IN THE SUPREME COURT OF FLORIDA

JERRY STOKES,	:	
Appellant,	:	
v.	:	CASE NO. 71,485
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

INTIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On December 17, 1986, a Madison County grand jury returned an indictment charging Jerry Stokes with the first degree murder of Cilla B. Taylor and with armed robbery. (R 1140-1141) Stokes pleaded not guilty and proceeded to a jury trial. The jury found him guilty as charged (R 1356) and, after hearing additional evidence, recommended a death sentence for the murder.(R 1357) Circuit Judge L. Arthur Lawrence adjudged Stokes guilty and sentenced him to death for the murder and life for the armed robbery. (R 1402-1417)

In support of the death sentence, Judge Lawrence found two aggravating circumstances: (1) that the homicide occurred during the commission of a robbery; and (2) that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.(R 1415-1416) The court found no mitigating circumstances.(R 1416)

Stokes filed a motion for new trial (R 1387-1389), an amended motion for new trial (R 1428-1429) and a motion to correct sentence for the robbery because it was imposed without a sentencing guidelines scoresheet.(R 1426-1427) The court denied the motion for new trial (R 1444) and granted the motion to correct the robbery sentence.(R 1399) First stating that the guidelines did not adequately cover capital murder, the court used a Category One scoresheet instead of the robbery category Category Three. (R 1459-1470) The court scored the

capital murder as a life felony primary offense with the robbery as an additional one at sentencing. (R **1412)** Again, sentencing Stokes to life for the robbery, the court departed from the sentencing guidelines. (R **1400, 1410-1412)** The court filed two reasons for departing: (1) that the guidelines did not sufficiently cover capital murder, and **(2)** that Stokes was later convicted of two felonies which were not scoreable.(R **1400)**

Stokes timely filed his notice of appeal to this Court. (R **1443)**

Facts -- Guilt Phase

Cilla B. Taylor owned and operated a small country store in Madison County. (R **476-477)** She lived alone in her home adjacent to the store and operated the store without assistance. (R **476-477)** Approximately two minutes after **9:00** a.m. on September 22, **1986,** a customer, Emily Carver, found Taylor dead on the floor behind the counter in the store. (R **476-483)** Taylor had suffered a **.22** caliber gunshot wound to the head. (R **717-724)** According to the medical examiner, Dr. Peter Lipkovic, the bullet entered between the left side of the nose and the cheek. (R **717-719)** Because of the dense, oval-shaped powder burn, Lipkovic concluded that the barrel was in partial contact with the skin at the time of the shot. (R **718-719)** The bullet travelled upward and toward the right side before lodging in the front part of the brain. (R **719)** Brain injury caused immediate unconsciousness and death within two seconds. (R **718-722)**

Investigation revealed some physical evidence. Crime scene technicians photographed recently made tire tracks located in the dirt parking area in the front of the store. (R **507-512, 533-535)** These ran parallel with the highway and appeared to have been made by tires with little tread remaining. (R **509-511)** Tennis shoe tracks were also found but these proved to have been made by an observer at the scene. (R **512-513)** Latent fingerprints were found inside the store and preserved. (R **536-538)** Finally, the medical examiner recovered a badly mushroomed **.22** caliber bullet from the body. (R **720-721)**

A long time customer at Taylor's store, Robert Wright, said he stopped at the store at 7:30 on the morning of the homicide. (R **450)** He paid her for a purchase he made on credit the previous day with three one dollar bills. (R **450-451)** Taylor placed the bills under the counter where she customarily kept some money since she had no cash register. (R **451)** Wright said Taylor also kept money in another location in the store. (R **452)** Two other customers testified that Taylor kept money in a cigar box and a metal pan underneath the counter as well as a third location away from the counter.(R **476, 661-662)** Karen Cooper, a crime scene technician, examined the cigar box and pan. (R **812)** She found no bills in the containers, but the cigar box contained in excess of **$3.00** in coins. (R **812-815)** In another part of the store, away from the public area but accessible from it, Cooper found a bubble gum container on a counter which contained **$768.00** in currency. (R **813-816)** This money included **88** one dollar bills. (R **816)**

William Brown testified he drove passed Taylor's store just after **8:00** a.m. on September 22. (R **454-456)** He worked about a mile beyond the store and was a little late that morning. (R **456)** Although he drove passed in excess of **60** miles an hour, Brown managed a two second observation of a car parked at the store. (R **465)** He was a car enthusiast and noticed details about them. (R **457)** He described this one as a Pontiac Grand Prix, two-door, painted blue with a white vinyl top. (R **456-457)** The car had distinctive wire wheel covers because it appeared **as** if the center emblems were missing. (R **457)** Brown told Investigator Leonard Harris about seeing the car. (R **459)** Over objection, Harris testified to the information Brown gave him in that interview which was consistent with Brown's testimony with some added details. (R **496-499)** Harris said Brown told him he saw a **1974** to **1976** model Grand Prix, with faded, medium blue paint and a white half top that was either painted or vinyl. (R **497)** The car had nonstandard wheel covers with missing center emblems. (R **497)** Additionally, Harris said that Brown told him that the car had a CB antenna in the middle of the trunk. (R **497)** Again over objection, Brown's employer, Dewayne Leslie, was also permitted to testify to the description as Brown related it to him. (R **665-666)** He said Brown told him that the car was an older Grand Prix painted blue with a white top. (R **666)** Brown further said the car had a CB antenna and unusual hub caps without anything in the center. (R **666)** Brown and Leslie accompanied Harris to view **15** to 20 suspected vehicles. (R **459-460, 498)** For various

reasons, Brown eliminated these cars. (R **459-460, 498)** Although not revealed to the jury, FDLE Special Agent Wayne Bass hypnotized Brown on October **17, 1986,** in an effort to gain more details to aid the investigation. (R **336-361)**

On October **23, 1986,** Detective Logan Henderson of the Lowndes County Sheriff's Department in Valdosta, Georgia, interviewed Jerry Stokes in an investigation unrelated to the homicide. (R **514-525, 546-547)** Stokes said that he owned a brown Toyota automobile and that he had a pistol and a shotgun in that car. (R **576)** Henderson obtained a search warrant for the Toyota which was actually registered to Stokes sister, Elizabeth McFarland. (R **577, 623)** He executed the warrant at the residence where Stokes' mother, sister and other family members lived. (R **577-578)** Stokes' **.22** caliber pistol was seized. (R **578-579)** Parked next to the Toyota at the same address, Henderson noticed a blue and white Grand Prix. (R **580)** The car belonged to Garfield Stokes, Jerry Stokes' brother. (R **586, 624)** Knowing that Detective Leonard Harris was looking for such a car, Henderson had Harris notified. (R **580)**

The following day, October **24, 1986,** Harris accompanied Brown to view the Grand Prix in Valdosta. (R **461, 590)** Brown's employer, Dewayne Leslie, and Chief Deputy James Bunting were also present. (R **460-461, 590-592, 668-669, 673-675)** They viewed the car while it was still parked at the residence. (R **590)** Brown identified the car as the one he saw in front of the store. (R **461-464)** He testified he was sure of his identification because of the faded blue paint and the wire wheel

covers which had the center emblem painted over. (R **462-464)** Harris testified that upon seeing the car, Brown said, "That looks like the vehicle. The only thing I don't remember is the tinted windows on the vehicle.'' (R **590-591)** Leslie testified, over objection, that Brown looked at the car and identified it as the car he had seen at Taylor's store. (R **668-669)** Bunting testified, over objection, that when Brown saw the car, he said the color, year and wheel covers were right. (R **675)** Bunting also heard Brown say, "I never thought I would see that car again." (R **675)** Finally, in Bunting's presence, Brown said to Leslie, "I told you the hub caps were different." (R **675)** Stokes was not allowed to cross-examine Brown on the fact that he had been hypnotized six days before identifying this car and had given inconsistent descriptions of the car he saw at the store during the hypnotic session. (R **470-473)**

The tires on Garfield Stokes' car were badly worn. (R **589, 855)** Badly worn tires made the tracks found at the scene. (R **509)** Mary Lynn Hinson, a microanalyst, compared the photographs of the tracks with the tires from the car. (R **850-855)** She concluded that the tires could have made the tracks, but she could not state those tires and no others were responsible. (R **855-863)**

David Williams, a firearms expert, examined Stokes pistol. **(R 817-821)** The gun is a single-action, **.22** caliber revolver in working condition.(R **821-826)** However, he found the weapon to be unsafe and subject to accidental discharge. (R **826, 842-847)** A single-action revolver requires that the hammer be

cocked before the gun is fired by pulling the trigger. (R **824-825)** Once the hammer is cocked on this pistol, only one pound of pressure on the trigger is necessary to fire it. (R **825-826)** Williams said this is a dangerously light trigger pull, and the weapon could accidentally fire without pulling the trigger. (R **826, 842-844)** If the person holding the gun were startled or made a sudden movement, the pistol could accidentally fire. (R **843-844)** The same would occur if there were a blow to the gun. (R **844)** Further limiting the safety of the pistol is the fact that it does not have a transfer bar safety mechanism. (R **844-845)** These devices prevent accidental firing if the hammer should fall without the trigger pulled to the rear. (R **845)** William's fired the pistol and found that the barrel has six lands and grooves with a right hand twist. (R **832-833)** He examined the bullet removed from the victim and concluded that it was fired from a gun with a similar barrel configuration. (R **833-834)** Stokes' pistol could have fired the bullet, but any of the millions of other **.22** caliber firearms with the same type barrels could have also fired it. **(R 837-841)**

