They can't attack what they said because they were telling the truth. (R. 1279-80) You heard Detective Halliday's experience . . . . If these men are cons, they would not con Detective Halliday. (R. 1283)

Although this bolstering of Skalnik's testimony did not occur until after the judge had curtailed cross-examination of Skalnik, it certainly exacerbated the earlier error.

explained in the direct examination." Questions designed "to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from [a witness's] testimony, are legitimate cross-examination." 395 So.2d at 1152 (quoting from 4 Jones on Evidence, § 25:3 (6th ed. 1972)). Evidence concerning the nature of Skalnik's offenses would have fully apprised the jurors of the seriousness of his crimes, the extent of his self-interest, and his tendency to lie for personal gain.

The right to confront the witnesses is a fundamental constitutional right guaranteed by the sixth amendment. It is elementary that the court may not deprive the defendant of his right to cross-examine a witness who testifies against him. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L. Ed. 2d 923 (1965). An abuse of discretion by the trial judge in curtailing cross-examination of a key prosecution witness regarding matters germane to the witness's testimony and plausibly relevant to the defense may "easily constitute reversible error," especially in a capital case. Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978); accord Pait v. State, 112 So.2d 380 (Fla. 1959) (error in capital case must be carefully scrutinized before written off as harmless).

The policy considerations here are not the same as when the prosecution is attempting to impeach a defendant. Rules that restrict the admission of character evidence against the defendant are designed to guard against the conviction of an innocent person. When a defendant is attempting to impeach a prosecution witness, the policy considerations are reversed. The exclusion of such

evidence, not its admission, could lead to an innocent person being sentenced to prison or death. The danger is worse when the witness is a professional "snitch" rather than an eyewitness to the crime.

The right to develop and present a theory of defense is a fundamental constitutional right. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 279 (1973); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L. Ed. 2d 1019 (1967). Dailey's defense was that he did not commit the crime. It was essential to his defense to convince the jury that the three inmates who provided all of the direct evidence of Dailey's guilt were lying. Paul Skalnik's testimony was the most damaging. Thus, the trial court's restriction of cross-examination concerning Skalnik's prior dishonest behavior deprived James Dailey of his constitutional right to present a meaningful defense.

When an error affects a constitutional right, the reviewing court may not find it harmless unless the state proves beyond a reasonable doubt that the error did not contribute to the defendant's conviction. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Skalnik provided the only details of the murder attributed to Dailey. Had the jurors not believed Skalnik, they might not have been convinced beyond a reasonable doubt that Dailey was guilty.[29] Thus, the case should be reversed for a new trial.

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[29] Error during the guilt phase of a trial may be harmful during penalty phase. Castro v. State, 14 F.L.W. 359, 364 (Fla. July 13, 1989). Skalnik testified that Dailey told him the girl "kept staring at him, screaming, and would not die." (R. 1116-17) The other two informants testified only that Dailey and Pearcy planned to exonerate each other and that Dailey said he killed the girl because he "lost it." (R. 1066-95) The testimony that Dailey

ISSUE VII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY OVER DEFENSE OBJECTION THAT THE DEFENDANT NEED NOT HAVE BEEN PRESENT WHEN THE CRIME WAS COMMITTED TO BE GUILTY OF FIRST-DEGREE MURDER.

As part of the guilt phase jury instructions, the trial court gave Standard Jury Instruction 3.01, regarding "principals." (R. 1305-06) The instruction reads as follows:

> If two or more persons help each other commit or attempt to commit a crime and the defendant is one of them the defendant must be treated as if he had done all of the things the other person or persons did if the defendant:
>
> 1. Knew what was going to happen,
>
> 2. Intended to participate actively or by sharing in an expected benefit and
>
> 3. Actually did something by which he intended to help commit the crime.
>
> "Help" means to aid, plan or assist. To be a principal, the defendant does not have to be present when the crime is committed.

When the prosecutor presented this written instruction to the judge during charge conference, she had omitted the final sentence. (R. 1213-14) Defense counsel objected to the final sentence because no theory of the evidence or argument supported it. (R. 1214) The judge said he was worried about what counsel

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"lost it" suggests a frenzied irrational killing (not CCP) while testimony that the girl would not die suggests calculation and possible premeditation. Skalnik's testimony makes the homicide more heinous and cruel (HAC). Even if the excluded impeachment evidence raised a doubt less than a "reasonable doubt," that doubt might have weighed in favor of a life recommendation.

would argue during the closings. Defense counsel said that he did not think there was any chance the state would argue that Dailey wasn't there. The prosecutor agreed that she would not argue it. (R. 1214) Apparently, the judge did not believe them.

> THE COURT: I am worried about you arguing it, worried he wasn't there. I am going to give it. I want it given.

He agreed to give it over defense objection.[30] (R. 1214)

"Jury instructions must relate to issues concerning evidence received at trial." Butler v. State, 493 So.2d 451, 452 (Fla. 1986); Buford v. Wainwright, 428 So.2d 1389 (Fla.), cert. denied, 464 U.S. 956, 104 S. Ct. 372, 78 L. Ed. 2d 331 (1983). Only instructions which have support in the record should be given. Buford, 428 So.2d at 1391. The court should not give instructions that are confusing or misleading. Butler, 493 So.2d at 452; Doyle v. State, 483 So.2d 89, 90 (Fla. 4th DCA 1986) (giving of misleading instruction constitutes fundamental and reversible error)

Although a judge should generally adhere to the Standard Jury Instructions, Moody v. State, 359 So.2d 557, 560 (Fla. 4th DCA 1978), the instructions need not be literally given in every case.

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[30] Defense counsel noted that codefendant Pearcy had argued it "because of Dailey," but that "Dailey wasn't there when it was done." (R. 1214) If the judge was "worried" that Dailey really wasn't there when the crime was committed, by giving the instruction he encouraged the jury to make an erroneous finding. If the state had argued it, the harm caused by the instruction would have been worse. Although no one argued that Dailey was guilty even if he was not there, both counsel commented on the principal instruction. The prosecutor argued that if Dailey helped commit the crime, he would be guilty of Pearcy's acts. (R. 1249-50, 1264-66)

State v. Bryan, 287 So.2d 73, 75 (Fla. 1973) (Florida Supreme Court approval of recommended instructions "is not iron clad or carte blanche and must be applied in each instance as appropriate"). Florida Rule of Criminal Procedure 3.985 provides that the standard jury instructions "may" be used by the trial judges

> to the extent that the forms are applicable, unless the trial judge shall determine that an applicable form of instruction is erroneous or inadequate, in which event he shall modify or amend such form or give such other instruction as the judge shall determine to be necessary accurately and sufficiently to instruct the jury in the circumstances of the case . . . .

The standard instructions "are not to be literally applied in every case, the object being to make the pattern fit the cloth rather than the cloth the pattern." Bryan, 287 So.2d at 77.

The instruction that the defendant need not have been present when the crime was committed was clearly error. Both the state and the defense found it inapplicable. (R. 1214) Based on the evidence, there is no way that Dailey could be guilty of first-degree murder if he was not present when the murder was committed.

The instruction was confusing and misleading to the jury. Some of the evidence suggested that Dailey may have gone to bed and that Pearcy took Shelley to the beach alone.[31] Because of the erroneous jury instruction, the jurors may have believed that, even

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[31] Dwaine Shaw testified that only Pearcy took Shelley home. Shaw said that he rode with them as far as the pay phone. (R. 997-99, 1007) Gayle Bailey was in the bathroom and did not see them leave. (R. 972) It is conceivable that Pearcy took Shelley to the beach and killed her, then returned to pick up Dailey, and that the two men returned together later in the night.

if Dailey was asleep in bed when the murder took place, he was guilty because he and Jack picked up the girl together earlier.[32]

Alternatively, the jurors may have believed that Dailey was guilty even if he wasn't present when Pearcy murdered the girl because Pearcy and Dailey were "fall partners." The letters Dailey passed to Pearcy while in jail inferred that they were "partners" covering for each other. (R. 1476-77) Inmate Pablo DeJesus testified that Dailey told him that he and Pearcy were "fall partners" and that they had been together a long time. (R. 1093)

Evidence of involvement with a perpetrator only after the crime was completed does not justify conviction under a principals theory. Smith v. State, 502 So.2d 77 (Fla. 3d DCA 1987). Nevertheless, the jurors may have concluded that, even if Dailey was not there when Pearcy committed the crime, he was equally guilty for trying to protect Pearcy from conviction. The erroneous instruction would have bolstered that conclusion.

The danger in instructing on a legal avenue unsupported by the evidence is that the jury may nevertheless employ that avenue to convict. This danger is particularly disturbing when the legal theory is the principals theory under which one man may be held legally responsible for a crime committed by another. A jury not unanimously convinced beyond a reasonable doubt that the

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[32] The prosecutor misstated the testimony during her closing argument. Shaw testified that only Pearcy left to take Shelley home after the group returned from the bar. (R. 997, 1007) Shaw rode with Jack and Shelley as far as the phone booth. The prosecuter told the jury that this happened earlier and that, while Shaw was on the phone, the group left to go to the bar. (R. 1272-74)

accused committed the crime may convict on a principals theory where that option is provided. Thus, the danger is real that some of the jurors found proof that Dailey was the perpetrator lacking but voted to convict at least under the principal theory.

