IN THE

SUPREME COURT OF FLORIDA

DAVID YOUNG

Appellant,

v.

CASE NO: 72,106

STATE OF FLORIDA

Appellee,

_____/

INITIAL BRIEF OF APPELLANT

(On Appeal from the 15th Judicial Circuit
In and For Palm Beach County, Florida
Circuit Case No: 86-8682 CF)

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STATEMENT OF THE CASE

A Palm Beach County grand jury charged David Young by indictment with the first degree premeditated murder of Clarence John Bell while armed with a shotgun, burglary of a conveyance while armed, and possession of a short barrelled shotgun. The jury convicted Mr. Young of the burglary and possession as charged, and of first degree murder without specifying premeditated or felony murder. (R3871). After a Phase II trial, the jury recommended death, ten to two. (R4094).

Mr. Young timely filed his Notice of Appeal for his conviction of first degree murder, and burglary of a conveyance; this appeal follows.

STATEMENT OF THE FACTS

In the early morning hours of August 31, 1986, Appellant left his community of Riviera Beach, Florida and drove north approximately twelve miles to Jupiter, Florida. Young, who was twenty years old at the time, was accompanied by Jerry Saffold, Jerry Harris, and Tony Holmes, all juveniles. Appellant drove his car and carried with him a sawed off shotgun he had brought with him from his home. (R3343). As they drove, Young explained to his companions that the purpose of the shotgun was to shoot back at anyone who shot at him. (R3384). Harris had suggested "getting a car" after which Appellant drove to the Plantation Condominium parking lot in Jupiter. Harris and one juvenile exited and approached a car which Harris liked. They looked over

the car and returned and got Young. (R3424). This was established at trial by testimony of Saffold and Holmes. Each testified that the other approached the car with Harris while he remained in Young's car. Saffold denies seeing what occurred at the Trans-Am, but heard breaking noises. (R3355). Holmes states that Appellant stood by the Trans-Am while Harris entered and attempted to steal it. (R3425).

Holmes and Saffold both testify to hearing a white man come from the house. When the boys heard the man approach, they all returned to Appellant's car. They observed the man, Clarence John Bell carrying a revolver. (R3427). The man put his gun to the windshield and ordered Young from the car. When Appellant exited, Mr. Bell placed the gun to Appellant's head and ordered all the boys out of the car. He informed them if they failed to comply he would blow Appellant's head off. (R3043). Bell told the boys if he shot, he would shoot Appellant. (R3425). Saffold said he saw Appellant take the shotgun with him and place it by his side while he laid on the ground. (R2897). This was pursuant to Bells direct order. Bell had the boys on the ground a long time, calling them names and told them that if any one of you niggers run, I am going to shoot him (Appellant) in the head. (R3448). Both Holmes and Saffold testified at trial that Harris started to move and Bell shot in the ground toward Harris. The shot was approximately ten feet from Appellant's head. (R3433). Harris ran and Bell fired two more shots toward him. (R3434). Appellant fired once from the ground where he laid, striking Bell

(R3436). Bell pointed the gun at Appellant and ordered him around the car. Appellant walked around the car, ducking, and fired a second shot. Neither Saffold or Holmes testified at trial that they observed Appellant reload. Appellant, Holmes and Saffold fled in the car. Harris ran from the scene on foot. As Young drove away, he threw the shotgun from the car. (R3439).

Holmes stated he wanted to exit the car but Appellant refused to stop the car because he was afraid he would be caught and sent to prison. (R3440).

Holmes testified that sometime before the shooting began, he heard Appellant complain of chest pains to Bell. (R3492). During the chase Holmes said Appellant claimed that was in order to get Bell closer to Appellant to afford a better shot. (R3441). Bell did not move closer. (R3456). Bell fired his three shots after Appellant's statement that his chest hurt. (R3656).

Holmes stated that Young brought the shotgun in case they became involved in a fight with another gang. (R3460).

The State also presented testimony from Clarence John Bell's son, Michael, who was present during part of the confrontation. (R2278-2424).

Mike Bell stated his father woke him at 2:00am on August 31, 1986 stating that he should "come on, someone is trying to steal the car". (R2283). He followed him father out to the parking lot and to the Appellant's car. (R2292). No one was near Mr. Bell's car, Appellant and his friends were already inside Appellant's car. Mr. Bell approached Appellant's car and ordered Appellant

to put down his gun. (R2293). Mr. Bell had carried his gun out in his right hand, holding it behind his right leg. (R2294). Appellant asked to leave stating they thought the car was a friend's, Mr. Bell said no, they weren't going to steal his car. (R2296).

Mr. Bell forced Young out of the car and had him lay on his stomach. Mike Bell saw his father move around the driver's door and place his gun to Appellant's head and order the others out of the car or he would shoot Appellant. (R2299). After Mr. Bell got the others out and on the ground at the rear of the car, he told Mike to go in and call the police. (R2302). Mike Bell called and reported that they had caught someone tried to steal their car. (R2303). Mike grabbed a hammer and went back outside. His father than told him to turn on the car lights so they could see, and Mike went back in to get his keys. (R2304). Mike Bell testified that Appellant complained about his stomach, but his father ignored it. (R2307).

When Michael was returning he heard two or three shots, followed by clicking. Mike ran to his car door, but heard his father tell him to come there. He ran toward his father and heard another shot. (R2308). Although Michael had never heard a shotgun fired, he thought the clicking sounded like someone reloading a shotgun. (R2309). When questioned, Mike thought all the shots sounded the same, and he was unable to distinguish any as louder than any others. (R2310).

Mike Bell saw someone exit Appellant's car, play with the

battery cables, and drive off. He followed (R2312) until he turned the chase over to the police. (R2343).

Mike Bell viewed the Appellant's car at the police department. (R2350). Mike Bell indicated he saw a new pair of Nike high top tennis shoes (R2354) that they belonged to him (R2350) and had been in the Trans-Am prior to 2:00am, August 31, 1989. (R2355).

Detective Friedman testified for the State and presented a detailed diagram of the Appellant's car after the incident. The diagram showed the nature and location of all contents. No sneakers were on the diagram. (R2535) and no sneakers were listed in the return on the search warrant. (R2538-2541).

Holmes and Saffold both stated that it was Harris's intention to steal a fast car. No mention was made about stealing any articles from the car. The State avoided asking either Holmes or Saffold about the tennis shoes which were allegedly taken from John Bell's car and found in Appellant's car.

On cross examination, Mike Bell stated he never saw Appellant with a gun. (R2397). Mike saw his father place the gun approximately a foot from Appellant's head and threaten to shoot Appellant. (R2058). Bell also stated that before he had talked to anyone regarding his testimony, he had identified the clicking sound as an empty chamber in his father's gun (R2075-2076). Bell also said that there were four shots before the last, and that they all sounded the same. (R2419).

Detective Friedman was the crime scene investigator for the investigation. (R2427-2430). He recovered a 38 pistol from the ground near John Bell's body. (R2432). Friedman found shotgun pellets and five bullet fragments from the 38 pistol. Friedman recovered bolt cutters from Appellant's car, a screwdriver, pliers, and a live shotgun shell, but no tennis shoes. (R2462).

Although Saffold and Holmes maintained that Clarence John Bell shot first, the State attempted to establish through the testimony of several witnesses that the first and last shots sounded much louder and the middle three were quieter. Although no expert testified that they had tested the specific weapons for sound, several witnesses testified that the first and last louder shots sounded like shotgun blasts, while the middle shots were more like pistol fire. Trooper Brinker was the security guard on duty at the Condominium and heard the shots from approximately four hundred yards away. (R2794). Over objection, Brinker testified that based upon his experience with weapons, shotguns sounded louder then 38 pistols. (R2769). Further, he heard a loud blast (R2769) followed by two quieter shots and another loud blast. (R2774). Robert Melhorn lived next door to the Bells and heard a "loud boom" (R2816) which he considers "louder than a pistol." (R2818). He heard the loud shot from inside his patio, about ninety feet from the shooting. (R2831). Melhorn heard the blast followed by "at least two clicks, and a pop, then another loud boom. (R2831). These clicks could not be heard from four hundred yards. (R2834). Christopher Griffiths heard the

disturbance from his home approximately seventy yards from the parking lot. (R2623). He heard an "irrational" man threaten to use a 357 pistol to kill. (R2623). He heard these threats mixed with "motherfucker" and other expletives. (R2624). Griffiths testified he had handled shotguns and pistols before. (R2625). Griffiths heard five shots. A loud blast, three quick shots, and a second loud blast. (R2631). The first and fifth shots were perceptively louder, but not much louder. (R2632). Griffiths would not say the louder shots were from a shotgun, but only that the middle three sounded like pistol fire. (R2633). Dana Thomas heard shots from her upstairs window. She had first heard arguing for as long as twenty minutes. (R2968). Dana heard threats "if you move I'll blow your head off." (R2969). Dana had heard shotguns on at least one other occasions and they had sounded very loud. (R2972). She also said that she had fired pistols that had sounded like a cap gun. (R2974). She testified that the first sound was shotgun. (R2974). She saw a flash from the front of the car. (2975). The first was followed by three small flashes (R2979) followed by another loud shot. (R2982). On cross, Dana Thomas indicated that she observed the argument for ten to fifteen minutes, and that she heard Clarence John Bell state he had been watching the boys fool with the car for twenty minutes before that. (R3004).