At 2:30 p.m. on October **24,** James Bunting and Leonard Harris interviewed Stokes in the jail in Valdosta. (R **596-598, 638-641)** Bunting first told Stokes about some of the evidence in the case. (R **678-679)** He mentioned that he had Stokes' guns and that shoe and tire tracks were found at the scene. (R **679)** Stokes then said that the **.22** caliber pistol May have shot the lady. (R **679-680)** Stokes explained that he had loaned the gun

to Willie Thomas a month earlier. (R **680)** Thomas kept the gun for overnight. (R **680)** When he returned the firearm, Thomas told Stokes that he had shot a woman with it and did not know how badly he hurt her. (R **680)** Thomas offered to buy the gun, but Stokes refused to sell. (R **680)** Thomas advised Stokes to dispose of the pistol. (R **680)** Stokes said Thomas was a black male who lived in Valdosta and looked enough like himself to be considered a twin brother. (R **681)** Bunting testified that Jerry Stokes and his two brothers, Garfield and Roosevelt, are very similar in appearance. (R **698-699)** Local law enforcement officers were unable to locate Willie Thomas. (R **681)** Bunting also testified that Stokes said he had driven his brother's Grand Prix on one occasion through Madison County to Perry. (R **680)** Stokes said he learned about the homicide from his brother who read an article in the newspaper. (R **681)**

During the evening of October **24,** FDLE Agent Robert Kinsey and Leonard Harris conducted a second interview of Stokes. (R **596-599, 702-712, 736-738)** Throughout the interview, Stokes contended that the investigators had the wrong man. (R **802)** He again said that he had loaned his pistol to Willie Thomas. (R **745-748)** However, he said Thomas borrowed the gun after the murder, not before it occurred. (R **768-769)** Stokes told Kinsey that he had been living in Ohio, but he had moved back home to Valdosta in September **1986.** (R **740-741, 790-792)** Although registered in his sister's name, Stokes had purchased the Toyota before moving to Ohio. (R **742, 795)** While he was in Ohio, his sister had use of the car. (R **795)** Several other

family members and friends also had access and use of the car. (R **795)** Garfield Stokes' blue and white Grand Prix was his second car, and he loaned it to his mother, sister, girlfriend and others. (R **743, 797)** Jerry Stokes said he drove his brother's Grand Prix only once to Perry to visit Rev. Dimlet. (R **743-744)** His sister, Elizabeth McFarland accompanied him. (R **743)** Stokes said he was familiar with Taylor's store and had made a purchase there at least once. (R **749-759, 792-794)** He passed **by** the store on his way to Perry and a couple of other times when taking his sister to work at a truckstop on the same highway. (R **792-794)** When asked if the tire tracks in front of the store could have been made by his brother's Grand Prix, Stokes speculated that his brother could have loaned the car to someone who drove it there, perhaps Willie Thomas. (R **748)** Even though the tennis shoe tracks found at the scene were matched to someone else (R **801–802),** Kinsey asked Stokes about them. Stokes again speculated that someone could have had access to them since he sometimes left them in his brother's car. (R **749,** 800) The latent fingerprints found in the store did not match Stokes' prints. (R **809-811)** However, Kinsey asked Stokes to explain how his prints might be in the store. Stokes said the only possibility is that they were left during his one visit to the store to make a purchase. (R **749-750)**

Stokes allegedly made a statement to an inmate trustee in the jail in Valdosta. (R **872-893)** Lowell Woodson testified that he was in a holding cell with Stokes on October **23,**

waiting to see a doctor. (R **874)** During their conversation, Stokes asked him to make a telephone call to his brother, Garfield. (R **875)** He wanted Woodson to tell his brother to get rid of the tires from his car or the whole car. (R **875)** According to Woodson, Stokes told him there had been a robbery, a lady was shot and the police had his gun. (R **875)** Woodson asked where the lady had been shot, and Stokes pointed to his face. (R **875-876)** Stokes never said that he shot the woman. (R **881-883)** Woodson did not make the call because a detention officer, Alvin Lamar, saw him talking to Stokes and told him not call. (R **876, 898-900)**

After Stokes was incarcerated in the Madison County Jail, he allegedly made a statement to Investigator Harris. (R **611-612)** Stokes asked Harris about securing the return of some tennis shoes which had been seized from him. (R **611)** Harris said he could not get them until after the trial via a court order. (R **611)** Stokes allegedly said, "I don't know why you want those shoes. I wasn't wearing them when **...."** (R **611)** Stokes did not finish this statement, and his conversation with Harris ended. (R **612)**

Jerry Stokes testified in his defense at trial. (R **942)** He denied ever making a statement of any kind to Lowell Woodson. (R **942-943)** He also denied portions of the statements he allegedly made to Deputy Bunting and Agent Kinsey. (R **944-966)** Stokes testified that he had never been inside Taylor's store and that he never gave a description of the store to the investigators. (R **946-964)** He admitted owning the

.22 caliber pistol and stating that he loaned it to Willie Thomas before the murder. (R **944-945)** However, Stokes denied telling Bunting that Thomas told him that he had shot a woman with the pistol. (R **946)** Stokes also said that he had never driven his brother's Grand Prix. (R **946-947)**

Motion To Preclude William Brown's Testimony

The trial court heard a motion in limine to exclude William Brown's testimony about the identification of the Grand Prix automobile. (R **304-416)** Brown had been hypnotized in an effort to gain more identification details just six days before making the identification of Garfield Stokes' car. (R **311-312)** At the pretrial hearing, the court received testimony about the identification procedures and the hypnotic session. (R **304-417)** Brown admitted that the hypnosis helped him remember and refreshed his recollection of the car he saw. (R **393-394)** He said had seen the car at the store for only two seconds as he drove passed at over **60** miles an hour. (R **392-393)** However, he denied that the hypnotic session assisted him in the later identification of Garfield Stokes' car. (R **403)**

Brown's description of the car while under hypnosis was different than his original description and the characteristics of Garfield Stokes' car. Before being hypnotized, Brown described the car he saw as a faded blue, older model Grand Prix with a white, painted or vinyl top. (R **309-310, 319-322, 369)** The car had a CB antenna and wire wheel covers which were not standard equipment. (R **309-310, 319-322, 369)** The wheel covers were also unusual since they appeared to have the center

emblem missing. (R **309-310, 319-322, 369)** While hypnotized, Brown described the car as a faded blue Grand Prix with a white vinyl top and a CB antenna on the middle of the trunk. (R **354-356)** He also described unusual wire wheel covers, white wall tires and six vertical lines through the taillights. (R **355-557)** Brown described a Florida license tag with the numbers **286** followed with three letters one of which was "Z." (R **358-360)** He noticed no bumper stickers on the car. (R **356)** Garfield Stokes' car was an older model, faded blue Grand Prix with a white vinyl top. (R **314-318)** The car also had wire wheel covers with the center emblems painted over.(R **381)** There was no CB antenna, but a mark on the trunk could have been made by a magnetic antenna mount. (R **318)** The windows were tinted which Brown did not remember at all. (R **316, 373, 590-591)** The taillights did not have vertical lines. (R **314-318)** And, finally, the license tag was from Georgia with the number HZY **821.** (R **317)**

The trial court ruled that evidence of the hypnotic session was inadmissible. (R **415)** Neither side was permitted to present evidence of Brown's having been hypnotized or of any of the descriptions and information revealed during that session. (R **415)** However, the State was allowed to present evidence of Brown's identification of Garfield Stokes' car, even though it occurred after Brown had been hypnotized. (R **415-416)** Stokes was not permitted to cross-examine or otherwise impeach Brown with the inconsistent description of the car he gave while under hypnosis. Furthermore, Stokes was

precluded from showing the impact hypnosis may have had in the identification. (R **415-416, 470-473)**

Jury Selection

Jerry Stokes' jury was comprised of ten whites and two blacks. (R **419-420)** One of the two alternate jurors was black. (R **420)** The prosecutor used six of seven peremptory challenges on black prospective jurors. (R **420)** He challenged four black jurors for cause. (R **258)** On several occasions, Stokes objected and argued that a prima facie case of a likelihood of racial discrimination had been established. (R **95,** 130-131, **150-152, 205-208, 215-216, 223-224, 258-259)** Each time, the trial court ruled that the threshold had not been met and that the prosecutor did not have the burden to demonstrate race-neutral reasons for the peremptory challenges. (R **95,** 131, **152, 208, 216, 224, 258-259)** Although the prosecutor did volunteer reasons for excusing two jurors, the court did not require it and made no effort to evaluate whether the reasons given were race-neutral. (R **205-207, 223-224) No** reasons were offered for the remaining four challenges.

Jury Instructions--Guilt Phase

The court instructed the jury on first degree premeditated murder and felony murder with robbery as the underlying felony. (R **1027-1032)** Instructions on lesser offenses were given for the murder charge, but none were given for the armed robbery. **(R 1032-1037, 1044)** During the jury instruction charge conference, held in chambers, Jerry Stokes' lawyer waived instructions on any lesser offenses for the armed robbery charge. (R

929) The court did not inquire of Stokes' wishes concerning lesser offenses, and Stokes did not personally waive the instructions. (R 929) Counsel told the jury that there were no lesser offenses for the armed robbery (R 975), and the court's instructions omitted all references to lesser offenses for the robbery. (R 1034-1037, 1044)

Penalty Phase And Sentencing

During penalty phase, the State did not offer any additional evidence. (R 1071) Stokes presented the testimony of four witnesses in mitigation. (R 1072-1088) His brother, Roosevelt Stokes, said that he and Jerry had always been close. (R 1073) Jerry was a good brother and was very good to all members of the family. (R 1073-1075) They were a poor family, and Jerry always helped his mother financially after his father died. (R 1073-1074) Roosevelt knew Jerry's employer who frequently mentioned Jerry's good, reliable work habits. (R 1074-1075) Elizabeth McFarland, Stokes' older sister, said Jerry never caused trouble while he was growing up. (R 1083-1084) He was good to his mother, sisters and brothers. (R 1084-1085) Furthermore, since their father died, their mother depended on Jerry. (R 1085) Daisey Stokes, Jerry's mother, testified that he was a good son and always worked hard. (R 1087-1088) She said Jerry would do anything for her and was good to his brothers and sisters. (R 1088) Jerry's fiancee, Martha LaGrant, said they met in Ohio and she had known him for four years. (R 1078) She knew him as a friend first before they developed a relationship. (R 1079) He always treated her

kindly. (R **1079)** She said Stokes worked hard as a painter while in Ohio. (R **1079-1080)**

While cross-examining Martha LaGrant, the prosecutor asked her if she knew that Stokes had another girlfriend in Augusta.(R **1080)** She said she did. (R **1080)** He then asked if she knew that he had shot that girlfriend and was wanted for escaping after committing the offense. (R 1080) LaGrant said she knew about the shooting incident but did not know about an escape. (R 1080) Defense counsel objected to the use of alleged criminal conduct which had not resulted in a conviction. **(R 1081)** The prosecutor argued that hearsay was admissible during penalty phase. (R **1082)** The court overruled the objection and refused to strike the testimony. (R **1082)** In his closing argument to the jury, the prosecutor said,

> But we do know that he is a three-time convicted felon. We know that as a result of the testimony of his girlfriend. In addition to that, he has shot his former girlfriend and is still wanted in Augusta.