When a case is presented to the jury "on alternate theories, some of which are legally correct and others legally incorrect and the reviewing court cannot determine from the record on which theory the ensuing general verdict rested, the conviction cannot stand." People v. Garewal, 173 Cal. App. 3d 285, 303, 218 Cal. Rptr. 690, 700 (1985); People v. Olmedo, 167 Cal. App. 3d 1085, 1094, 213 Cal. Rptr. 742, 747 (1985) (dealing with erroneous "principals" theory jury instructions). Such error violates the defendant's constitutional right to have the jury decide every material issue. Olmedo, 167 Cal. App. 3d at 1093, 213 Cal. Rptr. at 746; see also Sandstrom v. Montana, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39, 52 (1979) (when case submitted to jury on alternative theories, unconstitutionality of any theory requires that conviction be set aside); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (due process protects against conviction except upon proof of every element).

In the case at hand, some of the jurors may have relied on the erroneous instruction rather than a legally proper theory, to find Dailey guilty. Thus, the error may have contributed to his conviction. See Butler, 493 So.2d at 453; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Accordingly, Dailey is entitled to a new trial.

ISSUE VIII

THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTOR MADE TWO COMMENTS ON THE DEFENDANT'S FAILURE TO TESTIFY DURING HER CLOSING ARGUMENT.

James Dailey did not take the stand in his own defense. (R. 127) His codefendant, Jack Pearcy, invoked his fifth amendment right and refused to testify. (R. 987-89) During closing argument, the prosecutor argued:

> Now, there are only three people who know exactly what happened on that Loop area north of Indian Rocks Beach the night of May 5th, early morning hours of May 6th, 1985. Shelly Boggio and she is dead: Jack Pearcy and he is not available to testify; and the Defendant. So, when the defense stands up here, as they have already and I imagine Mr. Andringa will when he gets up to rebut, and says where's the evidence, where's the eyewitnesses, use your common sense. Murderers of young girls don't commit the crime, don't sexually assault and commit a crime of murder with an audience.

(R. 1260-61)[33] Although defense counsel did not interrupt the prosecutor, he objected and moved for mistrial when she finished her closing argument, specifically mentioning the above comment on the defendant's failure to testify.[34] The judge summarily denied the motion. (R. 1287)

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[33] While discussing possible motive, the prosecutor repeated a portion of the offensive comment: "As I said before, there is [sic] only three people who know what really happened out there that night and why they killed her." (R. 1264)

[34] An objection made at the conclusion of closing argument is timely. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

When the prosecutor made a second remark that reminded the jury of the Appellant's failure to testify, defense counsel objected immediately. Responding to defense counsel's comment that the state presented no evidence of whether Dailey had fingernails that would scratch the victim (R. 1233), the prosecutor argued:

> Fingernails. You didn't here [sic] about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less than 24 hours and we arrest him months later in the State of California. That's right. Only he knows the length of his fingernails.

(R. 1270) Defense counsel objected and moved for a mistrial based upon "grounds that are apparent to the Court." The trial judge responded: "Understand the argument. That's denied at this time. Proceed." (1270) Defense counsel reminded the judge of his objection at the close of the prosecutor's argument when he objected to her first comment on the Appellant's failure to testify. (R. 1287) The judge said he understood and that the "[m]otions are denied."

Comments on the defendant's failure to testify violate the self-incrimination clause of the fifth amendment to the United States Constitution. Griffin v. California, 380 U.S. 609, 613, 85 S. Ct. 1229, 14 L. Ed. 2d 106, 109 (1965). They also violates Florida Rule of Criminal Procedure 3.250.[35] Danford v. State, 492 So.2d 690, 691 (Fla. 4th DCA 1986). A comment is error if it is "fairly susceptible" of being viewed by the jury as referring to

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[35] Rule 3.250 provides that "no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before a jury or court to comment on the failure of the accused to testify in his own behalf . . . ."

the defendant's failure to testify. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Kinchen, 490 So.2d 21 (Fla. 1985).

A. First Comment

> **"Now, there are only three people who know exactly what happened on that Loop area north of Indian Rocks Beach the night of May 5th, early morning hours of May 6th, 1985. Shelly Boggio and she is dead: Jack Pearcy and he is not available to testify; and the Defendant."**

The first comment by the prosecutor in this case is similar to the prosecutor's erroneous comment in State v. Marshall, 476 So.2d 150 (Fla. 1985). That prosecutor argued as follows:

> Ladies and gentlemen, the only person you heard from in this courtroom with regard to the events of November 9, 1981, was Brenda Scavone [the victim].

475 So.2d at 151. It is also similar to the comment that the United States Supreme Court found to constitute reversible error in Griffin v. California. The Griffin prosecutor argued:

> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

380 U.S. at 611, 14 L. Ed. 2d at 1229.

Compare these comments to the argument of the prosecutor in the instant case. (See "First Comment," above) The common denominator of all three comments is their references to a lack of witness testimony when the defendant was the only witness who could have provided the testimony. Judge Hurley, in the district court opinion in Marshall, analyzed that prosecutor's comment as follows:

> Since only two people witnessed the events in question, and one of those chose not to testify, we cannot accept the state's argument that the prosecutor's remarks amounted to

> nothing more than a comment on "the evidence as it existed before the jury." . . . "A constitutional violation occurs . . . if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify."

Marshall v. State, 473 So.2d 688, 698 (4th DCA 1984) (citations omitted), quashed on other grounds, 476 So.2d 150 (Fla. 1985). Although the district court's decision was quashed because it applied the "per se reversible" rule rather than the "harmless error" rule, this Court agreed with the district court's finding that the prosecutor's comments "impermissibly highlighted the defendant's decision not to testify." 476 So.2d at 153.[36]

Judge Hurley's remarks are equally applicable in the case at hand. Dailey's prosecutor named the three witnesses and told the jury why the victim and the codefendant did not testify.[37] She then reminded the jurors that the defendant was the only other witness and left them to speculate about why he did not testify.

Both comments in the instant case are reminiscent of the prosecutor's comment in Abreu v. State, 511 So.2d 1111 (Fla. 2d DCA 1987). Referring to testimony by the confidential informant, the

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[36] Although the district court judge compared the comment to comments made in several federal cases, and referred to the more restrictive federal test (whether the comment would "naturally and necessarily" have been interpreted by the jury as a comment on the defendant's failure to testify), the court noted earlier that the "fairly susceptible" test is applied in Florida. 473 So.2d at 689.

[37] This comment may also have misled the jury as to why Jack Pearcy did not testify. The prosecutor said that he was "not available." What the jurors may have believed concerning Pearcy's failure to testify is beyond speculation.

prosecutor stated as follows:

> And what did you hear to rebut that? Who took the stand and said that what he said wasn't true?
>
> But who took the stand and said it wasn't true? Who rebutted what he said? No. All they proved was that he was a bad guy. So what? We knew that.

511 So.2d at 1113. The court noted that the state attorney could only have been referring to the defendant or the codefendant because they were the only ones present at the scene other than the confidential informant. Thus, the comment was fairly susceptible of only one interpretation -- that the defendant and codefendant did not rebut the confidential informant's testimony. Id.

Even if the comment could be interpreted in more than one way, it was error if one of those interpretations was "fairly susceptible" of being construed by the jury as a reference to the defendant's failure to testify. As this Court noted in State v. Thornton, 491 So.2d 1143, 1144 (Fla. 1986),

> While the comment on this silence can be interpreted to be probative as to the voluntariness of Thornton's subsequent waiver of rights ... it can also be interpreted to be a comment on Thornton's exercise of his right to remain silent. That is enough to constitute error.

B. Second Comment

"Only he knows the length of his fingernails."

Although the second remark may have been intended to rebut an earlier argument by defense counsel, the final sentence, that "only he knows the length of his fingernails," clearly and

unnecessarily alluded to Dailey's failure to testify at trial. It may also have been untrue. During the trial, the prosecutor never asked the other witnesses who knew or saw Dailey at the time of the homicide whether they remembered the length of Dailey's fingernails. The comment was also unnecessary because the length of Dailey's fingernails had very little probative value -- many people have fingernails long enough to scratch someone.

"[O]nly he knows the length of his fingernails," suggests the further reflection, "and he's not saying" or "and he didn't testify about it." See Griffin, 380 U.S. at 611, 14 L. Ed. 2d at 1229 ("Essie Mae is dead, she can't tell you her side of the story. The defendant won't.") The comment is also similar to the remark found to infringe on the defendant's constitutional rights in United States v. Griggs, 735 F.2d 1318 (11th Cir. 1984).

The prosecutor in Griggs commented that "the defendant has not testified about it." Applying the more stringent federal test,[38] the Eleventh Circuit found this "an unmistakable reference to Griggs' exercise of his fifth amendment privilege" and reversed for a new trial. 735 F.2d at 1324. See also Marsden v. Moore, 847 F.2d 1536, 1547-48 (11th Cir. 1988) (comment that defendant "is not here today denying that he wasn't at the scene because his hair wasn't there at the scene" was improper reference). Because Griggs

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[38] Under the more restrictive federal test a "statement by a prosecutor is improper if it was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Marsden v. Moore, 847 F.2d 1536, 1547 (11th Cir. 1988) (citation omitted).

and Marsden are federal cases in which a more stringent standard was applied, the comments would certainly constitute error under Florida's "fairly susceptible" test. An error "necessarily" construed as a comment on the defendant's failure to testify would have to be fairly susceptible of such interpretation.