Dr. Hobin, the medical examiner, testified that the cause of death of Clarence John Bell was a shotgun shot injury to the chest. (R2428) with a second serious, but not necessarily fatal

injury to the lower abdomen area. (R2895-2910). Dr. Hobin gave a probable distance of ten to fourteen feet (R2925) as the range from which the fatal shot was fired. Hobin also testified to a gun shot tatoo injury to the left side of Bell's face. This injury is an injury caused by grains of unexploded gunpowder striking the face. (R2929). The injury is produced by gunpowder coming from the back of a revolver. (R2930). Dr. Hobin reasoned that this evidence indicated to him that the revolver was fired at least once from a position of two inches from Bell's face. (R2934). Dr. Hobin speculated that this indicated that Bell was down and wounded when he fired. (R2936-2937). This testimony was accepted over objection although it was not given within a reasonable degree of medical certainty. (R2938).

The issue of who fired first is relative to the Appellant's efforts to show he fired in self-defense; that having heard a shot fired at Harris that Appellant reasonably believed John Bell was going to make good his threat and blow Appellant's head off. Evidence of the sequence of shots was available from a 911 tape of Griffiths phone call to the police. (R2697). The State and Defense agreed to have the FBI perform an enhancement and analysis of the tape to discover which weapon was fired first. The defense counsel and the prosecutor heard the tape. As the tape was being reviewed prior to the FBI's testing, the track containing the recording of the shots had been erased. Based upon this fact, the defense asked for and filed a Motion in Limine to exclude the tape. (R4322-4327). During the hearing on

the motion, Carlos Vasquez was qualified as an expert in the installation, maintenance, and design of the Dictaphone 4000, the model used in Jupiter Police Department on August 31, 1986. (R169-170, 172). Vasquez offered unrebutted testimony that the erasure could not have been by accident. (R181, 189). The court found no bad faith in the erasure, loss or destruction of the original tape. (R219-220). The court granted the Motion in Limine refusing to admit a copy of tape which could not be tested. (R248). In doing so, the court noted that had the State intentionally lost or deprived the Defendant of this evidence, the charge should be dismissed because the intentional destruction of the evidence constituted a deprivation of the client's right to a fair trial.

Appellant filed a Motion to Dismiss Count I of the Indictment, On October 25, 1987 (R4428-4430). The court denied this motion. On August 31, 1986, the Appellant was first questioned at Riviera Beach Police Headquarters. He was questioned by Detective Murray of the Palm Beach County Sheriff's Office. Detective Martin of Jupiter Police was also present. Defendant was Mirandacized, and did not to give any incriminating statements. This statement was not recorded.

Detective Murray had the Appellant accompany him to the Palm Beach County Sheriff's Office under the pretext of identifying his car. Once there he Mirandacized Appellant who essentially gave the same story as before. This statement was taped. After sometime, there is a break in the tape. After the hiatus of the

tape, Detective Murray returns to the tape and indicates that the Investigators have obtained conflicting stories from Harris and Saffold. This information was immediately followed by Murray's reference to the phone call which he was going to make to the State Attorney's Office and how important Appellant's cooperation was.

At this point, Appellant made incriminating statements including the facts that he had lied on the first statement and that he had actually fired the fatal shots. After the statement, Appellant was booked on charges of second degree murder and bond was set in the amount of $10,000.00.

The Appellant filed a Motion to Suppress alleging that during the hiatus in the tape Appellant had been promised by Murray and Martin that if he truthfully testified that he would be charged with second degree murder and that bond would be set. His mother, who was present at the Sheriffs Department also said she heard these statements. Both Officers denied on direct examination that these statements were made. On cross-examination, Detective Murray admitted that these matters were discussed in some fashion during the hiatus. Although Judge Cohen was concerned about these statements and "suspicious" that the charge actually filed was second degree murder and "suspicious" that given the circumstances, bond was set, he ruled the statement admissable and voluntary.

The State chose not to introduce the statement directly into evidence. However, they called Detective Murray to establish the

fact that Defendant admitted lying in the first statement, and that he actually admitted firing the fatal shots.

SUMMARY OF THE ARGUMENT

I.

GUILT ARGUMENT

The evidence is insufficient to support the convictions of first degree premeditated murder, and burglary of a conveyance. The evidence at trial showed clearly that Clarence John Bell was shot by the Appellant after one of Appellant's juvenile companions had bungled an attempt to steal Mr. Bell's car.

The Appellant did not know the victim. Appellant was not hired to execute the victim. Appellant had no plan to kill anyone. Mr. Bell was killed merely because of his overzealous efforts to restrain the Appellant from leaving the scene of Harris's attempted auto theft.

Appellant is not guilty of the underlying felony, burglary of a conveyance for the following reasons.

1. The evidence indicates that the attempted auto theft was committed by the juvenile, Harris. Young was a mere onlooker, and did not actively assist or participate in Harris's attempt to steal the car.

2. The evidence indicates that neither the Appellant nor Harris had any other motive in approaching the car other than to steal it. There was no proof which could withstand examination, that anyone wanted to burglarize the car. The State's technical argument that anyone who attempts to commit the third degree felony of auto theft, must necessarily commit burglary of a conveyance is an effort to extend the felony-murder rule where

the legislature did not intend. Much testimony, time and consideration was given to the State's efforts to prove that the object of the burglary was a pair of sneakers. The burglary of the sneakers was never charged until trial, and was not supported by the evidence.

Appellant also contends that the intimidation, threats, and provocation of the victim, Clarence John Bell, constitutes a sufficient break in the chain of evidence brought about by the felony. As such, Bell's death was not a natural result of the underlying felony.

II.

PENALTY PHASE

A. Aggravated Circumstances

The sentencing order of the court inappropriately found two aggravating factors: "cold, calculated and premeditated manner without pretense" and "committed for the purpose of avoiding or preventing a lawful arrest." The only aggravating circumstances which can withstand any scrutiny is that the death was a result of and escape from the burglary of a conveyance. For the reasons outlined above, Appellant contends that he did not commit the underlying felony and denies that he was a principal.

B. Mitigating Circumstances

The court erred in failing to consider and weigh evidence that the victim's behavior was a provocation which gave rise to a "pretense of moral or legal justification." While the behavior

may not have justified a finding of not guilty based upon self-defense, the fear that his life was going to be unnecessarily taken would offer a pretense of legal justification.

C. The death penalty is disproportionate in this case. Lloyd v. State, 524 So.2d 396 (Fla. 1988) requires that the imposition of the death penalty on the record contained herein is proportionately incorrect because the only aggravating circumstance which the State proved is that the death resulted as a consequence of the Appellant's participation in the underlying felony of burglary of a conveyance. Appellant presented non-statutory mitigating evidence of: (a) the other participates were not charged; (b) Appellant was involved in church activities and gave evidence of redeeming qualities; (c) Appellant had shown an ability to conform to prison rules and regulations and could profit by rehabilitation efforts.

Young's death penalty has failed to meet the requirements of evenhanded, non-arbitrary application under Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The standard jury instructions are constitutionally infirm. The reporters are chalk full of cases recording the derelictions of attorneys in capital cases. Trial judges commit reversible error with astonishing regularity. The use of technical bars to appellate review has turned death penalty litigation into a maze of traps for the unweary.

ARGUMENT

I.

GUILT PHASE

A.

THE EVIDENCE AGAINST APPELLANT WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR PREMEDITATED FIRST DEGREE MURDER

Young was indicted and brought to trial for the crime of premeditated murder: "did unlawfully and from a premeditated design to effect the death of a human being, kill and murder Clarence John Bell, a human being by shooting the said Clarence John Bell with a shotgun..." (R4262).

The State abandoned any serious attempt of proving a premeditated design or plan to kill Clarence John Bell during voir-dire. In opening, the State again explained that they were proceeding under the felony murder rule. At closing, the State Attorney took great solace in the fact that the jury would get a single verdict form and they would not have to have an unanimous verdict; That "it could be any combination... some of you could think premeditated, so sign it. If the State has proved premeditated felony murder, sign the verdict form. It does not have to be unanimous as to Count II." (R3703).

The State presented its theory "over and over under felony murder that it does not matter who fired the gun first, it does not matter about any threats, you commit a burglary and during the commission of that burglary somebody dies while trying to

escape for the burglary of a car, that is felony murder, there is no self-defense, it does not matter who fired first, it does not matter what threats there are... that is the bottom line in this case." (R3717).

The State relied solely on the factors that:

1. The Appellant armed himself in preparation for a burglary and informed his companions that he was bringing the weapon in case "if anyone pulls a gun on me and does not shoot, I will shoot." Holmes, one of his companions stated that this was in case he became involved in a fight with another gang. (R3460).

2. The weapon was particularly lethal, a short barrelled shotgun.

3. He came out of the car with a sawed off shotgun and hid it from Clarence John Bell's view.

4. Appellant feigned stomach cramps in order to be allowed to role over. The State argued that this was in order to get a better shot. Michael Bell testified that Appellant did complaint about his stomach, but he also stated that his father ignored it and that the incident was several minutes before the shooting. (R2307).

Michael also testified that Clarence John Bell placed a gun a foot from Appellant's head and threatened to shoot Appellant. (R2058). Before any shots were fired, Mr. Griffith heard Mr. Bell act as an "irrational man" and threaten to use a 357 pistol to kill any of the "motherfuckers" who moved. (R2623-2624).

Based on the foregoing, the trial court erred in denying

Appellant's motion for judgement of acquittal as to premeditated murder.

The State failed to present the evidence necessary to support a conviction of Appellant for first degree premeditated murder:

1.

THERE WAS A TOTAL LACK OF PROOF OF ANY PREMEDITATED DESIGN OR PLAN TO KILL CLARENCE JOHN BELL

A premeditated design to effect the death of a human being is a "fully formed and conscious purpose to take human life." McCutchen v. State, 96 So.2d 152 (Fla. 1957). Therefore, by definition, the issue of premeditation involves an analysis of the state of mind of the killer, an inquiry into the reflection and intention. In any such inquiry, circumstantial evidence must be relied upon by the jury.

"Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as to enable the accused to be conscious of the nature of the deed he is about to commit and the probable results to flow from it in so far as the life of the victim is concerned. Larson v. State, 104 So.2d 352 (Fla. 1958) at 354.

Since the State relied solely on circumstantial evidence to

prove premeditation, that evidence must not only be consistent with guilt but inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629 (Fla. 1956). No matter how strongly the suggestion of guilt is established by circumstantial evidence, Young's, conviction cannot be sustained because that evidence is not inconsistent with the conclusions listed below. Due to the reasons listed above and illustrated by the points below, premeditation was not proved beyond a reasonable doubt and Young's conviction was in violation of the due process clause of the Federal Constitution. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

1. Gerald Harris suggested the trip to Jupiter in order to get a fast car (R3345). The particular car, and thus the victim, was unknown to all the parties.

2. Appellant had armed himself with the shotgun before he was informed of Harris desire to steal a car. (R2879). Harris picked Mr. Bell's Trans-Am as the fast car which he wanted. Appellant had no idea which car would be picked. (R3350).

3. Young did not initially approach Mr. Bell's car. (R3424).

4. Appellant did not take the shotgun with him to Mr. Bell's car. (R2882-2892); (R3413-3427).

5. After Appellant had abandoned the attempted car theft and returned to his car, he asked Mr. Bell for permission to leave, and Bell denied that permission and ordered him from the car. (R2296).

6. Bell forced Appellant from his car by gunpoint and told him "if anyone of you niggers run, I am going to kill him. I am going to shoot him in the head." (R3448).

7. Saffold did not run because he believed that Bell was going to shoot Appellant. (R3448).

8. Bell held Appellant and the others at gunpoint for as long as twenty minutes. (R2968). Bell threatened (R2623), cursed (R2624), and acted like an irrational man threatening to use his 357 (SIC). (R2623).

9. Juvenile Harris disobeyed Bell's command, ran, and Bell fired the first shot. (R3433).

10. Both State witnesses Saffold and Holmes testified that they believed Bell would have shot Young.

An application of the Jackson standard reveals that there are several reasonable hypothesis of innocence as to the issue of premeditation. The most convincing is that Appellant was an willing accomplice to Harris's desire to steal a car. It was completely fortuitous that Harris chose Bell's car. Appellant did not take his firearm with him when he approached Bell's car. Bell's bizarre and overzealous actions after his intervention constituted a significant break in the circumstances set in motion by Harris and the Appellant. Bell exceeded the bounds of reasonable force in protecting his property. Mr. Young was justified in believing Bell, that he would make good his promise to "blow his head off" if any nigger moved. When Harris moved and Bell shot, Young was justified in returning the fire. He was

acting in self defense.

The conclusion that Appellant Young formed any intent to kill Mr. Bell defies logic. It was mere circumstance that Harris choose Mr. Bell's car to steal. Appellant could not have anticipated that he would have been drawn into a fatal combat situation. The circumstantial evidence more reasonably support the premise that Young shot in order to prevent Bell from killing him.

2.

THE JURY DID NOT RETURN AN UNANIMOUS VERDICT OF GUILT TO PREMEDITATED MURDER

Young's defense attorney filed a Motion for Special Jury Verdict Form for First Degree Murder, i.e. first degree murder through premeditated design; and first degree murder arising during the commission of a burglary of a conveyance. The court denied this requested verdict form. (R4463). The verdict form could have been utilized by the jury to allow it to indicate whether the conviction for first degree murder was based upon a finding of premeditation of upon a felony murder theory.

Because this special verdict form was not utilized, the Appellant Court is unable to determine whether the jury convicted on the theory of premeditation or felony murder. This is in violation of Mills v. Maryland, 108 S.Ct. 1860 (1988). In capital cases the court has recognized an even greater degree of necessity that the verdict rest on proper grounds. See Beck v. Alabama, supra. Neither this court nor the trial court should be

entitled to make that determination for the jury. Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980). There was not a definite determination by the jury that Young committed premeditated murder. See United States v. Paysano, supra, and United States v. Frazer, supra.

WHEREFORE, Appellant prays that his conviction be reversed and the case be remanded for a new trial.

B.

THE EVIDENCE AGAINST APPELLANT WAS INSUFFICIENT TO SUPPORT A CONVICTION OF FELONY MURDER/BURGLARY OF A CONVEYANCE

There is a complete lack of evidence that the Appellant, David Young, intended to burglarize or steal Clarence John Bell's automobile. There is no physical evidence connecting David Young to the theft. There are no fingerprints. There are no witnesses to the attempted theft of Mr. Bell's car other then the uncharged participants. Michael Bell, the son of the deceased, was the only State's witness that was actually present in the parking lot. (R2292). When he followed his father out to the parking lot, Appellant and his companions were already inside Appellant's car. (R2293). Michael Bell was unable to identify the Appellant at trial.

Young did not originate the idea of stealing a fast car. The idea came from Gerald Harris. (R3350). Young did not initially approached Mr. Bell's car with Harris. (R3424). Saffold puts Young near the Trans-Am, but does not know if he offered Harris any assistance. (R3355). Holmes states that the Appellant did nothing to assist Harris take the Trans-Am, but remained outside of the automobile and merely watched Harris attempt to steal the car. (R3425). When Harris and Young heard Mr. Bell approach, they returned to the Appellant's automobile. (R3427).

The mere presence at the scene and knowledge of a companion's

intent to commit a crime is not sufficient to convict him of aiding and abetting a burglary. Evidence that one drives a robber to a scene of a crime is insufficient to sustain a conviction of aiding and abetting the crime of robbery. E.H. v. State, 452 So.2d 664 (Fla.App. 3 Dist. 1984).

The Defendant's conduct in driving the actual perpetrator to and from the scene of a shoplifting, even in combination with other questionable behavior after the fact, while suggestive of guilt, was held insufficient to exclude the reasonable hypothesis of innocence generated by the Defendant's explanation of his presence at the time and place of commission of the crime; and thus the circumstantial evidence failed to establish beyond a reasonable doubt that the Defendant had a specific intent to participate as an aider and abetter. Stuckey v. State, 414 So.2d 160 (1982). Appellant's knowledge that Harris intended to steal or burglarize the car and the fact that Young was present with Harris are insufficient to prove that Young aided and abetted in the attempted burglary. G.C. v. State, 407 So.2d 639 (1981).

There is absolutely no evidence that Gerald Harris or the Appellant, David Young, intended to burglarize Mr. Bell's automobile. Holmes and Saffold both testified that Harris's idea was to get a fast car. (R3424). Clarence John Bell told his son to accompany him because someone was trying to "steal the car." (R2283). Michael Bell testified to his father's statement that he was not going to let Harris and Appellant "steal his car." (R2296). Michael Bell called and reported an attempted

automobile theft. (R2303).

The State tried to prove the burglary charge by submitting testimony that Michael Bell had seen a new pair of high top tennis shoes in Appellant's car after the incident. (R2354). On cross-examination, Bell admitted that he did not examine the tennis shoes and that they merely looked like his tennis shoes. Bell had not reported the missing tennis shoes to the police or at his deposition. Detective Freedman inventoried the contents of Appellant's automobile and did not list the sneakers as being present in the automobile. (R2535, 2538-2541).

This evidence, at best, supports a charge of grand theft auto, a violation of F.S. 812.014(c)(4), a third degree felony. The State improperly presented a theory of felony-murder based upon burglary of a conveyance. The ultimate purpose of the felony-murder statute is to prevent the death of an innocent person likely to occur during commission of certain inherently dangerous and particulary grievous felonies. State v. William, 254 So.2d 548 (1971). The enumerated felonies include burglary but do not specifically include burglary of a conveyance. It is the Appellant's contention that the legislature did not intend to include grand theft auto as one of those inherently dangerous crimes. In this particular case, when Harris approached the automobile it was unoccupied. An attempt to steal an unoccupied automobile is no more inherently dangerous than any attempted theft of unguarded personal property. When the perpetrator of an auto theft knows that the car is unoccupied the theft of that

automobile is not inherently dangerous. These are the facts that present themselves to the court in this case.

Appellant also contents that Clarence John Bell was not killed as a direct result of the attempt to steal his automobile. Bell's behavior after he interrupted the attempted theft was so unusual that it constituted an end to the events put in motion by Harris and the Appellant.

When the boys heard Mr. Bell approach, they abandoned their attempt to steal the car and returned to the Appellant's automobile. (R3427). At that time, there is no evidence that Clarence John Bell's life was in danger, or that he needed to do anything further to prevent the imminent commission of the burglary. His mere presence in the parking lot successfully protected his property. In fact, Appellant begged Bell's permission to leave the area well before any shots were fired. (R2296). After Appellant had exited his automobile, Young was ordered to the ground by Mr. Bell, and Mr. Bell placed his weapon a foot from Appellant's head and threatened to shoot him. (R2058). Bell threatened to kill Appellant if anyone moved. (R3043). Bell kept Appellant on his stomach while threatening him and cursing him for a period of five to twenty minutes. Bell told the Appellant that he was holding the Appellant personally responsible for the other boys behavior and if "anyone of you niggers run, I am going to shoot you." (R3448).

At that point, Harris ran and Mr. Bell fired a shot toward Harris. (R3433). Both Saffold and Holmes testified that only

after Bell fired at Harris did the Appellant return the fire. (R3436).