(R **1096)** Defense counsel moved for a mistrial because of the improper testimony and argument. (R 1100) In addition to contesting the admissibility of the testimony, he stated that the hearsay was factually incorrect. His investigation had revealed that Stokes had not shot his former girlfriend. The truth was that his girlfriend had shot him. (R 1100-1101) The prosecutor admitted that he may have been confused. (R 1101) He also told the court that he had no objection to a curative instruction. (R 1101) The court told the jury to disregard any reference to the allegation that the defendant shot his

girlfriend. (R 1101-1102) No effort was made to correct the factual error. (R 1101-1102)

The court used a slightly modified standard penalty phase jury instruction. This modification advised the jury that the final sentencing decision rested solely with the trial judge. As modified, the instruction stated,

> The final decision as to what punishment should be imposed rests solely with me as the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> * * * *
>
> As you have been told, the final decision as to what punishment should be imposed is my responsibility as the judge in this case.

(R 1070, 1112-1113)(emphasis added) The jury recommended a death sentence for the offense. (R 1121)

SUMMARY OF ARGUMENT

1. The trial court failed to require the prosecutor to provide reasons for his use of six out of seven peremptory challenges on black prospective jurors. Several times during jury selection, Stokes objected to the prosecutor's use of these challenges to excuse blacks. Each time the trial court ruled that Stokes had failed to make a prima facie showing of a likelihood of discriminatory use. The jury ultimately consisted of ten whites and two blacks. The trial judge was wrong. Stokes sufficiently met the threshold requirement set forth in State v. Neil, 457 So.2d 481 (Fla. 1984), and the burden shifted to the State to justify that its challenges were for race-neutral reasons. Since the court did not hold the State to its burden at jury selection, Stokes is now entitled to a new trial. Blackshear v. State, No. 70,513 (Fla. March 10, 1988).

2. Jerry Stokes moved to exclude William Brown's testimony because he had been hypnotized prior to identifying Garfield Stokes' car. The trial court partially granted the motion and excluded all evidence about the hypnotic session and information Brown related during that session. However, the court permitted Brown to testify about his observations before and after hypnosis, including the identification of the car made six days after the session. Admitting the posthypnotic identification of the car violated the rule of exclusion of such evidence this Court established in Bundy v. State, 471 So.2d 9 (Fla. 1985).

3. The trial court improperly restricted Stokes' cross-examination of Brown. Even though the court allowed Brown to testify to his posthypnotic identification of the car, Stokes was precluded from using the hypnotic session as a cross-examination and impeachment tool. This gave the State the advantage of the hypnotically refreshed identification evidence without fear of the best available source of impeachment material. Stokes was denied the opportunity to test the reliability of Brown's posthypnotic testimony. In this instance, the rule of excluding hypnotically refreshed testimony must yield to the Sixth Amendment right to confront and cross-examine witnesses.

4. William Brown was a key prosecution witness who saw a car parked at Taylor's store near the time of the homicide. He later identified Stokes' brother's car as the one he saw. Over objection, two investigators and Brown's employer were allowed to testify to out of court statements Brown made to them about the description and identification of the car. The court improperly allowed this hearsay into evidence under the theory that it was prior consistent statements and admissible to rebut defense impeachment of Brown. However, the defense never asserted that Brown had a recent motive to fabricate. Consequently, the exception to the general rule of exclusion of prior consistent statements does not apply. Additionally, the witnesses' testimony included statements attributable to Brown about which he never testified. The improper hearsay prejudiced the defense by bolstering and adding to Brown's identification testimony.

5. The State's evidence was circumstantial and insufficient to prove that Jerry Stokes was the perpetrator. The evidence proofed that Stokes' brother's car was seen at the scene near the time of the homicide and that Stokes owned a .22 caliber pistol. This was the same caliber as the murder weapon, but it could not be linked ballistically to the crime. Stokes also made some inconsistent exculpatory statements. The evidence also failed to prove a robbery since it did not establish that property was taken from the store. Stokes' motion for judgment of acquittal should have been granted.

6. The trial court improperly instructed the jury on robbery as an underlying felony for the State's felony murder theory of the prosecution. There was insufficient evidence to prove the existence of a robbery because the proof did not establish that something of value was taken. Only circumstantial evidence suggested that cash might have been taken from the store. Witnesses testified that the victim kept cash in three locations inside the store. No bills were found in two and several hundred dollars was found in the third.

7. During the jury instruction charge conference, Stokes' defense counsel waived lesser included offenses for the robbery charge. Stokes did not personally waive these instructions. Although defense counsel may waive lesser offenses in noncapital trials, a defendant must personally waive lesser offenses in capital cases. Harris v. State, 438 So.2d 787 (Fla. 1983). The personal waiver requirement is applicable here, even though the waived lesser offenses were for the noncapital

charge. This was a capital trial and the robbery was the underlying felony for the felony murder theory of the prosecution. The offense was an integral part of the capital case and must be treated as capital for the waiver requirement.

8. The trial judge should have declared a mistrial when the State introduced evidence of untrue, nonstatutory aggravating circumstances through the improper impeachment of a defense mitigation witness. On cross-examination, the prosecutor asked Stokes fiancee if she knew Stokes had shot a previous girlfriend and was wanted for escape from that charge. Stokes had not been convicted for either of these alleged charges, and in fact, the prosecutor later admitted that the allegations probably were not true. The court's instruction to disregard the evidence about Stokes having shot his former girlfriend was inadequate to cure the error.

9. The trial court should not have sentenced Stokes to death because there were no aggravating circumstances proven beyond a reasonable doubt. Although the judge found that the homicide occurred during the commission of a robbery and was cold, calculated and premeditated, neither of these circumstances was properly found. The threshold requirement for a death sentence of at least one aggravating circumstance has not been met. Stokes' sentence must be reversed.

10. Stokes' death sentence is disproportional to the crime committed and must be reversed. Under the State's theory of the case, the victim was shot a single time during the course of a robbery with a pistol which was subject to accidental

discharge. No evidence of the circumstances of the shooting exists. At best, this is a felony murder with no additional aggravating circumstances--a crime not deserving the ultimate penalty of death

11. The trial court should not have read a modified standard penalty phase jury instruction which told the jury that the sentencing decision was solely the judge's responsibility. An instruction stressing the importance of the jury's recommendation should also have been given. The instruction as read improperly diminish the role of the jury in violation of the Eighth and Fourteenth Amendments. Caldwell v. Mississippi, **472** U.S. **320, 105** S.Ct. **2633, 86** L.Ed.2d 231 **(1985).**

12. Stokes' robbery sentence must be reversed because the court used an incorrect sentencing guidelines scoresheet. A Category One homicide scoresheet was used with the robbery scored as an additional offense at sentencing. The capital offense was improperly scored as a life felony primary offense. A Category Three scoresheet should have been used for the robbery, and the capital murder should not have been scored.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT STOKES' HAD FAILED TO MAKE A PRIMA FACIE SHOWING OF A LIKELIHOOD OF RACIAL DISCRIMINATION IN THE STATE'S USE OF PEREMPTORY CHALLENGES AND IN NOT REQUIRING THE STATE TO GIVE REASONS FOR ITS EXCUSING OF BLACK PROSPECTIVE JURORS.

The Sixth and Fourteenth Amendments to the United States Constitution forbids a prosecutor to exercise peremptory challenges solely on the basis of race. Batson v. Kentucky, **476** U.S. **79, 106** S.Ct.____**, 90** L.Ed.2d **69 (1986).** This Court condemned such a practice under Article I, Section **16,** of the Florida Constitution. State v. Neil, **457** So.2d **481** (Fla. **1984).** In Neil, this Court held that when a showing is made of a likelihood of discriminatory use of peremptory challenges, the trial court must conduct a hearing at which the prosecutor must justify that he excused prospective jurors for nonracial reasons. Ibid. at **486-487.** Recently, in State v.Slappy, No. **70,331** (Fla. March **10, 1988),** this Court acknowledged that the "likelihood" standard for making a prima facie showing was imprecise but refused to fashion a more precise one because of the difficulties of formulating a rule to cover all the possible ways the issue could arise. Writing for the Court, Justice Barkett explained the rationale:

> Instead, we affirm that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of racial discrimination exists. Only in this way can we have a full

> airing of the reasons behind a peremptory strike, which is the crucial question.

Ibid., slip opinion at pages **5-6**. The opinion further stated,

> ...we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor.

Ibid., at page **6**. Stokes met this test. He established a likelihood of racial discrimination in jury selection. The trial court should have required the prosecutor to give reasons for his peremptory strikes.

Jerry Stokes was a black man on trial accused of murdering a white woman. His jury was comprised of ten whites and two blacks. (R **419-420)** One of the two alternate jurors was black. **(R 420)** In selecting the jury, the prosecutor used six of seven peremptory challenges exercised on black prospective jurors. (R **420)** The prosecutor challenged four black jurors for cause. (R **258)** Several times during jury selection, Stokes objected and argued that a prima facie case of a likelihood of racial discrimination had been established. (R **95,** 130-131, **150-152, 205-208, 215-216, 223-224, 258-259)** Each time, the trial court ruled that the threshold had not been met and that the prosecutor did not have the burden to demonstrate race-neutral reasons for the peremptory challenges. (R **95,** 131, **152, 208, 216, 224, 258-259)** The record also shows that the judge was reaching his own conclusion about the prosecutor's reasons for the excusal without ever hearing from him. (R 131, **152, 258-259)** After the prosecutor's second challenge, the court said,

> THE COURT: Well, I don't think the threshold had been met thus far. Very, very obvious about Johnson: and Robinson, I've got a pretty good idea about that, too.