As noted earlier, the comments made by the prosecutor in Abreu, 511 So.2d at 1113, are similar to the second comment as well as the first. "And what did you hear to rebut that?" (Abreu) is close to "You didn't here [sic] about the length of Mr. Dailey's fingernails. . . . Only he knows the length of his fingernails."

Abreu is reminiscent of the Dailey case in another way. In Abreu, the state could not show that the comment was harmless beyond a reasonable doubt[39] because the confidential informant, whose testimony was critical, was a criminal cooperating for a price, and some of his recollections varied materially from those of the detective. 511 So.2d at 1113-14. In the present case, the critical testimony was provided by three jailhouse "snitches," all criminals cooperating for a price (better sentences), and their testimony varied.[40]

As the prosecutor noted, there were no eyewitnesses. The

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[39] If the comment is found to be fairly susceptible of being viewed by the jury as referring to the defendant's failure to testify, the "harmless error" rule must be applied to determine whether the error may have affected the verdict. State v. Marshall, 476 So.2d 150 (Fla. 1985).

[40] For example, Leitner and DeJesus said Dailey admitted that he killed the girl. (R. 1066-67, 1095) Skalnik testified that Dailey told him Pearcy also stabbed the girl and that Pearcy held the girl under and drowned her. (R. 1114-17)

testimony of Gayle Bailey and Dwaine Shaw was inconclusive and no physical evidence connected Dailey with the crime. Without the testimony of the three "snitch" witnesses, no clear evidence showed whether Dailey, Pearcy, or some third party killed the victim. Thus, the prosecutor's comments may have caused the jurors to conclude that Dailey must be guilty because he did not take the stand to refute the testimony of the three inmate witnesses.

The state, as the beneficiary of the error, must prove beyond a reasonable doubt that the prosecutor's improper remarks did not contribute to the guilty verdict. DiGuilio, 491 So.2d at 1136; Marshall, 476 So.2d at 153. Because commenting on a defendant's failure to testify is a serious error, Kinchen, 490 So.2d at 22, the harmless error rule places a heavy burden on the state. DiGuilio, 491 So.2d at 1135.

Although both comments in this case were prejudicial, the combination compounded the error by twice reminding the jury that the defendant did not take the stand. See Freeman v. State, 538 So.2d 936, 937 (Fla. 2d DCA 1989) (errors cumulatively tainted defendant's constitutional entitlement to a fair trial). Because the jury may have interpreted the prosecutor's remarks as implying that Dailey would have rebutted the state's accusations if he were innocent, the remarks tainted his constitutional right to a fair trial and constituted reversible error.

ISSUE IX

THE TRIAL COURT ERRED IN QUALIFYING DETECTIVE HALLIDAY AS AN EXPERT IN HOMICIDE INVESTIGATION AND SEXUAL BATTERY BECAUSE HIS OPINION WAS BASED ON NOTHING MORE THAN COMMON INTELLIGENCE AND SPECULATION.

During the penalty phase of the trial, the trial court qualified Detective Halliday as an expert in homicide investigation and sexual battery (R. 1353, 1356) and permitted him to testify that, in his opinion, Shelley Boggio was the victim of a sexual battery or an attempted sexual battery. (R. 1357-61) Defense counsel objected to his being tendered as an expert because his opinion testimony was based on nothing more than common intelligence and speculation. (R. 1351-52) The trial judge agreed to a proffered voir dire of the witness. (R. 1345-46)

Detective Halliday testified in proffer that he had investigated a hundred or more rapes. (R. 1350) Halliday said that he had been qualified on one other occasion as an expert on homicides involving sexual battery. He admitted, however, that it was in the trial of the codefendant, Jack Pearcy. (R. 1346-47) Judge Penick also presided over that trial. (R. 232)

Halliday said that he had learned during his training that when a body is found naked, a sexual battery has almost always occurred. (R. 1351) He opined that, from the way the evidence was situated at the crime scene, he would "say without a doubt" that the intent was sexual battery. (R. 1347) He drew this conclusion from the placement of the victim's clothing and the fact that her

clothes had been removed. Halliday noted that the crime involved a young female, age 14, and "two 30 year old people." (R. 1348)

Halliday admitted that he had no specific training relative to the position of panties in relation to jeans and bodies. He said:

> I don't think what you're driving at is really expertise. I think that's just common sense, that when a pair of underpants is 140 feet from a body and a pair of jeans and a shirt and there is a trail of blood leading from where that pair of underpants and where the body is located, the girl would have had to have disrobed in that location where the blood started and her body over here, 140 feet away.

(R. 1349) Halliday agreed that his testimony would just be a "fair assumption" based upon the physical evidence that he observed, and that he had no expertise pertaining to any technical observations or lab test results, such as body hair or semen.[41] (R. 1349-50)

An expert opinion "is worth no more than the reasons on which it is based." LeFevre v. Bear, 113 So.2d 390, 393 (Fla. 2d DCA 1959); Kelly v. Kinsey, 362 So.2d 402, 404 (Fla. 1st DCA 1978). Under Florida law, the trial court's discretion in determining the admissibility of expert testimony is not unfettered.

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[41] Halliday testified before the jury that he believed the motive for the murder was sexual battery because the victim's nude body was found twenty feet off an embankment in the intracoastal waterway; her jeans and shirt, which was torn from the stabbing, were located there also; and her black underwear was found about 140 feet away. There was a trail of blood from that location to the embankment where the body was found. (R. 1357) Over defense objection, Halliday opined that, when clothing is found in a different location than the body, consensual sex is ruled out because, when sex is consensual, "you don't leave your clothing laying in a field or in a bedroom or anywhere. You take it with you." (R. 1360)

Johnson v. State, 314 So.2d 248, 251-52 (Fla. 1st DCA 1975); GIW Southern Valve Co. v. Smith, 471 So.2d 81, 82 (Fla. 2d DCA 1985). Purported expert testimony consisting of guesses, conjectures, or speculation is "clearly inadmissible." Durrance v. Sanders, 329 So.2d 26, 30 (1st DCA), rev. denied, 339 So.2d 1171 (Fla. 1976).

To be admissible, expert testimony must be (1) so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and (2) the witness must have such skill, knowledge or experience in that field that his opinion will aid the jury in its search for truth. Mills v. Redwing Carriers, Inc., 127 So.2d 456 (Fla. 2d DCA 1961); Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218, 219 (Fla. 5th DCA 1982); see also Hooper v. State, 476 So.2d 1253 (Fla. 1985) and Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1329, 79 L. Ed. 2d 724 (1984) (trial court correctly excluded testimony of experts in eyewitness identification because facts did not require any special knowledge or experience for jury to form its conclusions).

In the often quoted case of Mills v. Redwing Carrier, the court observed that:

> When facts are within the ordinary experience of the jury, the conclusion from those facts will be left to them, and even experts will not be permitted to give conclusions in such cases. (citation omitted) Expert testimony is admissible only when the facts to be determined are obscure, and can be made clear only by and through the opinions of persons skilled in relation to the subject matter of the inquiry.

127 So.2d at 456; see also Ortegus v. State, 500 So.2d 1367, 1371 (Fla. 1st DCA 1987) (testimony of firearms expert concerning close proximity of defendant to victim at time of shooting was properly excluded because it was not beyond understanding of average layman and would not have aided jury); Florida Power Corp. v. Barron, 481 So.2d 1309, 1310-11 (Fla. 2d DCA 1986) (where roofer fell from roof after being shocked by power line, trial court erred in permitting expert testimony that powers of concentration decrease when you are fatigued toward the end of the day and you are more likely to put yourself in an unsafe situation; this testimony is within common understanding of jury).

In Sea Fresh Frozen Products, 411 So.2d at 219, the plaintiff's expert testified about the slipperiness of algae on a boat ramp. The appellate court held that the trial judge erred in allowing such testimony because the subject was easily comprehendible by an average juror. Additionally, the witness, a marine chemist, admitted that he had never done any studies concerning marine algae growth or its control. Even if the subject could have been considered outside the realm of a layman's experience, the witness would not have been qualified to testify.

Another example is provided by Fisher v. State, 361 So.2d 203, 203 (Fla. 1st DCA 1978), in which the medical examiner admitted he had no knowledge of a scientific nature to justify his opinion that the victim's knife wounds were inflicted by a woman. He admitted that it was just his general belief, based on "vague notions of stereotyped characteristics of the men and women in our

culture," that men are "more handy" with a knife. The appellate court found that his testimony should have been excluded.

Our case is very similar. Detective Halliday admitted in proffer that his testimony was based only on common sense and assumption. He had no special training in forming deductions from the location of clothing in relation to a nude body. That he learned in training that a nude body generally indicates that a rape occurred does not make him an expert -- that deduction is apparent to anyone with borderline intelligence.