Bell's death is a direct result of the excessive force he used in order to apprehend a fleeing thief. The deadly force which Mr. Bell exhibited toward Appellant was not necessary to protect Mr. Bell's life, and it was not necessary to protect his property. Mr. Bell's only interest was in apprehending the Appellant and his friends. Given the circumstance of Mr. Bell's "irrational" behavior, Mr. Bell's threats to shoot the Appellant, and evidence that he shot first, Appellant's slaying of Clarence John Bell was done in self-defense and not as a result of Harris's or Appellant's attempt to steal Bell's car.

There is insufficient evidence to prove that the Appellant aided Harris in his attempt to steal Mr. Bell's car. The attempted theft of an automobile does not constitute burglary as contemplated by the felony-murder statute, and Clarence John Bell's actions constituted an interruption to the natural consequences of the attempted theft. For these reasons, Appellant cannot be found guilty under the felony-murder theory. The case should be remanded for a new trial.

C.

TRIAL COURT ERRED IN FINDING DEFENDANT'S CONFESSION ADMISSABLE. STATEMENT WERE FRUIT OF THE ILLEGAL INDUCEMENTS AND WERE NOT VOLUNTARY

On October 26, 1987, Appellant filed a Motion to Suppress Defendant's Confessions, Admissions, and Statements. (R4426-4427). The Motion alleged that the statements were obtained from the Appellant in violation of the Appellant's privilege against self-incrimination and the Appellant's right to counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The statements were procured from the Appellant by the police officer's inducements; to wit, that Appellant would be charged with second degree murder and that bail would be set, and Appellant would be allowed to return home that evening. Thus, the statements were violation of the Appellant's right's guaranteed by Article I, Section 9 of the Constitution of Florida. The trial court erred in ruling the tape of these statements, Exhibit 40, admissable into evidence, and by allowing Detective Mark Murray to testify regarding admissions obtained in this statement. Although Exhibit 40 was never played to the jury, the court ruled it admissable after a proffer by the State. (R3200).

The first half of the statement contained Appellant's unwavering denial that he was the shooter (Supplemental Record 1-18). During the interview the Appellant told Murray that he

did not wish to be charged with first degree murder. Appellant was then told that his cooperation was very important and that Detective Murray would get "a hold of the State Attorney's Office in the next little bit..." it's not like we're going to stick you out there and forget you, we're going to know very shortly. (Supp. R. 20).

The tape was interrupted for approximately fifteen minutes after which Detective Murray returned to the taping of the interview with the Appellant. Appellant then was told of the contradictions between his earlier statements and those obtained from Harris and Saffold. This revelation was followed by Murray's statement as follows: "Now, you know, in order for us to help you out at all, we try - and you know, when we talk to the State Attorney's Office, we need your honesty, okay, so like I told you before, we need your honesty." (Supp. R. 21, emphasis added). Appellant then changed his statement and admitted firing the fatal shotgun shots. (Supp. R. 21-35).

During the hearing on the Motion to Suppress, Murray stated that he first interviewed Appellant at the Riviera Beach Police Station at 10:26. Appellant denied any involvement. (R3192, 3195). Appellant was questioned a second time at the Palm Beach County Sheriff's Office at 1:25. (R3196). Murray mirandaized Appellant again who continued to deny his involvement. Murray stated he made no inducements to Appellant. (R3198). It should be noted the Appellant was tricked by Detective Murray as to the purpose of Appellant's visit to the Sheriff's Office. Appellant

was told he was going only to identify his car. (R3208).

Appellant's mother arrived at the Sheriff's Office sometime before the taped interview. (R3212). Murray was questioned about conversations which took place during the break in the interviews and indicated that he had told the Appellant that his cooperation was important and that Murray would call the State Attorney's Office "in reference to the charges". (R3214). Murray also admits having a conversation with his supervisor regarding charging Appellant with second degree murder. (R3216). Murray explained his on-tape statement that "he wouldn't let him sit over there in jail and forget about him," by saying he meant only that he would charge him promptly. (R3219). Immediately after obtaining that incriminating statement, Murray charged the Appellant with second degree murder. (R3299). The grand jury later indicted for first degree murder.

Appellant's mother, Olivia Harris, testified that she was present in the room when Murray promised the Appellant that if he told the truth he would only be charged with second degree murder. (R3225). Later that day, Murray called Mrs. Young and informed her that her son had confessed and had in fact been charged with second degree murder. (R3235). During his cross examination, Detective Murray steadfastly denied that any promises had been made. (R3238-3239). However, Murray reluctantly admitted that immediately after the interview he told Young he would be charged with second degree murder. (R3241).

The Appellant took the stand during the proffer and said

that Murray had promised that he would only be charged with second degree murder and bond would be set if he changed his story. (R3253). It was only after these promises and representations that Appellant made the admissions. (R3254).

Detective Martin contradicts Detective Murray, and admits that Mrs. Young was present in the interview room during the break in the taped recorded segments. (R3278).

The totality of the circumstances indicate that promises and inducements were made to the Appellant in order to obtain these admissions. Mosley v. State, 12 Fla. Law Weekly 12-65, March 1987. The trial court recognized that after the break, the second part of the tape differed dramatically from the first and the Appellant incriminates himself and admitted firing the fatal shots. (R3295). Appellant's testimony was that he was utmost interested in a bondable offense and after the statement he obtained a bond. Murray himself alluded to his agreement in the tape when he confided in the Appellant his need for Appellant's cooperation and Murray's intention to call the State Attorney. This was in fact a promise of leniency. As Judge Cohen stated "it is very strange" Appellant was charged with second degree murder. That fact supports the conclusion that Murray's conversations concerning the call to the State Attorney's Office and the charging of second degree murder was a promise of leniency and the State "has got problems with admissability." (R2834).

In denying the Motion to Suppress, the court was ultimately

persuaded by the State's arguments that Appellant's admissions were prompted by his being confronted with the conflicting statement of Saffold and Harris. The trial court did not have the benefit of a transcribed copy of Harris's statements and no one pointed out to the court that Appellant was not told of specific discrepancies. Nor was the court told that when these problems were brought to Young's attention, Murray immediately stated his need for Appellants cooperation and Murray's agreement to talk to the State Attorney concerning the charges. (Supp. R. 22).

Officer Murray attempted to explain the fact that Appellant was only charged with second degree murder as a simply mis-communication between himself and his supervisor. This flimsy excuse is offset by Murray's reluctant testimony that he had communicated with the Appellant during the break and in some manner had discussed Murray's need for Appellant's cooperation and Murray's charging the crime as second degree murder. (R3499).

The trial court was troubled in ruling these admissions admissable and found it "somewhat suspicious" that Appellant was in fact charged with second degree murder and bond was set. (R3480).

As a result of this ruling, the jury learned from Detective Murray that Appellant gave two diametrically opposed statements and that Appellant admitted that he had lied in the previous statement and that he had fired the gun. (R3496). Appellant contends that the court erred in admitting this evidence, that is

was fruit of the poisonous tree as it was obtained as a result of promises and inducements as prohibited by this court in Murray, supra.

WHEREFORE, Appellant prays that his conviction be reversed and remanded for a new trial.

D.

COURT ERRED IN FINDING THE DESTRUCTION OF THE 911 TAPE ACCIDENTAL, AND FAILING TO DISCHARGE DEFENDANT FOR WILLFUL DESTRUCTION OF BRADY MATERIAL

Christopher Griffiths heard the disturbance from his home which was approximately seventy yards from where Mr. Bell had parked his Trans-Am. (R2623). He heard an irrational man threaten to use the 357 pistol to kill, mixed with threats and expletives. Mr. Griffiths called the police dispatcher at the Jupiter Police Department and as he spoke he heard the first of five shots. (R2628). The Jupiter Police Department recorded this 911 call on an eight track tape utilizing a Dictaphone 4000 recorder. Griffiths voice was not identified. The tape became important because it contained an audio recording of the gunshots as they actually occurred. The tape also contained a conversation between Griffiths and the dispatcher who identified the sounds as gunshots. The 911 tape was turned over to Detective Murray who copied it onto a cassette tape.

The State and the Defendant stipulated that the eight channel reel to reel tape would be sent to the FBI laboratories for non-destructive testing. The test would determine if in fact the sounds heard in the background were shots. The FBI had the capability to enhance the sounds and could actually identify which weapon was producing which sound. In effect, the FBI would be able to test the recording and submit evidence as to who

fired first, the Appellant or the victim.

The evening before the eight channel tape was forwarded to the FBI for investigation, Counsel for the Appellant and the State as well as Detective Murray met in order to personally hear the original tape. Upon playing the tape an exhaustive effort was made to locate the subject conversation and gunshots; the shots could not be located.

The tape was sent to the FBI, as agreed, but they too could not locate the alleged conversation or gunshots on the tape.

On August 13, 1987, Appellant filed a Motion in Limine requesting that the State be prohibited from introducing Detective Murray's "copy" of the subject telephone conversation and reports of gunfire and/or any opinions addressing whether or not the particular sound on the copy was from any particular firearm.

On October 2, 1987, the court granted an evidentiary hearing to consider Appellant's Motion in Limine. At that hearing Carlos Vasquez was accepted over the State's objections, as an expert witness in the maintenance and operation of a Dictaphone 4000 recording machine. (R172). Mr. Vasquez testified that the eight track tape could not be erased through negligence or oversight. (R181). It would be impossible to erase just one channel without erasing all eight channels. (R183). Mr. Vasquez stated that in his expert opinion that the cassette copy of an alleged phone conversation between the dispatcher and Mr. Griffiths could not have been obtained from the reel-to-reel tape

in evidence. (R184-185).