(R 131) The court continued in the same vein after later objections:

> THE COURT: The reasons are very obvious for [the] challenge. I don't think the threshold has been met.

(R **152)**

> THE COURT: The objection is overruled. I think it is very obvious, there is no question in my mind that he ought to be challenged for cause.

(R **258-259)** Although the prosecutor did volunteer reasons for excusing two jurors, the court did not require it and made no effort to evaluate whether the reasons given were race-neutral. (R **205-207, 223-224)** The prosecutor said he excused Pricilla Aikens because she expressed reservations about judging someone and because her of her body language and lack of eye contact. (R **205-207)** He excused Mary Roberson because an assistant state attorney had interviewed a black police officer from Madison who said, "They are always into something bad."(R **223-224) No** reasons were offered for the remaining four challenges.

Stokes satisfied his burden, and the prosecutor should have been ordered to provide his reasons for the challenges. Although numbers do not necessarily constitute prima facie proof of racial discrimination, Slappy, at page 5., here the prosecutor used all but one of his seven peremptory challenges on blacks and successfully challenged four more for cause.

This Court has recently ruled a prima facie showing existed in a case where the prosecutor used eight of his ten peremptories on blacks. Blackshear v. State, No. **70,513** (Fla. March **10, 1988).** Moreover, the threshold has been met in other cases where only four challenges were made on black jurors. See, Slappy, at page 1; Tillman v. State, No. **68,506** (Fla. March **10, 1988),** slip opinion at page 3. The number of peremptory challenges used here, coupled with the use of four challenges for cause and the fact that Stokes is black and his victim was white, certainly gives rise to an inference of racial discrimination warranting an inquiry under Neil.

The trial judge did not have the benefit of this Court's decision in Slappy. He labored under a misunderstanding of the standards to be applied. His second guessing the prosecutor regarding reasons for the peremptory challenges evidences this fact.(R **131, 152, 258-259)** Neil does not permit a judge to read the mind of the prosecutor and then use that speculation to rule no likelihood of racial discrimination has been established. It is the prosecutor's reasons and motives in issue, not the judge's. See, Tillman v. State, No. **68,506** (Fla. March **10, 1988),** slip opinion at page **5.** The standards are designed to encourage "a full airing of the reasons behind a peremptory strike, which is the crucial question." Slappy at page **6.** The trial judge's formulating his own possible reasons for for the peremptory challenge does nothing to reveal the motives of the prosecutor. Moreover, the judge here, unlike the judge in

Tillman, did not even express his speculative reasons on the record. (R 131, **152, 258-259)** They cannot be reviewed.

Stokes satisfied the initial burden of showing of a likelihood of racial discrimination in the exercise of peremptory challenges. The trial court erred in ruling otherwise and in not shifting the burden to the state to provide race-neutral reasons for the peremptory strikes of black prospective jurors. This Court must now reverse this case for **a** new trial.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING STATE WITNESS WILLIAM BROWN TO TESTIFY TO HIS IDENTIFICATION OF THE GRAND PRIX AUTOMOBILE SINCE THE IDENTIFICATION WAS MADE AFTER BROWN HAD BEEN HYPNOTIZED TO ENHANCE HIS MEMORY ABOUT THE CHARACTERISTICS OF THE CAR.

In Bundy v. State, **471** So.2d **9** (Fla. **1985),** this Court recognized the unreliability of hypnotically refreshed testimony and held such evidence is per se inadmissible in a criminal trial. While the rule does not preclude the hypnotized witness from testifying to "those facts demonstrably recalled prior to hypnosis,'' it does preclude any posthypnotic testimony. Ibid, at **18.** The trial judge misapplied Bundy here in partially granting Stokes' motion in limine to exclude William Brown's testimony. The court ruled that evidence of the hypnotic session was inadmissible and that neither side was could present evidence of Brown's having been hypnotized. (R **415)** However, the State was allowed to present evidence of Brown's posthypnotic identification of Garfield Stokes' car. (R **415-416)** The court concluded that the hypnosis had not influence the identification. (R **413-416)** Stokes was not permitted to cross-examine or otherwise impeach Brown with the inconsistent description of the car he gave while under hypnosis. (R **415-416, 470-473)** Furthermore, Stokes was precluded from showing the impact hypnosis may have had in the identification. (R **415-416, 470-473)** The court's order allowed the State to present inadmissible posthypnotic identification testimony and deprived Stokes of his Sixth Amendment right to confront and

cross-examine the witnesses against him. Stokes urges this court to reverse this case for a new trial.

The State resorted to hypnosis in an effort to gain more identification details about the car. Agent Wayne Bass hypnotized Brown on October 17, 1988, (R 336), just six days before Brown identified Garfield Stokes' car. (R 311-312) Brown admitted that the hypnosis helped him remember and refreshed his recollection of the car he saw. (R 393-394) He said had seen the car at the store for only two seconds as he drove passed at over 60 miles an hour. (R 392-393) However, he denied that the hypnotic session assisted him in the later identification of Garfield Stokes' car. (R 403) Brown said the paint color and the wheel covers were the main items he relied upon in making the identification. (R 463)

Brown's description of the car while under hypnosis was different than his original description and the characteristics of Garfield Stokes' car. Before being hypnotized, Brown described the car he saw as a faded blue, older model Grand Prix with a white, painted or vinyl top. (R 309-310, 319-322, 369) The car had a CB antenna and wire wheel covers which were not standard equipment. (R 309-310, 319-322, 369) The wheel covers appeared to have the center emblem missing. (R 309-310, 319-322, 369) While hypnotized, Brown described the car as a faded blue Grand Prix with a white vinyl top and a CB antenna on the middle of the trunk. (R 354-356) He also described unusual wire wheel covers, white wall tires and six vertical

lines through the taillights. (R 355-557) Brown described a Florida license tag with the numbers 286 followed by three letters one of which was "Z." (R 358-360) He noticed no bumper stickers on the car. (R 356) Garfield Stokes' car was an older model, faded blue Grand Prix with a white vinyl top. (R 314-318) The car also had wire wheel covers with the center emblems painted over. (R 381) There was no CB antenna, but a mark on the trunk could have been made by a magnetic antenna mount. (R 318) The windows were tinted which Brown did not remember at all. (R 316, 373, 590-591) The taillights did not have vertical lines. (R 314-318) And, finally, the license tag was from Georgia with the number HZY 821. (R 317) Stokes was not allowed to explore any of these differences on cross-examination. (R 470-473)

No Florida appellate court has dealt with the admission of a posthypnotic identification allegedly based on characteristics observed before the hypnotic session. However, cases from other jurisdictions possessing similar rules about hypnotically refreshed testimony have addressed the question. The Supreme Court of Washington recently ruled on this precise issue in State v. Coe, 109 Wash.2d 832, 750 P.2d 208 (1988). Defendant Coe was convicted of three counts of rape. During the investigation, the police hypnotized two of the three victims shortly after the attacks in an effort to obtain better descriptions of the perpetrator. Neither victim provided any additional or different evidence under hypnosis. A few weeks after being hypnotized, the two victims identified Coe in a lineup. State

v. Martin, 101 Wash.2d 713, 684 P.2d 651 (1984), established a rule excluding hypnotically refreshed testimony but allowing evidence based on prehypnotic memory. The trial court interpreted Martin as allowing the admission of information given before hypnosis and information given after hypnosis which the State could prove was based on prehypnotic memories. On this basis, the trial court in Coe permitted the posthypnotic identification testimony because the descriptions given before and during hypnosis did not differ. Reversing for a new trial, the Supreme Court of Washington held that the trial court's interpretation was too expansive and only prehypnotic memories properly recorded were admissible. The posthypnotic lineup identification should not have been presented at trial.

Another Washington Supreme Court case, upon which Coe relied, had reached a similar conclusion. State v. Laureano, 101 Wash.2d 745, 682 P.2d 889 (1984). There, the victim of an armed robbery was hypnotized to obtain more identification information. Over two months later, she identified Laureano from a photographic display. More than two months beyond that time, she identified Laureano in a lineup. The appellate court reversed the conviction for a new trial holding that all posthypnotic testimony was inadmissible. Stating its rationale, the court adopted language from a law review and wrote:

> There is substantial support in the medical community that hypnotic techniques, as used by law enforcement personnel to enhance a witness's memory, are unreliable. Dr. Bernard L. Diamond, M.D., Professor of Law at the University of California at Berkeley, and Clinical Professor of

> Psychiatry at the University of California at San Francisco, stated in a recent article:
>
> > Even if the hypnotist takes consummate care, the subject may still incorporate into his recollections some fantasies or cues from the hypnotist's manner, or he may be rendered more susceptible to suggestions made before or after the hypnosis. A witness cannot identify his true memories after hypnosis. Nor can any expert separate them out. Worse, previously hypnotized witnesses often develop a certitude about their memories that ordinary witnesses seldom exhibit... The plain fact is that such testimony is not and cannot be reliable. The only sensible approach is to exclude testimony from previously hypnotized witnesses as a matter of law, on the ground that the witness has been rendered incompetent to testify.
>
> Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Cal.L.Rev. 313, 348-49 (1980).

682 P.2d at 895. The Washington Court continued and said,

> For these reasons, where this techniques has been used, we hold that all posthypnotic testimony should be rejected, and only the prior recall of the witness, properly preserved and documented (as set forth in State v. Martin), should be allowed in evidence.

Ibid. Concerns expressed about hypnosis in Laureano are consistent with the concerns this Court expressed in Bundy. 471 So.2d at 13-18. Stokes urges this Court to follow the holding of the Washington Supreme Court and interpret Bundy to mean that any posthypnotic identification is inadmissible even if alleged to have been based on descriptions given before hypnosis.