It can hardly be said that nudity, sex, rape, and murder are not within the common understanding of men and women in our society, or that the facts in this case were so obscure as to require an expert to draw inferences. Halliday's "expert" testimony was neither so distinctively related to some science, profession, business, or occupation as to be beyond the understanding of the average layman, nor "of such a nature as to aid the jury in its search for truth." Thus, it should not have been admitted. Mills v. Redwing Carrier, 127 So.2d 453.

The trial court clearly erred in qualifying Halliday as an expert in homicide and sexual battery investigations. Halliday admitted that his opinion was but a "fair assumption." A fair assumption is but another word for "conjecture," or "speculation." Fortunately, one cannot be convicted of a crime based on assumption or speculation. This is why the state did not charge Dailey with sexual battery or attempted sexual battery and the trial court refused to instruct the jury on felony murder. Even though a nude

body suggests the possibility of sexual battery, it does not prove that a such a crime occurred.[42]

The error was extremely harmful. Other than Halliday's testimony, there was no evidence during either phase of the trial that there was a sexual battery or attempted sexual battery. The trial court qualified Halliday as a witness for the sole purpose of admitting "evidence" of a sexual battery so that he could instruct the jury on the aggravating factor that the crime was committed during a sexual battery.[43] (R. 1327)

"Common sense" tells us that at least some of the jurors found this aggravating factor to exist solely because of Halliday's testimony. The testimony of an expert witness is often accorded special importance and validity by the jury. Mills, 127 So.2d at 456; Florida Power Corp., 481 So.2d at 1310-11 (because importance and validity of expert witness testimony are increased in mind of jury, allowing expert to testify to matters of common understanding creates possibility that jury will forego independent analysis of facts). That the judge qualified Halliday as an expert and allowed him to speculate about what might have happened may have suggested to the jurors that "speculation" would suffice for "evidence" upon which they could base a penalty phase verdict.

Had the jury not heard this testimony, the only pertinent evidence would have been Dr. Wood's testimony that she found no

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[42] For example, Shelley might have undressed to go skinny-dipping or for consensual sex.

[43] See Issue X

evidence of a sexual battery. Applying the "proof beyond a reasonable doubt" standard, the jurors would probably have concluded, without Halliday's testimony, that this aggravating factor was not established. This might have resulted in a life recommendation rather than a death recommendation.

The trial court also found this aggravating factor in his written order imposing the death penalty. (R. 234) He apparently considered Halliday's "expert" testimony to support his finding. Thus, the admission of Halliday's testimony was not harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). A new penalty phase trial is required.

ISSUE X

THE TRIAL JUDGE ERRED BY FINDING THREE AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY THE EVIDENCE AND BY CONSIDERING A NONSTATUTORY AGGRAVATING FACTOR IN HIS DISCUSSION OF POSSIBLE MITIGATING FACTORS.

Section 921.141(5) of the Florida Statutes enumerates certain statutory aggravating factors which the judge and jury may consider in determining whether to impose the death penalty. Only those circumstances may be considered by the sentencer. § 921.141 (5), Fla. Stat. (1987); Miller v. State, 373 So.2d 882 (Fla. 1979); Purdy v. State, 343 So.2d 4 (Fla. 1977). Misapplication of the sentencing statute produces the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), which Florida's sentencing scheme was designed to remedy. Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Thus, an incorrectly imposed sentence violates the eighth and fourteenth amendments to the United States Constitution.

In the instant case, the court instructed the jury on five aggravating factors: (1) the crime was committed while the defendant was engaged in a sexual battery or attempted sexual battery; (2) the crime was especially heinous, atrocious or cruel; (3) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the crime was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification; and (5)

the defendant was previously convicted of a felony involving the use or threat of violence. (R. 111, 1426-27) Defense counsel objected to all five aggravating factors because they were not established by the evidence. (R. 1327-32)

In his written order supporting the death sentence, the trial court found all five aggravating factors upon which the jury was instructed. (R. 233-37) Three of these factors -- (1), (3), and (4) above, were not supported by the evidence. Thus, the jury should not have been instructed to consider them and the judge erred by relying upon them to sentence the Appellant to death.

Additionally, in his written discussion of possible mitigating factors, the judge erroneously injected a nonstatutory aggravating factor, that "[f]or nearly the past 20 years, the Defendant has been a drifter going from city to city and job to job." Although he buried it among the mitigation, the judge considered this nonstatutory aggravating factor in sentencing.

Specific misapplications of the statute are as follows:

A.

The crime for which the defendant is to be sentenced was committed while the defendant was engaged in sexual battery or attempted sexual battery.

There was no evidence to support the trial judge's finding that the homicide was committed during a sexual battery or attempted sexual battery. The medical examiner found no sperm although she said that it could have been washed away. (R. 870-71) She found no evidence of trauma to the vaginal area. (R. 884)

There was absolutely no evidence to support this aggravator.

The judge's finding of this aggravator is perplexing because he agreed with defense counsel's position earlier. During charge conference for the guilt phase of the trial, the state requested that the court instruct on felony murder. Defense counsel argued that there was no evidence of sexual battery; that the jury should not be permitted to speculate about it; and that, if the only charge were sexual battery, the court would be forced to grant a judgment of acquittal. The judge agreed and did not give a felony murder instruction. (R. 1206-09)

The case of Atkins v. State, 452 So.2d 529 (Fla. 1984), is very much like the instant case. In that case, the trial court found that the murder was committed "while the defendant was engaged in the commission of [or flight after committing] a Sexual Battery." 452 So.2d at 532. The only evidence of sexual battery was the defendant's confession that he had committed oral and anal sexual battery on the child victim. There was no physical or other evidence that a sexual battery occurred. At the close of the state's case, the trial judge granted the defense motion for judgment of acquittal on the charge of sexual battery because he found no independent proof of the corpus delicti. Id.

Nevertheless, the trial court found the confession sufficient to rely on to establish that sexual battery occurred for purposes of finding that the murder was committed while the defendant was engaged in a sexual battery. The judge noted that the anal sexual battery must have been a mental fantasy because there

would have been physical evidence on the boy's body if an anal sexual battery had occurred. Even though there was also no independent evidence that an oral sexual battery occurred, the judge found the commission of an oral sexual battery as an aggravating circumstance based upon the defendant's confession. 452 So.2d at 532-33. This Court found an inadequate basis to distinguish between the two crimes. 452 So.2d at 533.

The Atkins court noted that "aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by a judge or jury." 452 So.2d at 532 (citations omitted). The sentencing judge found that even though a sexual battery conviction was not proper due to lack of proof of corpus delicti, it was nevertheless appropriate to consider for the purpose of finding a statutory aggravating circumstance. 452 So.2d at 532. Similarly, in the case at hand, although the trial judge found the evidence of sexual battery insufficient to instruct on felony murder because he would have had to grant a judgment of acquittal if sexual battery had been charged, he found it appropriate to consider for the purpose of finding the statutory aggravator. As in Atkins, this was error.

The only relevant event intervening between guilt phase charge conference, when the trial judge agreed that there was insufficient evidence to prove that sexual battery occurred, and penalty phase charge conference, when he decided to instruct on the sexual battery aggravating factor, was Detective Halliday's penalty phase testimony. Halliday testified that when a body is found nude,

with clothing scattered around the area, a sexual battery probably occurred. (R. 1353-60) The record indicates that the trial court specifically permitted the "expert witness" testimony to support this aggravating factor. During penalty phase charge conference, as soon as the prosecutor told the judge that he was prepared to present Detective Halliday to testify that a rape probably took place, the court agreed to instruct on this factor. (R. 1327) The judge knew what Halliday would say because he had already qualified him as an expert and permitted him to testify on the same subject in the codefendant's trial. (R. 1346-47) Thus, he knew that by allowing Halliday's testimony, he could admit "evidence" to support his finding of this aggravating factor.

Halliday's speculation was certainly not sufficient to sustain a conviction for sexual battery. If it had been, the state would have offered it during guilt phase. Additionally, as discussed in Issue IX above, Halliday's testimony should not have been admitted. It is error to qualify an expert witness on a subject that is not beyond the common understanding of the average layman. Mills v. Redwing Carriers, Inc., 127 So.2d 453, 456 (Fla. 2d DCA 1961). A trial judge cannot admit clearly inadmissible testimony for the sole purpose of supporting an aggravating factor he wants to rely on in sentencing. Additionally, Halliday's testimony added nothing that the jury would not have already speculated.

In Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988), this Court noted that, although several theories were advanced as to why the murders took place, there was no evidence to support any of

them. Nevertheless, the trial court seemed to have accepted all of them, finding that the murders were committed for pecuniary gain, to eliminate witnesses, to effectuate escape, and as underworld contract killings. Because there was no record support for any of the theories, these four aggravating factors were stricken.

The trial judge did the same thing in this case. He found that the murder was committed during a sexual battery, to avoid arrest, and with the heightened premeditation of a contract or underworld killing. This case is even worse than Scull because none of these theories were even advanced during guilt phase. With the exception of Halliday's erroneously admitted "expert testimony," there was no evidence of any of these factors in penalty phase either. As in Scull, the motive for the murder is unknown. Speculation as to what might have occurred is not enough to support the finding of an aggravating factor. See e.g., Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

B.