Judge Cohen granted the Appellant's Motion in Limine and instructed the State of Florida to refrain from making any mention or interrogation, directly or indirectly in any manner whatsoever, concerning the existence of "copy" of a taped phone conversation between the third person (Griffiths) and the dispatcher from the Jupiter Police Department which occurred on or about August 31, 1986 at approximately 2:00am. This would include but not necessarily be limited to any testimony or argument that the alleged gunshots were preserved on either the copy or the original eight channel reel-to-reel tape. (R4425).

The Court included Findings of Fact as follows:

A. That the particular segment of the eight channel reel-to-reel tape "Court Exhibit 3" then being used by the Jupiter Police Department during the time in question is no longer on the tape.

B. That the missing segment of the eight channel reel-to-reel tape was preserved on a cassette tape (Court Exhibit 1) now in custody of Detective Mark Murray of the Palm Beach County Sheriff's Office.

C. That the loss of the particular segment of the eight channel reel-to-reel tape was not through an intentional or deliberate act of any officer with the Palm Beach County Sheriff's Office and/or the Jupiter Police Department...

D. That the introduction of the copy of the subject portion of the eight channel reel-to-reel tape that was preserved on a

cassette tape (Court Exhibit 1) would, under the facts in this case, be unfair and improper. Section 90.953(3), Florida Statutes.

E. That the missing portion of the eight channel reel-to-reel tape that was preserved on a cassette tape (Court Exhibit 1) goes to a controlling issue as to Court I of the indictment, i.e., first degree murder through premeditated design. Section 90.954(4), Florida Statutes. (R4424-4425).

Appellant contends that the remedy afforded in suppressing the tape is insufficient in light of the finding of the court above. The testimony of Mr. Vasquez constitutes unrebutted evidence that the State substituted an eight track tape for the original in order to deny the Appellant the results of the test. (R168-204). The court's finding that the lose of the shots was unintentional is simply not supported by the record. Appellant has been denied his right of due process guaranteed by Article I, Section 9 of the United States Constitution as well as his right to produce witnesses who might relate favorable testimony on his behalf in order to properly confront at trial adverse witnesses as guaranteed by Article I, Section 16 of the Constitution of Florida. The Appellant argued throughout his trial that the victim used unnecessary force in the protection of his property. The facts actually show that the victim was trying to prevent the Appellant from leaving after Appellant's failed attempt to steal the victims car. It was clearly unnecessary for the victim to use deadly force to protect himself from harm, and the force was

not used in an effort to protect his property. The victim was simply trying to prevent Appellants departure.

The State's own witnesses, Saffold and Holmes, testified that the fatal shots were fired only after the victim threatened to blow the Appellant's head off if the Appellant and his friends did not do exactly what the victim told them. Both Saffold and Holmes testified that Harris ran, Mr. Bell fired, and the Appellant returned the fire.

The law is clear that the State's intentional or negligent suppression of material evidence favorable to the Defendant after defense requests for such evidence constitutes a denial of due process under our State and Federal Constitutions.

Barber v. State, 438 So.2d 976 (Fla.App. 3 Dist. 1983), 447 So.2d 885 (Fla. 1984); Marrero v. State, 428 So.2d 304 (Fla.App. 2 Dist. 1983) and State v. Newman, 367 So.2d 251 (Fla.App. 4 Dist. 1987).

It is indisputable that the State failed in their duty of preservation. The State has avoided disclosure of potentially favorable evidence of a central issue by destroying vital matter before the Defendant could test that matter. Budman v. State, 362 So.2d 1022 (Fla.App. 3 Dist. 1978). It is fundamentally unfair as well as a violation of Rule 3.220 to allow the State to negligently dispose of this critical taped evidence of who fired the first shot, and then to allow the State to present a series of lay witnesses who testimony can not be refuted by the Appellant. State v. Hill, 476 So.2d 845 (Fla.App. 4 Dist. 1985);

Stipp v. State, 371 So.2d 712 (Fla.App. 4 Dist. 1979), cert. denied, 383 So.2d 1203 (Fla. 1980). There should be no material distinction between the destruction of evidence by the State's affirmative action and by its failure to act when it had a ready means of preserving the evidence with a minimum of inconvenience.

The destruction of the tape was unnecessary and the State offered no explanation as to how the tape was destroyed. The damage to defense case is evident, Appellant was denied critical scientific evidence as to who fired the first shot. He was denied an opportunity to show that the interpretation of the State's witnesses as to who fired first was in error.

Michael Bell, who was the only State's witness present in the parking lot, was unable to tell which shot was fired first. Saffold and Harris both stated that Bell's fired his pistol first, but Griffiths, Thomas, Brinker, and Melhorn testified that the sound they heard indicated that the shotgun was fired first. Although the Appellant objected each time Griffiths, Thomas, Brinker or Melhorn attempted to testify that the shotgun was fired first, the objection was denied. Had the test been performed, the Appellant may have rebutted this evidence with scientific evidence. The State's failure to preserve the 911 tape for testing denied the Appellant this opportunity.

Therefore, the introduction of the testimony of Griffiths, Thomas, Brinker and Melhorn all violated the Appellant's due process rights of confrontation. State v. James, 404 So.2d 1181 (Fla.App. 2 Dist. 1981). Under Brady v. Maryland, 373 U.S. 83,

83 Supreme Court 1194, 10 L.2d 215 (1963), it is clearly unconstitutional for the State to have either intentionally or negligently destroyed critical evidence in its case against the Appellant and then to be allowed to introduce unrefutable testimony against the Appellant. It is wrong because it violates the fundamental right of due process constitutionally mandated in Florida and the United States as held in Johnson v. State, 249 So.2d 470 (Fla.App. 3 Dist. 1971) and affirmed in State v. Johnson, 280 So.2d 673 (Fla. 1973).

Adams v. State, 367 So.2d 635 (Fla.App. 2 Dist. 1979); Kelly v. State, 46 So.2d 578 (Fla. 1986); State v. Ridder, 448 So.2d 512 (Fla.App. 5 Dist. 1984) and Stipp v. State, 371 So.2d 712 (Fla.App. 4 Dist. 1979).

The State's actions denied the Appellant access to relevant and material evidence necessary for the preparation of his defense. Under United States v. Herndon, 536 F.2d 1027 (5th Cir. 1976), a three pronged test was offered concerning the due process issue as follows:

> "whether a Defendant has been deprived of the right of due process will depend upon (1) the materiality of the evidence, (2) the likelihood of mistaken interpretation of it by government witnesses or the jury, and (3) the reasons for its nonavailability to the defense."

In this case Judge Cohen stated in his order that the evidence was material and went to a controlling aspect of the case, the issue of who shot first. The likelihood of error by the witnesses in their "interpretation" of the sound of the shots

is obvious.

Michael Bell who was the only State's witness that was present in the parking lot was unable to tell which shot sounded louder, Saffold and Harris both stated that the pistol was fired first, but Griffiths, Thomas and Brinker testified that the sounds they heard indicated that the shotgun was fired first. Although the Defendant objected each time Griffiths, Thomas, Brinker or Melhorn attempted to testify that the shotgun was fired first based upon their experience with the sounds of shotgun, the objection was denied. This testimony was unrebuttable because of the State's failure to preserve the evidence.

The State made no attempt to explain what happen to the missing tape in contrast, the Appellant's attorney introduced Vasquez's unrebutted testimony that the State had lost the original tape and had attempted to substitute a second reel-to-reel tape.

WHEREFORE, the Appellant has demonstrated actual prejudice due to the eraser of the reel-to-reel tape. The Appellant was denied access to a controlling piece of evidence and was prevented from rebutting the witnesses called by the State. Based upon these violation of the Appellant's fundamental right of due process and the violation of the rights provided by Article 1, Section 16 of the Constitution of the State of Florida, Appellant prays that his conviction for first degree murder be reversed and remanded for trial.

E.

THE TRIAL COURT ERRED IN ALLOWING THE PROSECTION TO PURSUE A FELONY-MURDER THEORY AS THE INDICTMENT GAVE NO NOTICE OF SUCH A THEORY

The trial court unlawfully allowed the prosection to pursue a felony-murder theory, despite the fact that the indictment contains no notice of a felony-murder theory. The first notice that the State would seek a conviction based upon felony-murder was given during voir-dire on the first day of trial. Defense counsel strenuously objected. (R414). Defense counsel requested that the court limit the prosection to the charge of premeditated murder as brought in the indictment. No opportunity was presented to the defense counsel to investigate and brief the issue regarding the grand theft auto, the burglary of a conveyance under the felony murder theory. At this time the State Attorney advanced an argument which he maintained throughout the trial. "The information does not allege one or the other in the alternative." (R149). "We have a right in the alternative in the first question, that is premeditated or felony murder, we will explain it." (R417). At that time the defense counsel moved to "make the State elect at this juncture, make it state what theory they are going to travel under." The court denied the motion and allowed the State to advance the theory of felony-murder with each juror during voir-dire. (R417).

In closing the State improperly argued the felony murder theory and improperly explained to the jury that they did not have to return a unanimous verdict:

> "Before you, you have two types of first degree murder by we emphasized over and over, premeditated murder is... The facts in this case, the judge will instruct you on two types of law, in first degree murder, and premeditated first degree felony murder is what is before you when you go back to deliberate, there is only one verdict form for first degree murder, no one that says premeditated first degree and one that says felony murder first degree. You see, there is only one form. See what that enables you to do? Six of you could think in terms of how we have proven this case, if you want premeditated, let's say the back row, six of you, the front row could think in felony murder. The bottom line is, you all are agreed that the Defendant is guilty of first degree murder, so you sign the form. It could be any combination. Two people could think felony murder, ten could think premeditated... It does not have to be unanimous as to Count I, it does not have to be twelve to zero that it is premeditated, it does not have to be twelve to zero that it is felony murder." (R3702-3704).