The trial court should have excluded William Brown's identification of the Grand Prix made six days after his

hypnotic session. Stokes Sixth Amendment rights to confront and cross-examine witnesses has been abridged. This Court must reverse this case for a new trail.

ISSUE III

THE TRIAL COURT ERRED IN LIMITING STOKES' CROSS-EXAMINATION OF WILLIAM BROWN BY PRECLUDING THE USE OF EVIDENCE FROM THE HYPNOTIC SESSION WHICH INCLUDED INCONSISTENT DESCRIPTIONS OF THE CAR HE ALLEGEDLY SAW AT THE STORE.

For the reasons argued in Issue 11, supra., the trial court should not have allowed the introduction of the posthypnotic identification William Brown made of Garfield Stokes' automobile. However, the court further compounded that error when it ruled that Stokes could not use information from the hypnotic session to cross-examine and impeach the witness. (R **415-416, 470-473)** The State was given the 'witness's posthypnotic identification testimony without having to defend it from the best available attack on its credibility. The jury never knew the witness was hypnotized. The jury never knew any of the adverse effects hypnosis can have on the accuracy of a witness's memory. The jury never knew that the witness gave descriptions which were inconsistent with the identified automobile. Stokes was denied his Sixth Amendment right to confront and cross-examine his accuser. See, Pointer v. Texas, **380** U.S. **400, 85** S.Ct. **1065, 13** L.Ed.2d **923 (1965);** Coxwell v. State, **361** So.2d **148** (Fla. **1978).**

State evidentiary rules cannot be applied in such a manner as to deprive a criminal defendant his right to cross-examine witnesses. Davis v. Alaska, **415** U.S. **308, 94** S.Ct. **1105, 39** L.Ed.2d **347** (1974); Chambers v. Mississippi, 410 U.S. 284, **93** S.Ct. **1038, 35** L.Ed.2d **297 (1973).** In Chambers, Mississippi's

evidence rule preventing the impeachment of one's own witness was used to prohibit a murder defendant from cross-examining a witness who had confessed to the crime and then repudiated the confession on the witness stand. The defendant was also prevented from introducing the witness's oral confessions as hearsay. The Supreme Court reversed holding that Chamber's right to confront and cross-examine witness was paramount to the state's evidence rules. A similar ruling was made in Davis where the defendant was precluded from using a witness's juvenile adjudication as impeachment because of Alaska's law making juvenile records confidential. Again, the Supreme Court ruled the defendant's right to confront and cross-examine witnesses outweighed the need to enforce the state's evidentiary rule. In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), the trial court would not allow the murder defendant to cross-examine a prosecution witness on the fact that a public drunkenness charge against him had been dismissed when he agreed to talk to the prosecutor about the murder. The ruling was based on a Delaware rule of evidence which allowed exclusion of relevant evidence which is unfairly prejudicial, cumulative or a waste of time. Holding that the application of the rule violated the defendant's right to cross-examine the witness about a potential bias, the Supreme Court remanded the case. Once the trial court ruled that evidence of William Brown's posthypnotic identification was admissible, the court was not free to apply the rule excluding hypnotically refreshed testimony in such a way as to deprive

Stokes of a critical area of cross-examination. The rule of exclusion must bow to Stokes' Sixth Amendment rights.

Recently, the United States Supreme Court addressed the the rule of excluding hypnotically refreshed testimony when it conflicts with a different Sixth Amendment right--a defendant's right to testify. Rock v. Arkansas, 483 U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Once again, the Court held the Sixth Amendment right outweighed the need to rigidly apply the evidence rule. Vickie Rock was charged with manslaughter for the shooting death of her husband. A licensed neuropsychologist hypnotized her in an effort to refresh her memory of the details of the shooting. Under hypnosis, she did not remember any further details. But, after hypnosis she recalled that she had not placed her finger on the trigger of the gun and that the shot occurred during a struggle with her husband. The trial court applied the state rule excluding hypnotically refreshed testimony and limited Rock's testimony to matters she remembered before the hypnotic session. The Supreme Court of Arkansas affirmed Rock's conviction. The Supreme Court of the United States reversed holding that the rule of exclusion as applied in these circumstances infringed on the defendant's right to testify. The opinion noted that vigorous cross-examination and the introduction of evidence to educate the jury about the problems with hypnotically refreshed testimony would sufficiently safeguard the state's interest in testing the reliability of the evidence. 97 L.Ed.2d at 52.

Vigorous cross-examination was also Stokes' means of testing the reliability of Brown's posthypnotic testimony. Once the trial court decided not to apply the rule excluding posthypnotic evidence, it was not free to apply the rule to exclude impeachment evidence from the hypnotic interview. Such a piecemeal application of the rule deprived Stokes' of his Sixth Amendment right to confront and cross-examine a key prosecution witness. This Court must reverse this case for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY REGARDING STATEMENTS STATE WITNESS WILLIAM BROWN MADE ABOUT THE IDENTIFICATION OF THE GRAND PRIX AUTOMOBILE WHICH IMPROPERLY BOLSTERED AND ADDED TO HIS TRIAL TESTIMONY.

The trial court allowed three prosecution witnesses to testify to out of court statements William Brown made about the description of the car he saw at the store and about the car he later identified. (R 495-500, 665-671, 674-675) These statements repeated and added to Brown's trial testimony. As a result, these hearsay statements improperly bolstered Brown's identification testimony. Since the credibility of Brown's identification was a critical issue at trial, the improper admission of this hearsay prejudiced Stokes' defense. Stokes' objections to the evidence should have been sustained, and he now asks this Court to reverse his convictions for a new trial.

During his trial testimony William Brown described the car he saw at Taylor's store as a Pontiac Grand Prix, two-door, painted blue with a white vinyl top. (R 456-457) He said the car had distinctive wire wheel covers because it appeared as if the center emblems were missing. (R 457) Brown told his employer, Dewayne Leslie and Investigator Leonard Harris about his seeing the car. (R 459, 664-666) Over objection, Harris testified to the information Brown gave him in the interview which was consistent with Brown's testimony with added details. (R 496-499) Harris said Brown told him he saw a 1974 to 1976 model Grand Prix, with faded, medium blue paint and a white

half top that was either painted or vinyl. (R **497)** The car had nonstandard wheel covers with missing center emblems. (R **497)** Additionally, Harris said that Brown told him that the car had a CB antenna in the middle of the trunk. (R **497)** Again over objection, Brown's employer, Dewayne Leslie, was also permitted to testify to the description as Brown related it to him. (R **665-666)** He said Brown told him that the car was an older Grand Prix painted blue with a white top. (R **666)** Brown further said the car had a CB antenna and unusual hub caps without anything in the center. (R **666)**

Harris, Leslie and Deputy James Bunting accompanied Brown to view Garfield Stokes' Grand Prix in Valdosta. (R **460-461, 590-592, 668-669, 673-675)** Brown identified the car as the one he saw in front of the store. (R **461-464)** He testified at trial he was sure of his identification because of the faded blue paint and the wire wheel covers which had the center emblem painted over. (R **462-464)** Leslie testified, over objection, that Brown looked at the car and identified it as the car he had seen at Taylor's store. (R **668-669)** Bunting testified, over objection, that when Brown saw the car, he said the color, year and wheel covers were right. (R **675)** Bunting also heard Brown say, "I never thought I would see that car again." (R **675)** Finally, Bunting heard Brown say to Leslie, "I told you the hub caps were different.'' (R **675)**

The court ruled that this hearsay was prior consistent statements Brown made and therefore admissible to rebut the defense's efforts to impeach his identification. (R **496-497,**

665-666, 667, 668, 674-675) See, Sec. 90.801(2)(b), Fla. Stat.; Jackson v. State, 498 So.2d 906 (Fla. 1986); VanGallon v. State, 50 So.2d 882 (Fla. 1951). This theory of admissibility is wrong for two reasons. First, the evidence was more than prior statements Brown made which were consistent with his trial testimony. All three witnesses attributed statements to Brown about which he never testified. Their testimony did not merely repeat and corroborate Brown's, it expanded and enhanced it as well. Second, even if the evidence had been limited to prior consistent statements, the exception allowing such evidence is not applicable. Prior consistent statements are generally inadmissible, unless "introduced to rebut an express or implied charge against the witness of improper influence, motive, or recent fabrication." Gardner v. State, 480 So.2d 91, 93 (Fla. 1985). Furthermore, the exception "is only applicable where the prior consistent statement was made 'prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify.'" McElveen v. State, 415 So.2d 746, 748 (Fla. 1st DCA 1982); accord, Jackson, 498 So.2d at 910. Stokes' impeachment efforts did not fall into this category. Defense counsel cross-examined Brown on the speed he was travelling when he saw the car and the length of time he had to make his observations. (R 468-476) He never suggested Brown had a bias or motive to falsify, much less that something between his statements to Harris, Leslie and Bunting and his trial testimony occurred giving him such a motive.

The hearsay was simply inadmissible and prejudiced Stokes' defense by improperly bolstering Brown's identification of the car. Since the trial court failed *to* heed Stokes' objections, this Court must now reverse the case for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN DENYING STOKES' MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE WAS INSUFFICIENT TO PROVE STOKES WAS THE PERPETRATOR OF THE CRIME, AND ALTERNATIVELY, THE EVIDENCE WAS INSUFFICIENT TO PROVE A ROBBERY.

A.

The State Failed To Prove Beyond A Reasonable Doubt That Jerry Stokes Was The Perpetrator Of The Offenses Charged.

The State relied on three items of evidence in an effort to prove Jerry Stokes committed the crimes. First was the identification of Garfield Stokes' car at the store at a time shortly before the discovery of the offense. Second was that Jerry Stokes owned a .22 caliber pistol which was the same caliber weapon as the one responsible for the Taylor's death. Third was Stokes' exculpatory statements, some of which were inconsistent and some of which demonstrated knowledge of the crime. However, all of this evidence was circumstantial. And, before it will sustain a conviction, it must satisfy the special review standard for such evidence. As this Court said in Jaramillo v. State, 417 So.2d 257 (Fla. 1982),

> A special standard of review applies where a conviction is wholly based on circumstantial evidence. In McArthur v. State, 351 So.2d 972, 976 n. 12 (Fla. 1977), we reiterated this standard to be that "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."