The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

When the victim of a homicide is not a police officer, proof of intent to avoid arrest by murdering a possible witness must be very strong to support this aggravating factor. Garron v. State, 528 So.2d 360 (Fla. 1988); Riley v. State, 366 So.2d 19, 22 (Fla. 1978), cert. denied, 459 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983). The evidence must show that the "dominant

motive" for the murder was the elimination of a witness. White v. State, 403 So.2d 331, 338 (Fla. 1981), cert. denied, 463 U.S. 1229, 103 S. Ct. 3571, 77 L. Ed. 2d 1412 (1983).

In his written findings, the trial judge relied on this aggravating factor to impose the death penalty because the victim knew and trusted James Dailey; numerous witnesses had seen Dailey with the victim earlier in the evening; and Dwaine Shaw and Gayle Bailey saw Dailey return home close to the time of the victim's death. (R. 234) He compared this case with Cooper v. State, 492 So.2d 1059 (Fla. 1986) and Meeks v. State, 339 So.2d 186 (Fla. 1976), finding it factually similar to Cooper. This case is clearly distinguishable from both Meeks and Cooper because, in those cases, there was direct evidence that the defendants killed their victims execution-style and solely to eliminate them as witnesses to robberies. In the instant case, there is no proof that another crime occurred nor evidence that the victim was killed to eliminate her as a witness. She was not killed execution-style.

In Cooper, one of the three victims recognized Walton, a codefendant, who told Cooper and Royal that they would therefore have to kill the three men. When Walton's gun misfired, he ordered Cooper and Royal to shoot the victims. Walton later told Cooper that one of the victims was not dead. Cooper returned and shot that victim a second time. 492 So.2d at 1060.

The judge stated that he found this similar to the instant case because Dailey knew that Shelley Boggio could identify him and accuse him of sexual battery or attempted sexual battery.

Tracking the prosecutor's argument (R. 1328-30), he observed that the defendant did everything possible to permanently silence her, including stabbing, beating, choking and drowning her, leaving her nude body in the waterway to sink or float away "so as to conceal the location of the struggle," and throwing some of her clothes in the water to "prevent or delay discovery of the crime." Dailey "took flight from Pinellas County, first traveling to Miami and subsequently escaping to California until his arrest." (R. 235)

These conclusions as to the Appellant's motives are sheer speculation. Dr. Wood testified that there was no evidence of a sexual battery. (R. 670, 884) For what crime was the Appellant trying to escape arrest? The judge's statement that the Appellant did "everything possible to permanently silence her," suggests only that he wanted her dead -- not that he wanted to eliminate her as a witness to a crime. That Dailey and Pearcy washed their clothes and the car and left the area the following day suggests only that they were attempting to avoid arrest for murder. These acts, calculated to prevent detection, apply to the murder -- not some other possible crime. They are not probative of the unknown motive for the murder.[44]

That Shelley knew Dailey and Pearcy would not be a good reason for them to kill her. As the judge noted, many people knew she was in their company. Killing her would not prevent their detection for sexual battery (if there was one) but would instead

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[44] That Gayle Bailey and Dwaine Shaw saw Pearcy and Dailey return home close to the time of the homicide is irrelevant.

expose them to arrest and prosecution for murder -- a much more serious offense. Moreover, this Court has held that the state does not establish a witness elimination killing merely by proving that the victim knew her assailant. Pentacost v. State, 14 F.L.W. 319, 320 (Fla. June 29, 1989); Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984).

Meeks v. State, 339 So.2d 186 (Fla. 1978), is even more distinguishable than Cooper. In Meeks, the defendant shot two witnesses to a convenience store robbery after forcing them to lie down on the floor. A psychiatrist's report revealed that Meeks's accomplice told him before the robbery that the clerk knew him and they would have to kill her. Meeks agreed that it was a good idea so that no one would recognize and blame them for the robbery. 339 So.2d at 191. This is clear evidence of witness elimination. Cf. Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984) (defendant said he shot victim again to prevent his testifying against him): Clark v. State, 443 So.2d 973 (Fla. 1983) (defendant told cellmate that victim could identify him); Vaught v. State, 410 So.2d 147 (Fla. 1982) (victim announced he recognized assailant who then shot him five times to make sure he was dead). In all of these cases, there was direct evidence that the defendant's primary motive for the killing was witness elimination.

In contrast to Cooper, Meeks, and the other cases cited above, there was no evidence in the present case of a motive for the murder. The trial court's conclusion that Shelley was killed

to eliminate a witness to an unknown crime is mere conjecture. A more likely explanation for the killing was that the attackers were intoxicated, angry, and frustrated because Shelley resisted their sexual advances or angered them in some other manner and, in an outraged frenzy, killed her. "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." Doyle v. State, 460 So.2d 353, 358 (Fla. 1985).

The trial court cannot assume Dailey's motive. The burden is on the state to prove it. Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). This factor requires "clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness." Riley, 366 So.2d at 19; Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Menendez, 368 So.2d at 1282. According to an informant who testified against him, Dailey said that he killed the girl because he "lost it." This is the only evidence that even suggests a motive. It does not suggest a witness elimination killing.

C.

The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The judge based his finding that the offense was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification primarily on the number and kind

of wounds inflicted on the victim. He noted that Shelley Boggio was stabbed 48 times; the defensive wounds were the most severe Dr. Wood had ever seen; there were "pricking wounds" which evidenced torture; and that the victim was beaten in the face, choked, and drowned. In his order, the judge cited Skalnik's testimony, noting that "[t]he Defendant by his own statement established his mental and physical determination to inflict wounds necessary to kill. 'No matter how many times I stabbed her, she would not die.'" (R. 233)

This Court has uniformly held that a finding of the "cold, calculated and premeditated" aggravating factor requires that the state prove, beyond a reasonable doubt, a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. Compare Preston v. State, 444 So.2d 939 (Fla. 1984) (CCP unsupported although victim, who had witnessed convenience store robbery, was marched 500 feet at knife point, nearly decapitated by fatal slash across throat, and stabbed numerous times) with Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 315 (1983) (factor upheld where defendant held victims at gun point for hours, made them strip, and beat and tortured them). The "cold, calculated and premeditated" aggravating factor is reserved primarily for execution or contract murders or witness elimination killings. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987).

The trial judge stated in his order that, although in Nibert v. State, 508 So.2d 1 (Fla. 1987), the court held that a "stabbing frenzy" does not establish the CCP aggravating factor,

Dailey went beyond any "stabbing frenzy," by beating, choking, and ultimately drowning the victim. (R. 236-37) In Nibert, this Court reaffirmed that the "cold, calculated and premeditated" aggravating factor requires coldblooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a first-degree murder conviction. 508 So.2d at 4. Quoting from Preston, 444 So.2d at 946-47, the Nibert court noted that the "cold, calculated and premeditated" aggravating factor has been found when the facts show a "particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Id.

"A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) (victim stabbed 110 times); see also Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (victim stabbed over 30 times). In both Mitchell and Hansbrough, this Court found that the heightened premeditation needed to support the "cold, calculated and premeditated" aggravating factor was not shown by the "frenzied stabbing" of the victim. Mitchell, 527 So.2d at 182; Hansbrough, 509 So.2d at 1086. Accordingly, if Dailey "lost it" and killed Shelley Boggio in a frenzy, the "cold, calculated and premeditated" aggravating factor is not supported by the evidence.

Although the judge cited Skalnik's testimony that Dailey told him, "[n]o matter how many times I stabbed her, she would not die," (R. 233) he failed to mention the testimony of another witness who testified that Dailey said he killed the girl because he

"lost it." This second statement negates calculation. Even the first statement, if true, supports only the premeditation necessary for a first-degree murder conviction and not the "careful plan or prearranged design" required for heightened premeditation. See Rogers v. State, 511 So.2d at 533 (Fla. 1987).

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), the defendant first attempted to smother the victim with a pillow. When this failed, the defendant strangled the victim to death with a telephone cord. The body was then taken to a remote location and disposed of by drenching it with gasoline and setting it on fire. Even this did not establish the "cold, calculated and premeditated" aggravating factor. Stabbing, choking and drowning a victim who continued to fight back is no more premeditated.

Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984). The burden is upon the state to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So.2d at 446; Peavy v. State, 442 So.2d 200, 202 (Fla. 1983). The burden is not on the defendant to prove that he lost control, acted in panic or for any other unknown reason. The state presented no evidence that Dailey took Shelley to the beach with the intention of killing her. He had no motive to kill her. Even the judge's conclusion -- that Shelley was killed during an attempted sexual battery -- does not suggest a "prearranged design." It suggests that Dailey lost control.

D.

Nonstatutory aggravating factor that for the past twenty years Dailey had been a drifter going from city to city and job to job.