The jury was ultimately instructed on felony murder. (R4471).

"It is well settled that the Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution and Article 1, Sections 2, 9, 16, and 17 of the Florida Constitution require an indictment or information to state all elements of the offense charged with sufficient clarity to apprise the Defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-769 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3rd Cir. 1987); United States v. Thomas, 444 F.2d 919 (D.C. Cir. 1971); Gray v. Raines, 662

F.2d 569, 570-572 (9th Cir. 1981); Givens v. Housewright, 786 F.2d 1380-1381 (9th Cir. 1986).

Givens, directly controls this situation. In Givens the information charged willful murder, a form of first degree murder, in Nevada. Id. at 1380. This is analogous to our premeditated murder. The jury was also instructed on murder by torture. This is analogous to our felony-murder. It is another form of first degree murder in Nevada. Like felony murder in Florida, murder by torture does not require the State of Nevada to prove an intent to kill.

The Ninth Circuit Court of Appeals held that it was a Sixth Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture as a theory of first degree murder.

The indictment urged willful murder. The court reached this result even though the information listed a statutory subsection which included both willful murder and murder by torture.

The indictment in the present case (R4262-4263) contains the same defect condemned in Givens, supra. It alleges that:

COUNT I

> DAVID YOUNG, on the 31st day of August, 1986, did unlawfully from a premeditated design to effect the death of a human being, kill and murder CLARENCE JOHN BELL, a human being by shooting the said CLARENCE JOHN BELL with a shotgun and in the commission of said offense did use and have in his possession a deadly weapon, to-wit: a shotgun, said shotgun being a firearm as defined in Florida Statute 790.001(6), contrary to Florida Statutes 782.04(1)(a) and 775.087(2)

COUNT II

The Grand Jurors of the State of Florida, inquiring in and for the body of said County of Palm Beach, upon their oaths do present that DAVID YOUNG on or about the 31st day of August, 1986 in Palm Beach County, Florida, unlawfully and without consent did then and there enter or remain in a conveyance, to-wit: a motor vehicle, the property of CLARENCE JOHN BELL, with intent then and there to commit an offense therein, to-wit: Theft, and in the course of committing said burglary was armed, or did arm himself within said conveyance with a dangerous weapon, to-wit: a shotgun, contrary to Florida Statute 810.02(2)(b),

COUNT III

The Grand Jurors of the State of Florida, inquiring in and for the body of said County of Palm Beach, upon their oaths do present that DAVID YOUNG on or about the 31st day of August, 1986 in Palm Beach County, Florida, did unlawfully have in his care, custody, possession or control a short barrelled shotgun which was or may readily have been made operable, contrary to Florida Statute 790.221,

Thus, the indictment only alleged premeditated murder and failed to allege felony murder.

The Appellant urges the Supreme Court to reject its reasoning reached in Knight v. State, 338 So.2d 201 (Fla. 1976), wherein the court rejected a similar claim. It should be noted that Knight was decided ten years before Givens. The holding of Givens should be controlling. This is especially true in a capital case involving the unique need for reliability under the Eighth Amendment and Article 1, Section 17 of the Florida Constitution.

F.

THE FIRST DEGREE MURDER CONVICTION URGED ON ALTERATIVE THEORIES MUST BE REVERSED.

The indictment of September 19, 1986, charged Mr. Young with the premeditated murder of Clarence John Bell was converted into alterative premeditated and felony murder theories of prosecution as permitted by this court's early decisions of Knight, supra, and Adams v. State, 341 So.2d 765 (Fla. 1967). The jury was told by the prosecutor during closing (R3702-3704) and by the judge when he instructed them (R3702-3704) that they could find Mr. Young guilty on Count I of first degree murder on either premeditated or felony murder theories. The jury returned a general verdict of guilty of first degree murder.

a. Because the evidence of the underlying felony burglary was insufficient, the first degree murder conviction is unlawful.

The fall of the burglary conviction, addressed above, necessarily results in the fall of the first degree murder conviction as well. "With respect to findings of guilt on criminal charges, the court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." Mills v. Maryland, 108 S.Ct. 1860 (1988). In capital cases, the court has required an even greater

degree of certainty that the verdict rests on proper grounds, even where the error occurs at the guilt phase of the proceeding. Beck v. Alabama, 447 U.S. 625 (1980). With the exception of Knight, and Adams, discussed above, Florida law follows the rule requiring reversal where evidence on one of two included charges is insufficient. In Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980), two separate crimes were alleged in a single count. A general verdict of guilt was returned, but the reviewing court found the evidence on one of charges insufficient. The First District reversed:

> Since it is impossible to determine whether the jury found Appellant guilty of the charge on which the evidence was sufficient or guilty of the charge on which the evidence was insufficient, this point also requires a new trial. Neither this court nor the trial court is privileged to make this determination for the jury. Id. at 1303.

Where there is an improper instruction it is error for the reviewing court to examine the record to determine whether the evidence of premeditation is sufficient. "The proper approach is to examine only the trial court's instructions and the jury's verdict and the sufficiency of the evidence to support the verdict." Adams v. Wainwright, 764 F.2d 1356, 1362 (11th Cir. 1985). Here, the judge's instructions and the prosecutor's elegant explanation directed that the jury could find Mr. Young guilty of first degree murder on the burglary-murder theory. The jury's verdict is simply a general finding of guilt on first degree murder as it was directed by the State Attorney. Under these circumstances, this court cannot be "certain" on which

theory the verdict rested, and the first degree murder conviction must be reversed.

b. The absence of a unanimous jury finding of guilt on any one theory requires the verdict be set aside.

The jury was instructed its finding of guilt must be unanimous, it was never required to unanimously agree on precisely what Mr. Young was guilty of: premeditated murder or felony murder based on burglary. The simple instruction requiring jury unanimity on the "verdict" misses the constitutional mark where the jury is instructed on two theories and its verdict is a general one. In such cases, as here, the jury was not required to find the Defendant guilty of a single, cognizable incident or "conceptual grouping" See United States v. Acosta, 7148 F.2d 577 (11th Cir. 1984); United States v. Gipson, 533 F.2d 453 (5th Cir. 1977). As the United States Supreme Court explain in Scarborough v. United States, 522 A.22 869 (D.C. Ct.App. 1987).

> The unanimity issue under a single count of an information or indictment does not turn only on whether separate criminal acts occurred at separate times (although in some cases it may); it turns, more fundamentally, on whether each act alleged under a single count was a separately cognizable incident... by reference to separate allegations and/or to separate defenses...whenever it occurred.

In this case, some jurors may have found Mr. Young guilty of premeditated murder. Some may have doubts he committed the murder through any premeditation, but thought that he was there

and become embroiled in the conflict during his flight from the burglary, concluding he was guilty of burglary-murder.

The different allegations and defenses attributable to each, are not amenable to a single "conceptual grouping." The allegations and defenses attributable to premeditated murder are far different then those attributable to the murder occurring during an attempted burglary. The burglary had been completed, and the Appellant had been held at gunpoint by the victim for at least ten minutes. The victims actions during this period constituted a significant change in the circumstances mandating that the two charges not be charged as one. A separate unanimity instruction was unquestionably required, the conviction must be reversed. United States v. Paysano, 782 F.2d 832 (9th Cir. 1986); United States v. Frazier, 780 F.2d 1461 (9th Cir. 1986).

It was error for the court to deny Appellant separate verdict form for first degree murder, i.e., first degree murder and first degree murder arising during the commission of a burglary of a conveyance. (R4463).

c. The first degree murder conviction violates due process and Florida law where the underlying felony used to transfer intent, if it occurred at all, happened well before the killing.

Florida has long followed the felony-murder rule permitting the jury to impute intent to kill from intent to commit an underlying felony. Adams v. State, 341 So.2d 765 (Fla. 1977):

> In its most basic form, the historic felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device. Id. at 767-767.

Burglary-murder was the alternative theory argued by the prosecutor. (R3702-3704), and instructed by the judge. We have briefed the evidence which unquestionably shows that the attempt to take Mr. Bell's car was at a place and time removed from the killing. Under the circumstances of this case, where Mr. Bell had held the Appellant a prisoner for a manner of twenty minutes, it is improper to transfer the intent from the attempted burglary. To due so violates due process and Florida law.

The court has concluded there are constraints on the application of the felony murder rule. In Bryant v. State, 412 So.2d 347 (Fla. 1982), the Appellant had been convicted of first degree murder. The evidence showed that Mr. Bryant had participated in the robbery, assisted in tying up the victim, placed him on a bed, and then left. His accomplice who stayed, sexually assaulted the victim. The victim ultimately died of asphyxiation, though apparently not from the cord which Mr. Bryant had used to tie him us. Trial counsel sought and was denied a instruction on independent act. This court reversed.

While finding Mr. Bryant could be found guilty of robbery and murder, the refusal to instruct the jury on independent act

unlawfully deprived him of arguing the defense theory that the was not legally responsible for the death of the victim. This court found the transferred intent theory of felony murder is "circumscribed," explaining:

> Since it is the commission of a homicide in conjunction with intent to commit the felony which supplants the requirement of premeditation for first degree murder, Fleming v. State, 374 So.2d 954 (Fla. 1979), there must be some causal connection between the homicide and the felony. Id. at 350.

The facts in Bryant are different, but the principle applies. The taking here was well before and unrelated to the killing, but the jury was told they could use burglary to find Mr. Young guilty of first degree murder. Bryant compels reversal.

II.

PENALTY PHASE

A.