Ibid. The evidence here failed to meet this special test, and the trial court should have granted Stokes' motion for judgment of acquittal.

1. The Automobile

Assuming the accuracy of William Brown's testimony (See, Issues II and III, supra.), the State proved that Garfield Stokes' automobile was present at Taylor's store near the time of the homicide. However, this does nothing to further the case against Jerry Stokes. If anything, it tends to link Garfield Stokes to the crime. Only through an improper compounding of inferences can this piece of evidence possibly link Jerry Stokes to the homicide. See, Gustine v. State, 86 Fla. 24, 97 So. 207 (Fla. 1923); Collins v. State, 438 So.2d 1036 (Fla. 2d DCA 1983); Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978). The first necessary inference is that the car was present at the scene at the time of the crime. Brown's testimony merely established that the car was at the store at 8:00 a.m. Taylor was seen alive at 7:30 a.m. and found dead at 9:02 a.m. This timing does not preclude opportunity for the commission of the crime after 8:00. A second inference would have to be that Jerry Stokes was using his brother's car at that time. There is no evidence to suggest that fact. Stokes testified that he drove the car only once, and he denied being in the car on the day of the homicide. Finally, the third inference would be that Jerry Stokes committed the crime. "Where two or more inferences ... must be drawn from the evidence and then pyramided to prove the offense charged, the

evidence lacks the conclusive nature to support the conviction." Collins, 438 So.2d at 1038. The presence of Garfield Stokes' car at the store falls in this category. It does not exclude a reasonable hypothesis that someone other than Stoke committed the crime.

2. The Pistol

Evidence proved that a .22 caliber firearm with a barrel containing six lands and grooves with a right hand twist killed Taylor. (R 833-834) Stokes admitted that he owned the .22 caliber pistol found in his Toyota. (R 576) A firearms expert determined that the pistol, like millions of other .22 caliber weapons in existence, had six lands and grooves with a right hand twist. (R 840) This evidence does not, however, link Stokes to the crime. Once again, an improper pyramiding of inferences is necessary to suggest these facts prove Stokes committed the homicide. Gustine: Collins: Chaudoin. First, an inference would have to be made that Stokes' firearm, out of millions of others which could have fired the fatal shot, killed the victim. A second inference would have to be that Stokes used the firearm. He claimed ownership of the gun, but it was not in his exclusive possession. Although he also claimed ownership of the car where the gun was found, others had use of the car. In fact, the car was registered in his sister's name. Moreover, it is just as plausible to infer that Garfield Stokes borrowed his brother's gun as it is to infer that Jerry Stokes borrowed his brother's car. The firearms evidence leaves a reasonable hypothesis of innocence.

3. The Statements

Jerry Stokes denied committing the crime. The State's theory was his exculpatory statements were not true because they contained inconsistencies and information about the scene and the crime. Even under the State's theory, however, Stokes' statements do not infer guilt to the exclusion of every reasonable hypothesis of innocence. There are at least three inferences to be made from the statements: (1) Stokes is guilty and fabricated his exculpatory statements; (2) Stokes is not guilty but has knowledge of the offense and the perpetrator gained innocently and is covering up for that person; (3) Stokes is not guilty and only has knowledge gained innocently or from law enforcement.

Assuming for argument that Stokes' statements were fabricated, they are still not admissions of guilt. Those innocent of crime may sometimes believe that an exculpatory lie will appease the accuser better than the truth. Lying does not make one guilty of murder. The statements to the investigators were made as the interrogator suggested the existence of nonexistent physical evidence. The Willie Thomas story was given in response to the suggestion that Stokes' pistol may be linked to the crime. (R 679-681, 745-746) When told that his brother's car was at the store, Stokes said that someone could have borrowed it, perhaps Willie Thomas. (R 748) When told tennis shoe tracks were found on the scene, Stokes speculated that someone using his brother's car could have used his shoes because he sometimes left them in the car. (R 749) When told

fingerprints might be found, Stokes said he had been in the store to make a purchase in the past. (R 749-756) Whether believed or not, the statements do not imply Jerry Stokes' guilt to the exclusion of innocence.

The suggestion that Stokes' statements are inculpatory because they include knowledge of the store and the crime is also without merit. Stokes did not have knowledge which could only be known to the perpetrator. He could describe the interior and location of the store because he had been there on another occasion. (R 749-759, 790-794) Nothing established that he could have gained that information only at the time of the crime. See, Jarmillo v. State, 417 So.2d 257 (Fla. 1982)(evidence insufficient where state failed to establish that defendant's fingerprints could only have been placed at the scene at the time of the murder) The State suggested that Stokes knew about the kitchen area in the store which was not a public area. (R 759-760) However, this area was not apart from the public area and was accessible from it. (R 759-760, 816) Karen Cooper, a crime scene technician, said the customers could walk up to the kitchen counter area. (R 816) According to the alleged statement Stokes made to a jail inmate, he also knew the location of the wound. (R 875) This information had not been officially released to the press. (R 508) However, Investigator Harris testified that that it was impossible to know who had the information. (R 628-629) Harris said it was common practice to discuss the investigation with fellow officers to aid in developing leads. (R 629) Although Bunting

and said he never told Stokes the location of the wound (R **700),** Investigator Harris may have done so. (R **628)** Stokes said he learned about the crime from his brother who said he read a newspaper article.(R **746)** The State never proved that no paper included such information in a news story. It is also possible that Stokes' brother had knowledge of the crime from other sources.

Stokes' alleged request to the jail inmate, Lowell Woodson, to call his brother and tell him to dispose of the car is also not inconsistent with his innocence. (R **874-875)** While it can infer guilty knowledge, it does not necessarily do so. Knowing that the police believed the car to be linked to the crime, Stokes may have felt getting rid of the car would be a prophylactic measure to avoid trouble even though innocent. It is also possible that Stokes was protecting his brother who owned the car.

Finally, the statement Stokes made to Investigator Harris about his tennis shoes is not inculpatory. Stokes asked Harris about securing the return of some tennis shoes which had been seized from him. (R **611)** Harris said he could not get them until after the trial. (R **611)** Stokes said, "I don't know why you want those shoes. I wasn't wearing them when ...." (R **611)** Stokes did not finish his comment, and his conversation with Harris ended. (R **612)** This statement was ambiguous at best. Although it could be finished "when I committed the murder," it could also be finished, "when you arrested me" or even "when the crime is supposed to have happened'' and not be inculpatory.

The State failed to prove Stokes was the perpetrator of the crimes. The circumstantial evidence did not exclude every reasonable hypothesis of innocence. Stokes conviction upon such evidence violates his right to due process, and he urges this Court to reverse his judgments with directions that he be discharged.

B.

The State Failed To Prove Beyond A Reasonable Doubt That A Robbery Occurred Since There Was Insufficient Evidence Of A Taking Of Property.

An essential element of the crime of robbery is a taking of property of another. Sec. 812.13, Fla. Stat.: Johnson v. State, 432 So.2d 758 (Fla. 1st DCA 1983). The State's circumstantial evidence here did not establish this element.

A long time customer at Taylor's store, Robert Wright, said he stopped at the store at 7:30 on the morning of the homicide. (R 450) He paid her for a purchase he made on credit the previous day with three one dollar bills. (R 450-451) Taylor placed the bills under the counter where she customarily kept some money since she had no cash register. (R 451) Wright said Taylor also kept money in another location in the store. (R 452) Two other customers testified that Taylor kept money in a cigar box and a metal pan underneath the counter as well as a third location away from the counter.(R 476, 661-662) Karen Cooper, a crime scene technician, examined the cigar box and pan. (R 812) She found no bills in the containers, but the

cigar box contained in excess of $3.00 in coins. (R 812-815) In another part of the store, away from the public area but accessible from it, Cooper found a bubble gum container on a counter which contained **$768.00** in currency. **(R 813-816)** This money included **88** one dollar bills. (R **816)** This evidence does not prove that the three one dollar bills Wright paid to Taylor were taken in the robbery. It is subject to reasonable inferences of innocence which must be accepted. See, e.g., McArthur v. State, 351 So.2d 972 (Fla. 1977). One reasonable hypothesis is that Taylor placed the bills in the bubble gum container with the other money. Another is that the bills were already used in making change for other customers. The State did not prove a taking of property as required for the crime of robbery.

The court should have granted a judgment of acquittal on the robbery count. Stokes asks this Court to discharge him on that offense.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER SINCE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE THE EXISTENCE OF THE ALLEGED UNDERLYING FELONY OF ROBBERY.

At the prosecutor's request and over defense objections (R 926-927), the trial court instructed the jury on the felony murder theory for first degree murder.(R 1031-1032) Armed robbery was the underlying felony alleged.(R 1031-1032) The State failed to prove the existence of a robbery (See, Issue V, supra.), and the trial court should not have instructed the jury on felony murder.

Some evidence of an underlying felony is necessary to justify such an instruction. See, Washington v. State, 432 So.2d 44 (Fla. 1983); Middleton v. State, 426 So.2d 548, 552 (Fla. 1983). There was no evidence of the commission of any underlying felony. Issue V of this brief addresses this lack of evidence, and those arguments are incorporated by reference here. Furthermore, the erroneous giving of a felony murder theory instruction could have improperly lead the jury to a first degree murder verdict, since there was only scant circumstantial evidence of premeditation.(See, Issue V, supra.) If the jury concluded that the homicide was not premeditated, it could have been mislead into a first degree murder verdict based on a felony murder theory. This distinguishes this case from the situation this Court discussed in Washington v. State, 432 So.2d at 47-48., where the erroneous giving of the felony murder instruction was deemed harmless because of the

overwhelming evidence of premeditation. The error was not harmless here, and this Court should reverse for a new trial.