In his written sentencing order, the trial court buried a nonstatutory aggravating factor among the mitigation. Under section E, entitled "Any other Aspect of the Defendant's Character or Record," he mentioned various mitigating factors including Dailey's youth, his Air Force tours in Vietnam, and his marriage and fatherhood. He then stated that

> For nearly the past 20 years, the Defendant has been a drifter going from city to city and job to job. (R. 233)

This allegation was not among the penalty phase evidence presented and is certainly not mitigation. Under "employment," in the PSI, there is mention of three jobs Dailey held in Kansas cities. (R. 243-H) He lived in Arizona briefly after his military discharge before returning to Kansas where he resided until he came to Florida about three months before the homicide. (R. 243-G)

If the judge concluded from the PSI that Dailey had been a drifter for twenty years, he did a lot of extrapolation. In our mobile society, many people live in four or five cities over a twenty-year period. Whether this makes one a "drifter" is a matter of opinion. In any event, the comment was derogatory and had no place amidst the mitigation discussion. Nor would it have been appropriate elsewhere in the order. It appears as though the trial judge was attempting to slander the Appellant's character by adding

his own unfounded and nonstatutory aggravating factor.

The court's consideration of this alleged aspect of Dailey's character was error. The comment bore no relation to the aggravating circumstances enumerated in section 921.141(5) of the Florida Statutes. Only those circumstances enumerated therein may be considered by the sentencer.[45] § 921.141(5), Fla. Stat. (1987); Hitchcock v. State, 413 So.2d 741, 746 (Fla. 1982); Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977) ("We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.") This finding must be stricken. See Menendez, 368 So.2d at 1281.

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[45] At least arguably, the trial court permitted the jury to consider another nonstatutory aggravating factor when it admitted the certified copy of the Appellant's conviction in Arizona. The document contained a notation that another charge was dismissed pursuant to a plea bargain. See Issue XI, infra. Additionally, the judge considered nonstatutory aggravating factors when he sentenced Dailey to death based partly on his conclusion that Dailey was the "dominant force" behind the murder and other nonrecord evidence discussed in Issue XIII, infra.

ISSUE XI

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A CERTIFIED COPY OF DAILEY'S 1979 CONVICTION FOR AGGRAVATED BATTERY, INCLUDING A NOTATION THAT ANOTHER CHARGE HAD BEEN DROPPED PURSUANT TO A PLEA BARGAIN.

In support of the section 921.141(5)(b) aggravating factor -- that Dailey had previously been convicted of a violent felony, Detective Halliday testified that Dailey was found guilty of aggravated battery in Arizona in 1979. (R. 1360) Mary Kay Dollar and Grace Davies, the Appellant's former wife and mother, respectively, testified that Dailey got into trouble in Arizona in 1979 while playing pool. He told them someone came at him with a pool stick and he hit the man in self-defense. (R. 1376, 1394)

Over defense objection, the state introduced into evidence a certified copy of the judgment and sentence. (R. 1397-98, 1479) Defense counsel objected to the inclusion of a notation on the second page that, pursuant to a plea agreement, another charge was dismissed.[46] (R. 1397, 1479) Defense counsel requested that, if the document were admitted, the notation be deleted. The court denied his request, admitting the document "as is." (R. 1398)

The admission of this evidence was prejudicial. The jury may have speculated that Dailey pled to a lesser charge in exchange for which the state dismissed a more serious charge under the

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[46] Only the case number was given. (R. 1479) Defense counsel also objected to the inclusion of the third page which was an order to the jail to release the defendant who was placed on probation. (R. 1398, 1479)

agreement. We do not know what the charge was nor whether it was a violent felony. In any event, it should not have been admitted because "[t]he plain language of subsection (5)(b) precludes considering mere arrests or accusations as aggravating factors; only convictions of violent felonies may be used."[47] Dougan v. State, 470 So.2d 697, 701 (Fla. 1985) (citations omitted), cert. denied, 475 U.S. 1098, 106 S. Ct. 1499, 89 L. Ed. 2d 900 (1986); accord Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988); Dragovich v. State, 492 So.2d 350, 354 (Fla. 1986) (admission of evidence that defendant was known arsonist in Gary, Indiana, required new sentencing hearing); Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977) (evidence of arrest or accusation for which no conviction obtained inadmissible to prove other violent felony).

The Dougan case is precisely on point. At the sentencing hearing, the state read into the record an indictment against Dougan and three other men for a different murder. One of the indictees testified that he and two other men committed the second murder at Dougan's direction. The trial judge denied the defense objection. The prosecutor told the jury that the indictment was introduced solely to aggravate Dougan's sentence. 470 So.2d at 701.

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[47] Section 921.141(5)(b), Florida Statutes (1987), reads as follows:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person. (Emphasis added.)

Dougan's sentence was vacated for two reasons. First, an indictment is only the vehicle by which the state charges that a crime has been committed. It is not evidence of guilt. Second, Dougan had not been convicted of the crime. In fact, the state later nolle prossed the charge against Dougan. This Court remanded for a new sentencing with a new jury because it could not tell how the improper evidence affected the jury. 470 So.2d at 701-02.

The same reasoning applies to the dismissed charge in Dailey's case. First, the fact that another offense was charged was not evidence of guilt. Second, Dailey had not been convicted of the dismissed charge. As in Dougan, it was nolle prossed.

The case of Barclay v. State, 470 So.2d 691 (Fla. 1985), involved Dougan's codefendant. See Dougan, 470 So.2d at 699. The trial judge used Barclay's criminal record to support the section 921.141(5)(b) aggravating factor. This Court reversed the finding because the judge admitted he did not know if Barclay's breaking and entering conviction involved the use or threat of violence as required by subsection (5)(b). 470 So.2d at 694-95.

This Court observed that, besides using Barclay's prior convictions to incorrectly support "prior conviction of a violent felony" as a statutory aggravating factor, the court improperly used his record as a nonstatutory aggravating factor.[48] 470 So.2d

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[48] The Dougan court also noted that the judge improperly considered two unspecified criminal contempt citations as "convictions" which were "more an aggravating than mitigating circumstance" under subsection (5)(b). Under the Barclay reasoning, this too would appear to be a nonstatutory aggravating circumstance.

at 695. In the case at hand, the jury may have done the same. Although the judge certainly knew that he could not use a nolle prossed conviction to aggravate the Appellant's sentence, he did not advise the jurors that they could not do so.

The aggravating factor that the Appellant was convicted of a prior violent felony was based on nothing more than a barroom fight over a pool game. This was the only violent felony of which the forty year old Appellant had been convicted. Had the notation concerning this other unspecified charge not been admitted, the jurors might have concluded that the aggravating factor should be given little weight. They may have instead concluded, however, that Dailey was probably also guilty of something more serious, thus requiring that the aggravating factor be given more weight.

The erroneous admission of this evidence distorted the weighing process. See Dragovich, 492 So.2d at 354 (erroneous admission of evidence of uncharged crimes compromised weighing process requiring new penalty phase); Barclay, 470 So.2d at 695; Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) (must guard against any unauthorized aggravating factor going into equation which might tip scales in favor of death). Thus, it affected the reliability of Florida's capital sentencing proceeding in contravention of the eighth and fourteenth amendments to the United States Constitution. See Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). If Dailey is not granted a new trial, he must be granted a new sentencing hearing with a new jury.

ISSUE XII

THE TRIAL COURT ERRED BY FAILING TO CONSIDER STATUTORY AND NONSTATUTORY MITIGATION PRESENTED BY THE DEFENSE.

The trial court judge instructed the jury to consider five statutory mitigators. (R. 113) (See "Statement of Facts," at pp. 16-17) In his sentencing order, however, he concluded that he did "not consider any of the factors presented by the Defendant to mitigate this crime."[49] (R. 239)

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court pointed out that a "finding" that no mitigating factors exist has been construed in several different ways: "(1) that the evidence argued in mitigation was not factually supported by the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." Id. at 534. Quoting from Lockett v. Ohio, 438 U.S. 586, 804-05, 98 S. Ct. 2958, 2964-65, 57 L. Ed. 2d 973 (1978), the Rogers court reiterated that the trial court may not be precluded from considering any mitigation the defendant proffers as a basis for a sentence less than death. 511 So.2d at 534. "[N]either may the sentencer refuse to consider,

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[49] The trial court found all five aggravating circumstances on which he instructed the jury. (R. 232-39) In his written discussion of mitigating factors on which he instructed the jury, it is unclear whether he found that any mitigation existed. At the end of his mitigation discussion, however, he stated that he did not consider any of the factors presented by the Appellant to mitigate the crime. (R. 237-39)

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." Rogers, 511 So.2d at 534 (quoting from Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982) (emphasis in original)).

Applying these principles, the trial court must first determine whether the facts alleged in mitigation are supported by the evidence. The court must then determine whether the facts established are "of a kind capable of mitigating the defendant's punishment, i.e, . . . extenuating or reducing the degree of moral culpability for the crime committed." Finally, the sentencer must determine whether the factors are of sufficient weight to counterbalance the aggravating factors. Rogers, 511 So.2d at 534. Citing Rogers, this Court remanded for resentencing in Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988) because the court's conclusion that none of the mitigation "rose to the level of a mitigating circumstance to be weighed in the penalty decision" was ambiguous as to whether the judge properly considered all mitigating evidence or whether he found that the aggravation outweighed the mitigation.

In the instant case, the trial judge disregarded all of the mitigation evidence. Although he discussed some of it briefly, his comments concerning the evidence show that he did not consider it. (R. 237-37) He gave it no weight. His final conclusion that none of the factors mitigated the crime was not a decision that the

mitigation did not outweigh the aggravating factors but, rather, was a decision that the factors were not worth his consideration.