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

1. Florida's vague application of its premeditated aggravation fails to guide the sentencer, limit the class of the death-eligible, or provide a rational basis for review of death sentences because the premeditation aggravation cannot be meaningfully and consistently distinguished from the premeditation element of first degree murder.

Florida law considers, as an aggravator circumstance to a capital felony:

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Fla. Stat. First degree murder is defined in part as:

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being...

782.04(1), Fla. Stat. This Court has repeatedly held that the premeditation which must be found for the aggravator to apply exceeds the premeditation required for first degree murder. See,

Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied 469 U.S. 1181 (1985). Premeditation under the murder statute is a fully formed, conscious purpose to kill which may be formed a moment before the act, but exists long enough "to permit reflection as to the nature of the act to be committed and the probable result of that act." Wilson v. State, 493 So.2d 1019 (Fla. 1986). Cases applying the cold, calculated, and premeditated aggravator cannot consistently and reasonably be distinguished from the premeditation of the first degree murder.

The common meaning of the aggravator does not require any different findings of fact beyond that found by the jury in convicting the Defendant of first degree premeditated murder. The statute on its face does not provide any obvious, objective guides to what murders are included within its reach. Assuming the phrase cold, calculated, and premeditated would be read altogether, it does not necessarily suggest a greater degree of premeditation than that involved in first degree murder. Premeditation for murder requires a purpose to kill with sufficient time to permit reflection of the act. Unless Florida requires some proof of actual reflection beyond the doing of the act and opportunity to reflect, premeditation for murder and the aggravator are identical insofar as any ascertainable evidence is concerned.

In Banda, supra, this court held that the lack of a pretense of justification constituted an element of the aggravator to be proven beyond a reasonable doubt by the State, and wrote:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of the homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Thus, the pretense of justification element simply becomes a rule of evidence for the premeditation element of the aggravator.

The pretense element has played little role in application of this aggravator: only three cases seriously consider its meaning since the aggravator was added to the Statute in 1979. See Banda, supra, Williamson v. State, 511 So.2d 289 (Fla. 1987), and Canedy v. State, 427 So.2d 723 (Fla. 1983). The definition and application of the premeditation element itself must be examined to see if the aggravator genuinely narrows the class of death-eligible or provides the sentencer any guidance in the penalty phase.

Heightened premeditation may be found in execution or contract murders. Bates v. State, 465 So.2d 490 (Fla. 1985); a particularly lengthy or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. Floyd v. State, 497 So.2d 1211 (Fla. 1986). However, this premeditation does not differ sufficiently from the premeditation for first degree murder. If the aggravtor as applied provides no principle to distinguish a particularly lengthy or substantial period of reflection, then this definition does not limit the aggravator any more than a conviction of premeditated murder does.

Although the court has recently announced it will require evidence of a careful plan or prearranged design to kill as a necessary element of the aggravator. Rogers v. State, 511 So.2d 526 (Fla. 1987), the court seemed to abandoned this position in Swaffold v. State, 533 So.2d 270 (Fla. 1988), the court abandoned the Rogers requirement of an actual plan or prearrangement. In Schafer v. State, 537 So.2d 988 (Fla. 1989), the court once again applied Rogers to find an absence of the aggravator. This "on again, off again approach to capital sentencing simply does not square with the Eighth Amendment.

Obviously this aggravator violates the narrowing requirement of the Eighth Amendment. No objective ascertainable narrowing of the class of death-eligible takes place as required by the Eighth Amendment under Zant v. Stephens, 462 U.S. 862 (1982). Since Florida also uses a felony murder aggravator which applies in cases such as the one under consideration, any first degree murder in Florida qualifies for a death sentence, making this error more egregious. The case of Lowenfield v. Phelps, 108 S.C.t 546 (1988) does not counsel a different result. In Lowenfild, Louisiana defined an aggravator which matched an element of the offense of first degree murder. The Supreme Court held that murder statute itself properly narrowed the class of murderers eligible for death. It held that the element/aggravator sufficiently narrowed the class of death eligible; it was irrelevant for Eighth Amendment purposes whether the narrowing was done in the guilt or penalty phase of the

trial. Id. at 555. However, the class eligible for death under the Florida Statute is much wider: any serious felony murderer or premeditated murderer might be executed. Because Florida's aggravating circumstances allows arbitrary imposition of the death penalty on a broad class, the statute violates the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

2. The facts and circumstances of this case fail to support finding of cold, calculated, and premeditated

The trial judge found the following four items of evidence persuasive in his conclusion that the murder was particularly premeditated and calculated:

1. Appellant carried with him a short barrelled shotgun which is a lethal weapon.

2. The Appellant had made a general statement that if "someone tried to shoot him, or pulled a weapon on him, he would use the shotgun."

3. The Appellant feigned stomach pains in order to gain access to the shotgun and an get clear shot at the victim.

4. The sentencing judge was convinced that the Appellant had fired first.

For the purposes of this argument, Appellant accepts the four items of evidence listed above with the exception that Appellant fired first. Appellant points out to the court that these are the same four grounds that the State argued as a basis for premeditation. The trial judge was particularly impressed by the medical examiner's testimony concerning the gunshot tattoo

injury to the left side of the victim's face. Dr. Hoben indicated in his testimony that this was evidence that the victim had been shot before he had received the injury to his face. Since this injury to his face was caused by grains of unexploded gunpowder striking his face from his gun, Dr. Hoben reasoned that Appellant had shot first. This was stated with no degree of medical certainty. (R2938). Dr. Hobin testified this evidence indicated that the revolver was fired at least once from the position of two inches from the victim's face. (R2934). This convinced Dr. Hobin that the victim was down on the ground when he fired. (R2936-2937). This evidence could equally support the scenario in which the victim fired first, Appellant returned the fire and wounded the victim. The victim fell, fired once more, and then was struck again by the Appellant's return fire. Whichever this court accepts, is it not critical to the analysis at hand.

The aggravating circumstance cold, calculated and premeditated manner without any pretense of moral or legal justification does not apply to the facts at hand. This factor "ordinarily applies in those murders which are characterized as execution or contract murder..." McCray v. State, 416 So.2d 804 (Fla. 1982). This killing was neither. It was at most, a bungled burglary resulting in the death of the victim. After years of gradual expansion of this aggravating factor, this court returned CCP to its "plain and ordinary meaning " and limited and redefined these circumstances to cases in which the prosection

presents strict proof that the Defendant "had a careful plan or prearranged design to kill" Rogers v. State, 511 So.2d 526 (Fla. 1987).

In that case Rogers armed himself with a .45 caliber semi-automatic handgun and drove from Orlando to St. Augustine in order to commit a robbery. When the robbery was interrupted by the cashiers difficulty in opening the cash register, Rogers told his accomplice to forget it and the two men ran out of the store, Rogers's Co-Defendant, McDermid, testified against Rogers at trial and said that as they left he had heard a voice say, "No, please don't". These words were followed by the sound of a shot, a short pause, and two more shots.

On the drive back to Orlando, Rogers allegedly told McDermid that the victim was playing hero and I shot the son of a bitch. The victim had been shot three times, once in the right shoulder and twice in the lower back. At trial, a pathologist testified that these shots to the lower back struck the victim while he was face-forward against a hard surface such as the pavement.

In finding that Rogers' actions were not cold, calculated and premeditated without any pretense of moral or legal justification, the Rogers court reasoned that the State had failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a calculated manner. Judge Barkett, writing for the court, stated that the statutory language must be construed by giving ordinary words their plain and ordinary meaning. Quoting Tatzel v. State, 356 So.2d 787 (Fla. 1987),

calculated is defined in Webster's Third International Dictionary at 315 (1981) "to plan to nature beforehand: think out... to design, prepare or adapt by forethought or careful plan." This court found an utter absence of any evidence that Rogers, in this case, had a careful plan or prearranged design to kill anyone during the robbery. The court found that the evidence of pre-arming with a lethal weapon and the fact that the victim was shot multiple times in the back did not support the heightened premeditation described in the statute, which must bear the indicia of calculation. Similarly, applied against the evidence in the instant case, there is no particular plan shown by the Appellant to shot anyone. The evidence merely shows that the Appellant carried a lethal shotgun to a scene when he was allegedly attempting to steal an automobile. It is evident from Rogers the arming of oneself to prepare for a robbery or burglary and the subsequent killing of the victim is not enough to justify the finding of the aggravated circumstance, committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Similarly, Young's comments that he faked the stomach pains can no more be used as evidence of premeditation then Rogers comments that he shot his victim for being a hero. Amoros v. State, 531 So.2d 1256 (Fla. 1988); Hamblen v. State, 527 So.2d 800 (Fla. 1988) and Perry v. State, 522 So.2d 817 (Fla. 1988).

This Honorable Court also refuses to find this particular aggravating circumstance present in the case of Lloyd. In that

case, the victim was a twenty-eight year old woman who was murdered in her home. Lloyd who was apparently unknown to the woman entered her home at 12:00 noon and shot the victim twice. There is some evidence that the murder was a contract murder which was apparently being masked as a robbery. The court found that although there was sufficient evidence of premeditation, there was an insufficient show of heightened premeditation, calculation or planning that must be established to support a finding that the murder rose to the standards of this particular aggravating circumstances. Again, there was found to be no showing of a calculated plan or a prearranged design. That plan is also missing in Appellant's case.