ISSUE VII

THE TRIAL COURT ERRED IN ALLOWING STOKES' TRIAL COUNSEL TO WAIVE INSTRUCTIONS ON LESSER INCLUDED OFFENSES OF THE ROBBERY CHARGE WITHOUT STOKES' PERSONAL WAIVER OR RATIFICATION OF HIS LAWYER'S ACTIONS.

During the jury instruction charge conference, held in chambers, Jerry Stokes' lawyer waived instructions on any lesser offenses for the armed robbery charge. (R 929) The court never inquired of Stokes' wishes concerning lesser offenses, and Stokes did not personally waive the instructions. (R 929) Counsel told the jury that there were no lesser offenses for the armed robbery (R 975), and the court's instructions omitted all references to lesser offenses for the robbery. (R 1034-1037, 1044)

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that a defendant in a death penalty case may waive jury instructions on necessarily included lesser offenses. However, the defendant must expressly and personally make the waiver.

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

Ibid, at 797. (emphasis deleted) Later, in Jones v. State, 484 So.2d 577 (Fla. 1986), this Court chose not to extend the personal waiver requirement to noncapital trials. Although the lesser offense instructions waived in this case were for the noncapital offense charged, the personal waiver requirement of

Harris is applicable. This was a capital offense prosecution, and the noncapital offense was an inseparable part. Stokes did not personally waive instructions on the lesser included offenses, and a new trial is required.

The decision in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) contributed significantly to the rationale behind Harris. In Beck, the United States Supreme Court held unconstitutional an Alabama statute which prohibited a trial court from instructing on lesser included offenses in a capital case. The Court reasoned that depriving a jury of the option to convict of an offense less than capital would inject an intolerable degree of uncertainty and unreliability into the fact finding process. Discussing Harris and Beck in Jones, this Court said,

> In the absence of a "third option" a conviction might signal a jury's belief that the defendant had committed some serious crime deserving of punishment, while an acquittal could reflect a hesitancy to impose the ultimate sanction of death. Such possibilities, the Court held, "introduce a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." 447 U.S. at 643, 100 S.Ct. at 2392.

484 So.2d at 579. The jury was deprived of this critical "third option" in this case as well. Since the robbery was the underlying felony for the felony murder theory of the prosecution, it was part of the capital charge.(R 1031-1032) A conviction on an offense less than the robbery would have eliminated the predicate felony for first degree felony murder. See, Sec. 782.04(1)(a)(2) Fla. Stat. Stat. (1985).

Consequently, the waiver of lesser included offenses for the underlying felony of a felony murder is no less important than the waiver of the lesser homicide offenses of second degree murder and manslaughter. The personal waiver requirement of Harris applies.

Even if the robbery was not the predicate offense for the felony murder, a personal waiver of lesser offenses should still be the standard. Noncapital charges tried with a capital charge acquire many of the procedural appurtenances of the capital case. The offenses are frequently charged via indictment. A twelve person jury decides guilt or innocence. Written jury instructions are used pursuant to Fla. R. Crim. P. 3.390(b). And, finally, this Court obtains appellate jurisdiction to review the judgments. In the interest of insuring uniform procedures in a capital trial, the required higher standards should be employed for all offenses which are being tried with the capital ones.

Jerry Stokes did not expressly and personally waive the jury instructions on the lesser included offenses of the robbery. Since that charge was an integral part of the capital trial, a personal waiver was necessary pursuant to Harris v. State. The trial court erred in not giving the instructions on the lesser offenses, and this Court must reverse this case for a new trial.

ISSUE VIII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO USE REFERENCES TO CRIMES STOKES ALLEGEDLY COMMITTED, WHICH HAD NOT RESULTED IN CONVICTION, TO IMPEACH A CHARACTER WITNESS WHO TESTIFIED DURING PENALTY PHASE.

Jerry Stokes' fiancee, Martha Ann LaGrant, testified in mitigation during the penalty phase of the trial. (R 1078) She said she met Stokes about four years earlier in Ohio and their relationship started as a good friendship. (R 1078) LaGrant further testified that Stokes had always been extremely kind to her, and she knew him to be a hard worker as a painter. (R 1079) On cross-examination, the prosecutor's questions proceeded as follows:

> Q. Did you know him when he was living in Augusta, Georgia, I guess about a year and a half ago?
>
> A. Yes.
>
> Q. Did you know that he had another girlfriend when he was living in Augusta?
>
> A. Yes.
>
> Q. Did you know that he shot his girlfriend?
>
> A. Yes.
>
> Q. Do you know that he is wanted in Augusta for escaping after committing that offense?
>
> A. Yes. He is wanted in Augusta. I don't know about the escaping.

(R **1080)**

Defense counsel objected to the prosecutor's use of alleged criminal conduct which had not resulted in a conviction. (R 1081) The prosecutor argued that hearsay was

admissible during penalty phase and said, "[W]e're playing under a different set of rules here." (R 1082) The court overruled the objection and refused to strike the testimony.(R 1082) In his closing argument to the jury, the prosecutor said,

> But we do know that he is a three-time convicted felon. We know that as a result of the testimony of his girlfriend. In addition to that, he has shot his former girlfriend and is still wanted in Augusta.

(R 1096)

After the State's closing argument, defense counsel moved for a mistrial because of the improper testimony and argument. (R 1100) In addition to contesting the admissibility of the testimony, he stated that the hearsay was factually incorrect. His investigation had revealed that Stokes had not shot his former girlfriend. The truth was that his girlfriend had shot him. (R 1100-1101) At that time, the prosecutor admitted that defense counsel may be correct and that he may have been confused. (R 1101) He also told the court that he had no objection to a curative instruction. (R 1101) The court told the jury to disregard any reference to the allegation that the defendant shot his girlfriend. (R 1101-1102) No effort was made to correct the factual error. (R 1101-1102)

Under the guise of impeachment, the State effectively introduced nonstatutory aggravating circumstances, which were factually erroneous, into the sentencing proceeding. The jury was left with the uncorrected belief that that Stokes had shot his former girlfriend. No amount of judicial instruction could

unring the sounding of that bell in the jury's ears. The prejudicial impact was too great. A mistrial was the only adequate remedy. Now, this Court must reverse for a new penalty proceeding with a new jury.

Robinson v. State, 487 So.2d 1040 (Fla. 1986) is on point. There, the State used two alleged crimes for which Robinson had not yet been charged or convicted to impeach the credibility of Robinson's character witness. Defense counsel objected on the ground that Robinson had not been convicted of the these offenses. This Court rejected the contention that such impeachment was proper in the penalty phase of a capital trial because the procedure allowed the State to introduce nonstatutory aggravating circumstances indirectly. Since there had been no conviction, the offenses were irrelevant to prove the statutory aggravating circumstance of a previous conviction for a violent felony. Sec. 921.141(5)(b) Fla. Stat. Noting the prejudicial impact, this Court said,

> Arguing that giving such information to the jury by attacking a witness's credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042. The prosecutor went too far in this case. He used the same impeachment method used in Robinson which created the same prejudicial impact. In fact, the prejudice

was even greater here than in Robinson because the allegation about other crimes were later admitted to be false.

The jury's receipt of this prejudicial, untrue allegation of criminal conduct tainted the sentencing proceeding. Stokes' death sentence based upon such a tainted jury's recommendation of death violates the Eighth and Fourteenth Amendments and cannot stand. Stokes urges this Court to reverse his sentence for a new sentencing proceeding with a new jury.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING STOKES TO DEATH ON THE BASIS OF TWO AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

In sentencing Stokes to death, the trial judge found two aggravating circumstances--the homicide occurred during the commission of a robbery, Sec. 921.141(5)(d) Fla. Stat.: and the homicide was cold, calculated and premeditated. Ibid, at (5)(i). Neither of these circumstances was proven beyond a reasonable doubt, and no valid aggravating circumstances exist. Stokes death sentence cannot stand since the threshold requirement of at least one aggravating circumstance has not been met. Sec. 921.141, Fla. Stat.; ~~see~~, e.g., McCray v. State, 416 So.2d 804, 807-808 (Fla. 1982); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979). State v. Dixon, 283 So.2d 1, 9 (Fla. 1973): Stokes' death sentence violates the Eighth and Fourteenth Amendments. This Court must vacate the death sentence and remand for imposition of life imprisonment.

A.

The Trial Court Erred In Finding That The Homicide Was Committed During A Robbery.

The State failed to prove the commission of a robbery. Stokes has argued that the evidence is insufficient and that his motion for judgment of acquittal should have been granted in Issue V of this brief. Those arguments are incorporated by reference here. The circumstantial evidence simply did not

prove the essential element of a taking of property from the victim. Since the burden of proof for an aggravating circumstance is the same as for a conviction, the trial court improperly found the commission of a robbery as an aggravating circumstance as well. Stokes sentence must be reversed.

B.

The Trial Court Erred In Finding That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

There was also insufficient evidence to prove the premeditation aggravating factor. The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). Concluding that this factor applied, the trial judge made the following findings:

> As to Aggravating Circumstance 5(i), the Court finds that the capital felony was a homicide and was committed in a cold calculated, and premeditated manner without any pretense of moral or legal

> justification. The evidence was undisputed at trial that the death weapon was in contact with the decedent's face (to the immediate left of her nose) at the time the fatal shot was fired. In addition, the murder weapon was a single-action revolver and required that the hammer be cocked before it could be fired. Given the gender and age difference of the Defendant and the decedent, one must conclude that the Defendant intended to shoot the victim when he cocked the pistol, and further intended to execute the victim by placing the gun barrel in contact with the victim's head. There was no evidence to even remotely suggest that the Defendant was justified in taking any type of defensive action during the robbery. To the contrary, it is obvious that the Defendant could have successfully committed the robbery without the use of any weapon. The victim was completely defenseless. Killing the victim was not necessary to effectuate the robbery. There was no rational explanation of the killing that even pretends to come close to moral justification.