As in Lamb, the trial court's conclusory statement was at least ambiguous as to whether the judge properly considered the mitigating evidence or whether he found that the aggravation outweighed the mitigation. Therefore, James Dailey's sentence of death was unconstitutionally imposed in violation of the eighth and fourteenth amendments to the United States Constitution. See Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Rogers, 511 So.2d at 534.

The record of the penalty phase testimony in the instant case contains much convincing and uncontroverted evidence of impaired capacity (alcohol and drugs) and nonstatutory mitigating aspects of Dailey's character and record. Moreover, the trial judge's written order is replete with incorrect information, facts not of record (see Issue XIII), and erroneous conclusions. The court clearly erred by failing to consider the mitigation and refusing to weigh it against the aggravating factors.

A.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired by alcohol or drugs.

Under the heading of "The Capital Felony was Committed

While the Defendant was Under the Influence of Extreme Mental or Emotional Disturbance," the judge admitted that some evidence was presented that Dailey suffered from a drinking problem in the past. He concluded, however, that the evidence "rose to a level no higher than bare allegations." (R. 237) "Bare allegations" is an unusual way to characterize testimony under oath at trial. The testimony that Dailey was an alcoholic was unrebutted. It was no less corroborated than the state's evidence presented to convict Dailey. Additionally, the evidence during guilt and penalty phase showed clearly that Dailey was intoxicated to some extent at the time of the homicide, had smoked marijuana, and was an alcoholic.

Mary Kay Dollar testified that Dailey had a drinking problem which caused their divorce. (R. 1370) The problem was worse each time he returned from Vietnam. (R. 1374-75) Dailey received treatment for alcoholism at Clark Air Force Base in the Philippines in 1972, and in Olathe, Kansas. He attended Alcoholics Anonymous in Lanexa, Kansas in 1983. (R. 243-G) His PSI, which the judge considered, indicates that Dailey consumed half to a case of beer a day, smoked marijuana daily, used cocaine whenever he could afford it, and experimented with acid, quaaludes, speed, and hash. (R. 243-G) The trial evidence showed that Dailey was drinking all day prior to the homicide and continued to do so that evening. (R. 900-01, 995-96) He also smoked marijuana that night. (R. 907, 955)

Evidence of impairment through drug or alcohol abuse must be considered as mitigation. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988); see also Gardner v. Florida, 430 U.S. 349, 352,

97 S. Ct. 1197, 51 L. Ed. 2d 393, 398 (1977) (defendant's testimony, if credited, that he consumed vast quantity of alcohol during day-long drinking spree preceding crime, sufficient to support finding of at least one statutory mitigating circumstance); Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986). It seems, however, that this factor supported the statutory mitigator that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired by alcohol or drugs," and, in fact, the judge also discussed it under that factor. (R. 233)

The judge admitted that there was "some evidence" that Dailey had gone to a bar on the night of the murder. (R. 233) He failed to mention other uncontroverted testimony that Dailey had been drinking all day. (R. 900-01, 995-96) The judge noted that Dailey used marijuana on the night of the murder but concluded that there was no evidence that he was intoxicated or impaired to the extent that he could not control his behavior. (R. 233)

In support of his conclusion, the court observed that Dailey was able to "relate with clarity and specificity the events surrounding the murder . . . to inmates of the Pinellas County Jail." This observation is not supported by the evidence. The hearsay testimony of the inmates was neither clear nor specific. It was vague, general, and often conflicting. Dailey's history of alcoholism, combined with the uncontroverted evidence that he drank all day long and smoked marijuana, clearly supported the mitigator

that Dailey's capacity to appreciate the criminality of his conduct was substantially impaired. Although the judge could accord it little weight, he was not at liberty to completely disregard it.

B.

Any other aspect of the defendant's character or record and any other circumstance of the offense.

There was much evidence that should have been considered as nonstatutory mitigation:

(1) Dailey was a good father, husband, and son. In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court found that the trial court should have considered uncontroverted testimony that the defendant was a good husband, father, and provider as a mitigating factor. 511 So.2d at 535 (citing Lockett, 438 U.S. at 604-05). Similarly, in Harmon v. State, 527 So.2d 182, 189 (Fla. 1988), the court noted that a jury recommendation of life might be based in part on evidence that the defendant was "a good father as well as a good son."

James Dailey had two children. (R. 1368-69) His former wife testified that he was good with the children and never hit her or the children. She said that he was a very good husband. (R. 1370) His daughter, Stacey, testified that Dailey was a good father. (R. 1384) His mother testified that he was a good son. She said that Jim was her favorite of her four children because he was sweet, loving, and thoughtful. (R. 1389-90)

(2) Dailey was traumatized by his father's death. The "effects produced by childhood traumas . . . have mitigating weight

if relevant to the defendant's character, record, or the circumstances of the offense." Rogers, 511 So.2d at 535; see also Kampff v. State, 371 So.2d 1007, 1010 (Fla.1979) (evidence tending to show felony committed while defendant under influence of extreme mental or emotional disturbance should have been considered). Dailey's mother said that Jim's father died at the age of 43 from a heart attack. Jim, who had started college, did not adjust well to the loss. She could not afford to keep him in college after his father's death. Thus, he left college and enlisted in the Air Force. (R. 1391-93) The loss of his father may have been a factor influencing Dailey to drink too much while in the military service. His drinking problem progressed to alcoholism which most certainly effected his behavior at the time of the homicide.

(3) Dailey had a good service record. Military service is an established factor to be considered in mitigation. Rogers, 511 So.2d at 535; accord Pope v. State, 441 So.2d 1073 (Fla. 1983); Halliwell v. State, 323 So.2d 557 (Fla. 1975). In Masterson v. State, 516 So.2d 256 (Fla. 1987), this Court found the defendant's honorable military service, post-traumatic stress disorder and substantial drug and alcohol consumption on the day of the murders sufficient to require a reduction of the death penalty to life.

Dailey enlisted in the Air Force after his father died. (R. 1392-93) He was in Vietnam three times and in Korea, Germany and the Philippines. Richard Dollar testified that Dailey was a "billboard-type GI," a recruiter's dream. He was very good at electronics, his military job. (R. 1379)

(4) Dailey contributed to his community. "Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation." Rogers, 511 So.2d at 535. Mary Kay Dollar recalled an incident when Jim saved two people from drowning at a beach party. Additionally, he intervened in an argument between a girl and her boyfriend and was stabbed eleven times. (R. 1370-72)

(5) Dailey was religious and sang in church choir. In Harmon, 527 So.2d at 189, this Court approved as a mitigating factor the psychiatrist's testimony that Harmon was a religious man who attended church regularly in the past, and that he was an intelligent person. Jim Dailey sang in the church choir and taught Sunday School when he was married. (R. 1373) He also sang in the choir as a child; his father was the choir director. (R. 1391)

(6) Dailey's codefendant who was at least equally culpable received a life sentence. Disparity in sentencing is a valid and often cited mitigating factor. See e.g., Lamb, 532 So.2d at 1053 (codefendant's plea-bargained seventeen-year sentence was mitigating factor); Harmon, 527 So.2d at 189 (jury may have reasonably considered accomplice's seventeen year sentence in recommending life); Craig, 510 So.2d at 870 (degree of participation and relative culpability of accomplice, together with any disparity of treatment, are proper factors to be considered in sentencing); Rogers, 511 So.2d at 535 (lesser sentences imposed on accomplices may be considered in mitigation).

Identical crimes committed by individuals with similar

criminal histories require identical sentences. Slater v. State, 316 So.2d 539, 542 (Fla. 1975) (defendants should not be treated differently upon same or similar facts). Uniformity and predictability of result are what Florida's death penalty statute was intended to accomplish. See Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); Dixon v. State, 283 So.2d 1 (Fla. 1973).

The trial judge discussed the disparity in sentencing at the sentencing hearing and in his written findings of fact, not as mitigation but as a reason for imposing the death penalty. Although Pearcy received a life sentence, Judge Penick, who also presided over Pearcy's trial, compared the evidence and concluded that Dailey was the more culpable. (R. 239, 1445-46) He concluded that Dailey was "clearly the dominating force behind the murder of Shelly Boggio." (R. 239) Because no evidence at Dailey's trial suggested that Dailey was the "dominating force," the judge must have based his conclusion on evidence from the codefendant's trial.

This Court has upheld disparate sentencing when the defendant was the "dominant force" behind the homicide. See e.g., Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986); Meeks v. State, 339 So.2d 186, 192 (Fla. 1976). Such cases are distinguishable, however, because the defendants therein were clearly more guilty than their accomplices. In Marek, for example, the defendant talked to the two women the men stopped to help for forty-five minutes before convincing them to get into the truck. His accomplice remained in the truck most of that time and did not talk with

the women. Only Marek's fingerprint was found where the body was discovered. In Meeks, the defendant killed two men in robberies two weeks apart. His accomplice was only involved in one of the robberies. Meeks v. State, 14 F.L.W. 313 (Fla. June 22, 1989).