(R 1415-1416)

Contrary to the trial court's assertions, this was not proven to be an execution murder. The trial court found facts which were not proven, drew improper inferences from the evidence and considered irrelevant factors. First, the evidence did not prove that the murder weapon was a single action pistol which had to be cocked before firing. The evidence proved that Stokes owned such a weapon, but nothing linked the pistol to the crime. An examination of the bullet removed from the victim revealed that the gun used was a .22 caliber with a right hand twist of the lands and grooves inside the barrel. (R 834) Almost every .22 caliber firearm in existence has those characteristics. (R 840) Consequently, merely proving that

Stokes possessed a .22 caliber pistol with those characteristics does not prove his pistol shot the victim. Second, the court's conclusion that Stokes intended to shoot when he cocked the pistol and intended to execute the victim when he placed the barrel in contact with her head are not based on any evidence. There is no evidence about the circumstances of the shooting. And, there are other reasonable inferences from the fact of a contact wound to the victim's face. He could have been threatening the victim during the course of the robbery without any intent to shoot. His pistol was subject to accidental discharge. (R 843-847) Consequently, an accidental shooting during the course of the robbery is an equally reasonable inference from the evidence. The fact that only one shot was fired also supports an accidental shooting inference. Third, the court concludes there was no evidence that Stokes had to take defensive action. Again, this inference is from a lack of evidence. It is possible that the victim did take some aggressive action while being threatened with the gun. A blow to the gun, a slight touch on the trigger or causing a startled reaction on the part of the one holding the gun could have caused the weapon to fire. (R **843-845)** Finally, the court notes that the killing was not necessary to effect the robbery. The fact that a murder was not necessary is simply an irrelevant consideration.

This Court has consistently rejected the premeditation aggravating circumstance in felony murder situations where no evidence of a prior plan to kill exists. E.g., Hill v. State,

515 So.2d 176 (Fla. 1987); Rogers v. State, 511 So.2d 526 (Fla. 1987). There is no evidence in this case about the motives or circumstances surrounding the shooting. Proof of a heightened form of premeditation cannot be inferred from the mere fact of a shooting death during a robbery. In other similar cases, this Court has disapproved the premeditation factor. For instance, in Thompson v. State, 456 So.2d 444 (Fla. 1984), the defendant shot a gas station attendant after being told there was no money on the premises. The trial court found the premeditation aggravating circumstance because the defendant murdered the intended robbery victim rather than merely fleeing. Rejecting the trial court's reasoning, this Court said,

> No evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape.

Ibid., at 446. In Maxwell v. State, 443 So.2d 967 (Fla. 1984), the premeditation factor was deemed inapplicable where the defendant shot his robbery victim when the victim verbally protested handing over his gold ring. The defendant in White v. State, 446 So.2d 1031 (Fla. 1984), shot two people and attempted to shoot two others during the robbery of a small store. One of the victims died from a bullet wound to the back of the head. This Court again held that the heightened form of premeditation necessary for the aggravating factor was not present. Ibid., at 1037. In Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant confessed to robbing a motel,

kidnapping the night auditor, driving him to a remote wooded area and shooting him. He said that he did not intend to kill and shot when the victim jumped at him. His crime did not qualify for the aggravating circumstance. Finally, in Jackson v. State, **498 So.2d 906** (Fla. **1986),** the defendant shot a store owner during a robbery when the owner grabbed the code-fendant. Finding no plan to kill, this Court disapproved the premeditation circumstance. Ibid., at 910-911.

The prosecution's best case falls into the category where the homicide occurred for some unknown reason. With a void in the evidence, however, proof beyond a reasonable doubt of a prior plan to kill and a heightened form of premeditation cannot be inferred. Stokes' death sentence, based on this nonexistent aggravating circumstance, is unconstitutionally imposed. This Court must reverse for imposition of a life sentence.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING STOKES TO DEATH BECAUSE THE SENTENCE IS DISPROPORTIONAL TO THE CRIME COMMITTED.

The State prosecuted this case as a premeditated murder during a robbery. As previously argued, the degree of premeditation and the existence of a robbery are in question. (See, Issues V and IX, supra.) However, under the best evidence available to the State, a death sentence is still inappropriate. A premeditated murder during the commission of another felony, without any additional aggravation, simply does not qualify for a death sentence when compared to similar cases. See, e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Stokes' death sentence violates the Eighth and Fourteenth Amendments and must be reversed.

This Court has consistently reversed death sentences imposed simply for murders committed during a robbery or burglary. Ibid. Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340. Jerry Stokes' offense is easily comparable to these cases. He allegedly shot a store owner one time during the commission of an armed robbery. Although the trial court found nothing in mitigation (R 1416), Stokes presented unrefuted evidence of his good relationships with family, friends and employers. (R 1072-1088) He had no history of violence. (R 1072-1088) In Caruthers, the defendant shot a store clerk three times during

an armed robbery. After disapproving the premeditation and avoiding arrest aggravating factors, this Court held that Caruthers, whose only prior offense was for stealing a bicycle, should not die. **465** So.2d at **499.** In Rembert, the defendant bludgeoned a store owner to death during a robbery. No other aggravating circumstances were present and no mitigating circumstances were found. His death sentence was reduced to life. 445 So.2d at **340.** In Proffitt, the defendant stabbed his victim as he awoke during the burglary of his residence. The trial court found the homicide was cold, calculated and premeditated in addition to being committed during the burglary. Proffitt had no significant criminal history. This Court reduced his sentence. 510 So.2d at **898.** In Richardson, the defendant beat his victim to death during a residential burglary. This Court approved four of the six aggravating circumstances found. Although the jury recommended life, no mitigating circumstances were found to exist. His sentence was reversed for imposition of life imprisonment. **437** So.2d at **1094-1095.** In Menendez v. State, **419** So.2d **312** (Fla. 1982), the defendant shot a store owner twice during a robbery. No other aggravating circumstances existed, and Menendez had no significant criminal history. This Court reversed his death sentence. Finally, in Holsworth v. State, No. **67,973** (Fla. Feb. **18,** 1988), the defendant stabbed two victims, killing one, during a burglary of a residence. Three aggravating circumstances were approved: (1) prior conviction for a violent felony, (2) homicide during a burglary and **(3)** heinous,

atrocious or cruel murder. No mitigating circumstances were found, but this Court concluded that jury could have based its life recommendation on evidence of drug usage and past history of nonviolence. Holsworth's death sentence was reduced to life. Like the defendants in each of these cases, Stokes also does not deserve to die for his offense.

Jerry Stokes death sentence is disproportional to his crime. He urges this Court to reverse his death sentence with directions to the trial court to impose a life sentence.

ISSUE XI

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH DIMINISHESTHE RESPONSIBILITY OF THE JURY'S ROLE IN THESENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> (An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See,Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), vacated for rehearing, 828 F.2d 1498 (11th Cir. 1987).

The trial court read a slightly modified standard penalty phase instructions to the jury. In part, those instructions stated:

> The final decision as to what punishment should be imposed rests solely with me as the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> * * * *
>
> As you have been told, the final decision as to what punishment should be imposed is my responsibility as the judge in this case.

(R 1070, 1112-1113)(emphasis added) The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely his responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Stokes realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, No. 68,477 (Fla. Feb. 18, 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence.

ISSUE XII

THE TRIAL COURT ERRED IN SENTENCING STOKES ON THE ROBBERY COUNT USING A CATEGORY ONE GUIDELINES SCORESHEET INSTEAD ONE FOR CATEGORY THREE.

Both the trial judge and the prosecutor expressed concern that the sentencing guidelines did not adequately cover capital murder. (R 1458-1470) They apparently did not realize that capital offenses are specifically exempt from the guidelines and cannot be scored. Sec. 921.001(4)(a) Fla. Stat.: Torres-Arboledo v. State, No. 66,354 (Fla. March 24, 1988). In an attempt to fashion a remedy for the perceived problem, the court, over objection, used a homicide scoresheet, Category One, to determine a sentencing range for the robbery. (R 1412, 1458-1470) The first degree murder was scored as a life felony primary offense at sentencing for 165 points. (R 1412) The robbery was scored as the additional offense at sentencing for 45 points. (R 1412) Prior record was scored at five points and victim injury at 21. (R 1412) The resulting sentencing range was 17 to 22 years (236 points). Had the court used the correct scoresheet for robbery, Category Three, the murder would not be scored. The robbery would be the primary offense at 82 points and prior record would be scored at 10 points. There would be no points scored for victim injury. Ivey v. State, 516 So.2d 336 (Fla. 1st DCA 1987) Stokes' sentencing range would be properly calculated at 3 1/2 to 4 1/2 years (92 points). Although the court could depart from this range on the basis of the murder, Hansbrough v.State, 509 So.2d 1081

(Fla. 1987), Stokes is entitled to have his sentence determined on a correctly calculated scoresheet and sentencing range. See, Uptagrafft v. State, 499 So.2d 33 (Fla. 1st DCA 1986). He asks this Court to reverse his robbery sentence for resentencing.

CONCLUSION

For the reasons and authorities presented in Issues I, 11, 111, IV, VI and VII, Jerry Stokes asks this Court to reverse this case for a new trial. On Issue V, he asks that his convictions be reversed with directions to discharge him. On Issues VIII, IX, X and XI, he asks that his death sentence be reversed and reduced to life imprisonment. Finally, on Issue XII, he asks this Court to reverse his robbery sentence for resentencing.

Respectfully Submitted,

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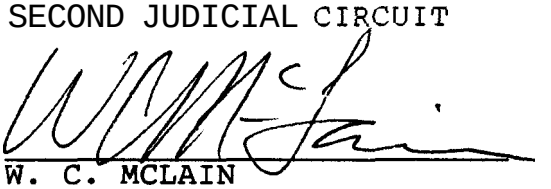
SECOND JUDICIAL CIRCUIT

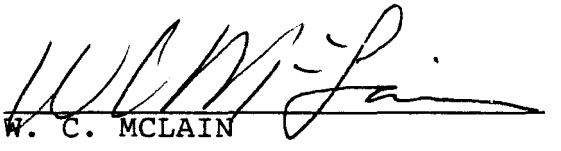


W. C. MCLAIN
ASSISTANT PUBLIC DEFENDER

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 7 day of April, 1988.



W. C. MCLAIN