There was no clear evidence in the case at hand as to which of the codefendants was more culpable. The testimony of the victim's sister and Dailey's two housemates suggested that Pearcy may have been the dominant figure. He drove the car and danced with the victim at the bar that evening. After they took Gayle Bailey home, Shaw testified that Pearcy left without Dailey to take Shelley home. Bailey believed that both Pearcy and Dailey left together to take Shelley home although Gayle was in the bathroom when they left. Paul Skalnik testified that Dailey told him Pearcy held the girl under. (R. 1116) If the judge heard any evidence suggesting that Dailey was the dominant figure, it came from self-serving statements by Pearcy introduced only at Pearcy's trial.

This was not a case in which the codefendant entered into a plea agreement in exchange for a life sentence. See Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985) (codefendant entered plea for life sentence; moreover, evidence at trial showed that Brown's role was more significant); Bassett v. State, 449 So.2d 803 (Fla. 1984) (permissible to allow one equally guilty defendant to plead guilty and be sentenced to life and the other to exercise right to jury trial and take chance of receiving death penalty). Even in the case of plea agreements, however, it is appropriate to consider as mitigation the fact that the codefendants made agreements with

the state and received lesser sentences. See Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979).

Pearcy's life sentence was not presented to the jury as a factor to consider in mitigation. The trial judge imposed the sentence, however, and should have considered it as mitigation in Dailey's case. Combined with the other mitigation, the disparity was sufficient to outweigh the two valid aggravating factors.

* * * * *

The trial court judge should have found two statutory mitigating factors -- substantial impairment by alcohol and drugs; and the final statutory mitigator which includes all nonstatutory mitigation. He should have weighed those and the nonstatutory mitigation discussed above against the only two valid aggravating factors. The first statutory aggravating factor -- that the Appellant was convicted of a prior violent felony, deserved little weight because it was only a 1979 barroom incident. The other aggravator -- that the homicide was heinous, atrocious or cruel, is found to exist in most homicides. Although it is deserving of some weight, it is not deserving of so much weight that no amount of mitigation would overcome it. The mitigation in this case, particularly the disparate sentencing of Jack Pearcy, tipped the scales in favor of life, thus mandating imposition of a life sentence.

ISSUE XIII

THE TRIAL JUDGE ERRED BY BASING HIS SENTENCE, IN PART, ON OFF-THE-RECORD INFORMATION FROM THE CODEFENDANT'S TRIAL, THE CODEFENDANT'S PSI, AND THE PROSECUTOR'S SENTENCING MEMORANDUM, THUS VIOLATING THE APPELLANT'S RIGHT TO CONFRONT THE WITNESSES.

Judge Penick stated in his sentencing order that he presided over the trials of both defendants accused of this murder and that Jack Pearcy, the codefendant, was found guilty of first-degree murder and sentenced to life in prison. (R. 232) He said that he "carefully considered the evidence presented at each trial, the sentencing phase of each trial and at each sentencing. the Sentencing Memoranda filed [by the prosecutor], the arguments of all counsel, and the statement read into the record and placed in the file by the Defendant . . . ." He also considered the pre-sentence investigation ("PSI") "for each defendant." (R. 232-33) The judge found that Dailey "was clearly the dominating force behind the murder of Shelly Boggio." (R. 239) His consideration of information not of record was clearly reversible error.

In Gardner v. Florida, 430 U.S. 349, 352, 97 S. Ct. 1197, 51 L. Ed. 2d 393, 398 (1977), the United States Supreme Court reiterated that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358, 51 L. Ed. 2d at 402. The Gardner Court held that the court's consideration of portions of the defendant's presentence investigation not provided to defense counsel denied the

defendant due process. 430 U.S. at 362, 51 L. Ed. 2d at 404.

In Porter v. State, 400 So.2d 5 (Fla. 1981), this Court applied Gardner to the extrajudicial consideration of depositions of a state witness. It held that the Gardner ruling should extend to "any other information considered by the court in the sentencing process which is not presented in open court." 400 So.2d at 7. It is now clearly established that the sentencing judge's reliance on information from a codefendant's statements, not made at the defendant's trial, is reversible error. Engle v. State, 438 So.2d 803, 813-14 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L. Ed. 2d 753 (1984); accord Rhodes v. State, 14 F.L.W. 343, 334-35 (Fla. July 6, 1989) (error to allow jury to hear taped statement of Nevada victim of unrelated crime); Walton v. State, 481 So.2d 1197 (Fla. 1985) (error for court and jury to hear confessions of codefendants not available for cross-examination); Gardner v. State, 480 So.2d 91 (Fla. 1985) (error to allow officer to testify about codefendant's statements incriminating defendant).

Engle is directly on point. In that case, the sentencing judge considered information from the codefendant's confessions and statements introduced at the codefendant's trial for the same murder. Vacating the sentence, this Court held that consideration of a confession admitted at the codefendant's trial unconstitutionally denied the defendant an opportunity to cross-examine and confront the codefendant. 438 So.2d at 813-14.

> The consideration of the confession or statement of a co-defendant is quite different from the consideration of a presentence report. If the defendant disputes the truth of a pre-

> sentence report, he has the right to secure confrontation and cross-examination if he wishes to do so. On the other hand, a defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure.

438 So.2d at 814 (citation omitted).

The same is true in this case. The sentencing judge "carefully considered" all of the evidence at the codefendant's trial. He considered not only the guilt phase evidence, but the penalty phase and sentencing hearing evidence. Even worse, he considered the arguments of counsel at the codefendant's trial and the codefendant's presentence investigation report. This is not speculation -- he said so in his order. (R. 232-33)

Additionally, the judge considered the prosecutor's memorandum supporting death which contained facts about Pearcy not in evidence. The memorandum included the following:

> Jack Pearcy was arrested in Olathe, Kansas where he initially gave a video-taped statement to Detectives LaRue and Pruett of the Olathe Public Safety Department. After being transported back to Pinellas County he made statements which ultimately implicated James Dailey in the murder. (R. 159-60)

The vast majority of the information that Judge Penick considered is not of record. None of Pearcy's trial is of record. Pearcy's PSI is not in the record and it is unlikely that defense counsel saw it or even suspected that the judge would consider it. Although the prosecutor's sentencing memorandum is in the record, it contains information apparently learned through the prosecutor's office or at the codefendant's trial. The sentencing judge may not

consider matters not of record in his findings of fact supporting the death penalty. See Craig v. State, 510 So.2d 857, 867 (Fla. 1987) (vote tally on jury's recommended sentence not of record).

The trial judge also noted that he considered Dailey's presentence investigation report. Included therein was a victim impact statement:

> This officer spoke with Frank Boggio, father, who stated that his life, and that of his family was drastically changed and that his life has practically been destroyed. He states that Shelley was the family nucleus and everything has now changed. Mr. Boggio further stated that he lives in constant depression and fear and that they have all lost their freedom and trust of others. Finally, Mr. Boggio states that the defendants had no reason or motive to kill Shelley and have shown no remorse whatsoever.

(R. 243-D) This statement was not evidence. Furthermore, the United States Supreme Court has held that the eighth amendment precludes a capital sentencing jury from considering victim impact evidence. Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). Because the judge imposes sentence in Florida, the Booth holding also precludes the judge from considering such testimony. Grossman v. State, 525 So.2d 833 (Fla. 1988).[50]

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[50] It appears that Dailey was given a copy of the PSI at the sentencing hearing. Defense counsel did not make any specific objections but remarked that he could clear things up "after the fact." (R. 1441) Failure to object in the sentencing proceeding of a capital trial "should not be conclusive of the special scope of review by this Court in death cases." Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); see also Combs v. State, 525 So.2d 853, 855 (Fla. 1988) (no objection needed for reversal of Hitchcock error). Contra, Grossman, 525 So.2d at 843.

There is no evidence that the judge gave defense counsel notice that he intended to consider evidence from Pearcy's trial or other nonrecord information.[51] At sentencing, he told Dailey that he had presided at and heard the evidence in both trials, and that he found Dailey the most culpable. (R. 1445-46) He had already prepared his written findings which he signed at sentencing. The Appellant waived formal reading of the order. (R. 1448)

Pearcy was called as a witness at Dailey's trial. He exercised his fifth amendment right and refused to testify. (R. 986-89) Dailey could not force him to waive his constitutional right and testify at sentencing. See Engle, 438 So.2d at 814. Thus, Dailey could not cross-examine him.

It is easy to see why Dailey was prejudiced by this error. As noted by the prosecutor, Pearcy gave a video-taped statement upon his arrest and later gave a statement implicating Dailey. (R. 159-60) He would certainly have minimized his own involvement in these self-serving statements. He was not subject to cross-examination. Accordingly, Dailey was denied his sixth amendment right to confrontation. If he is not granted a new trial or new penalty phase hearing for reasons stated in other issues herein, he must be granted a new sentencing hearing.

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[51] Although defense counsel probably realized that the judge would consider the prosecutor's memorandum, he would not have suspected that the judge would rely on facts not in evidence from it.

CONCLUSION

For the above reasons, Appellant JAMES MILTON DAILEY respectfully requests that this Court reverse his conviction and remand for a new trial. If the Court does not grant this relief, Appellant requests that this Court vacate his death sentence and remand for the imposition of a life sentence or, in the lesser alternative, award him a new penalty trial before a jury impaneled for that purpose, and a new sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL., 33602, by U.S. mail, this 15th day of September, 1989.

A. Anne Owens

A. ANNE OWENS