Again in Amoros supra, the court failed to find evidence sufficient to support this aggravating circumstance. In that case, Amoros had been arguing with his former girlfriend, a woman named Simmonds, about her ownership of a new car and the identity of the person who had given it to her. Amoros made a specific threat to kill her. That next night, Simmonds went to the police station to report the threat and left her roommate inside her apartment As she left, Simmonds padlocked the back door at the roommate's request. Simmonds returned home to find her roommate dead and the police investigating the scene. Amoros had been seen entering the apartment and about two minutes later, neighbors heard gunshots which they immediately reported to the police.

An autopsy of that victim revealed three gunshot wounds, two

through the right arm and one to the chest. Medical evidence indicated that the victim was trying to escape through the padlocked back door.

Again, this Honorable Court refused to find in the record the necessary heightened premeditation, calculation, or planning required to establish the aggravating circumstance. Citing Rogers v. State, supra, Combs v. State, 403 So.2d 418 (Fla. 1981) and McCray v. State, 416 So.2d 804 (Fla. 1982). This was despite the fact that the evidence was clear that Amoros had made a specific threat to his former girlfriend. Still the court was swayed by the fact that Amoros did not know the victim and was unaware that the victim was residing with his former girlfriend at the time he entered the apartment. The court rejected the supposition that Amoros' threat to the girlfriend could be transferred to the victim in order to find the existence of this aggravating circumstance.

Applying the reasoning of Amoros to the case at hand it is obvious that there was no evidence of heightened premeditation. The Appellant did not know Clarence John Bell and had made no threats to anyone. In fact, the evidence indicated that he armed himself only in the eventuality that he was confronted by members of a rival gang. (R3460).

The definition of cold, calculated, and premeditated elaborated in Rogers was intended to insure the very significant distinction between premeditation and the heightened premeditation contemplated in Section 921.145(5)(i), Fla.Stat.

(1981). Failure to maintain this distinction would bring into question the constitutionality of that aggravating statute, and perhaps the constitutionality, as applied, of Florida Death Penalty Statute. Herring v. State, 446 So.2d 1049, 1058 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

In Eutzy v. State, 536 So.2d 11143, Judge Barkett considered the evidence against the Rogers standard and found that cold, calculated and premeditation in that case was based upon circumstantial evidence consisting entirely of the fact that Eutzy took the murder weapon from his sister-in-law in advance of the murder, and that the victim died of a single shot to the head at close range, evidence that there was no struggle, and evidence that there was no attempt of a robbery. Judge Barkett found that this dearth of evidence is equally as consistent with an impulsive shooting, or a failed robbery, or a gunshot fired during a verbal argument as it is with the "careful plan or prearranged design" required by Rogers. Justice Barkett's decision points out that the circumstances of the failed robbery do not meet the Rogers standard. This is certainly the case here. Appellant was interrupted while his friends and he tried to steal the victim's car. Appellant had removed himself from the victim's car and was attempting to flee. The victim not only attempted to detain Appellant, but threatened to kill him if his companions did not obey the victim. The death of the victim occurred as a result of this bungled car theft not as the result of a careful plan or prearranged design.

Even if this court does not accept the theory advanced that Appellant shot in self defense as a defense to murder, it certainly offers a pretense of moral or legal justification. Though the court may not accept it as proof of a legal defense, it is a colorable claim of moral or legal justification, that he was acting in self defense. Banda v. State, 536 So.2d 221 (Fla. 1988), the prosecution did not prove its absence beyond a reasonable doubt.

WHEREFORE, Appellant prays that the trial court's finding of the aggravating circumstance of cold, calculated and premeditated be reversed and held as erroneous, that the death sentence be reversed and remanded for a new sentencing hearing.

B.

THE COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE "COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY

In finding that this aggravating circumstance "committed for the purpose of avoiding or preventing an lawful arrest or affecting an escape from the custody the trial court wrote:

> "The uncontroverted evidence shows that the Appellant was interrupted in the commission of the aforementioned burglary by the victim and his son who attempted to keep the Appellant from fleeing while the police were summoned to the scene. The victim ordered his son to call 911 in order to get the police on the scene to make a lawful arrest. The Appellant killed the victim in order to escape and prevent the lawful arrest from occurring."

It is clearly not an appropriate factor upon which a death sentence may be based in this case. The sentencing court could not have found from the testimony that the victim knew and could identify the Appellant, but ability to identify is not sufficient to prove this aggravating factor. Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bates v. State, 465 So.2d 490 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985). This court has been careful to restrict the avoid arrest/effect escape aggravation to very specific scenarios, and this case is not one of them.

Unless the victim was a law enforcement officer, and John Bell undeniably was not, the State must present "clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), citing, Riley v. State, 366 So.2d 19 (Fla. 1978), and Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Accord, Scull v. State, 533 So.2d 1137, 1141-42 (Fla. 1988) ("proof of intent to avoid arrest or effectuate escape must be very strong in order to support this aggravating factor"). The record of this case suggests no such proof. The State's theories shift from a motive of premeditated killing to that of felony burglary. No "witness" to the killing was slayed, and in fact Bell's son was there to give an eyewitness account at trial. The evidence falls short of the clear proof requirements of Rogers. Here the true motive for the killing is unclear, the avoid arrest-effect escape finding was disallowed. See Garron v. State, 528 So.2d 353, 360 (Fla. 1988).

In considering these circumstance, the court failed to consider the fact that Appellant's life was at stake. He had been taken at gunpoint from his automobile and told to lay on the ground. The victim held the gun six inches from Appellant's head and ordered three other boys, all juveniles, from Appellant's auto. The victim was yelling expletives and screaming that if anyone ran that Appellant's head would be blown off. Both Saffold and Holmes testified that at this point Harris disregarded the victim's instructions and ran. The victim then

fired his gun into the ground. (R3433-3434). Clearly, Appellant feared for his life and this provided the dominant motivation in his shooting of the victim. The Appellant was drawn into armed conflict and killed to save his own life.

At trial, Appellant was convicted of first degree murder after the prosecutor had presented a case of felony murder, with the underlying felony being burglary, or an escape therefrom. In Phase II, the court then instructed the jury on the aggravating circumstance for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. The court erred in finding an aggravating circumstance which duplicates an essential element of first degree murder. Under these circumstances, the court failed to accomplish the mandate set out in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1982). Narrowing the class of persons eligible for the death penalty and to reasonably justify the imposition of a more severe sentence on the Defendant compared to others found guilty of murder. According, the death sentence was imposed contrary to the Eighth and Fourteenth Amendments.

The aggravating circumstance complained of herein must automatically apply to every case of felony murder based upon facts while the murder occurred as the Appellant was fleeing from the felony. This double-dip effect leaves the jury without sufficient standards and guidance to insure that the death penalty is not frequently, wantonly or arbitrarily imposed in violation of Furman, supra. Obviously this aggravating

circumstance merely repeats an essential element of felony murder and cannot perform its narrowing function. The aggravating circumstance "escape" cannot be a factor narrowing it from felony murder.

As the result of the way Florida has chosen to define first degree felony murder, those convicted thereunder are automatically sentenced to death without any additional evidence. Even if the Defendant presents mitigating evidence it must be weighed against the aggravating circumstance included in felony murder, i.e., flight from burglary. In any felony murder, the same felony which elevates the crime to murder by providing the intent is now used to effect a death sentence. This double enhancement has a ironic consequence in that one who commits a clearly planned and premeditated murder has no automatic death sentence but the Appellant who set out to steal an automobile and in his attempt to escape from that burglary kills someone enters the Phase II hearing with the presumption of death. Not only is the aggravating circumstances of the felony murder rule found to exist, but he is again penalized for his attempt to escape.

The evidence is unrebutted that the victims slaying occurred during the Appellant's flight from an attempted auto burglary or grand theft auto. The victim did not come on the scene until Appellant had left the victim's auto, entered his own car and attempted to drive away. If the court rejects Appellant's argument advanced above that the felony had been abandoned or that the Appellant had withdrawn from his efforts to commit the

burglary the finding of a separate aggravated circumstance "committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody" would be an impermissible doubling-up of an aggravating circumstances. Johnson v. State, 486 So.2d 657 (Fla.App. 4 Dist. 1986) and Clark v. State, 379 So.2d 97 (Fla. 1980).

WHEREFORE, Appellant requests that his death sentence be reversed and remanded for a new sentence hearing.

C.

THE TRIAL COURT ERRED BY RELYING ON THE PRE-SENTENCE INVESTIGATION REPORT

Prior to sentencing, the trial court ordered, received, and reviewed a pre-sentence investigation report. (R3881). Defense counsel objected to inaccuracies in the report, and objected to the court considering the pre-sentence investigation. (R4124-4135). The trial court nevertheless accepted the report and considered the same before writing the sentencing order.

Appellant argues that the use of the pre-sentence investigation report was improper on three grounds: first, it placed before the court matters outside the evidence; second, it contained statements regarding the impact on the victim and other matters irrelevant to a capital sentencing; and third, it set out non-statutory aggravating circumstances.

1. Matters Outside The Evidence. Although the pre-sentence investigation was not included in the record, defense counsel filed his Motion to Strike Portions of Pre-Sentence Investigation. (R4558-4560). The Motion to Strike was reviewed by the court in a hearing prior to sentencing. (R4125-4129). The areas complained about included a section captioned "present offense," "Defendant's statements," "victim impact," "prior record," "social economic status," "court official's statement and assessment and recommendation." Generally, the report seems to have been based entirely on matters outside the record, since the transcript had not even been ordered at the time of

sentencing.

Due process requires that a judgement be based solely on evidence properly before the court. It is a fundamental proposition that the prosection may not present to the fact finder any evidence outside the record. Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983), cert. denied. 104 S.Ct. 1427. The fact that the prosecution introduced these extra record matters through the pre-sentence investigation report rather then in open court does not improve the State's position. See Lee v. State, 501 So.2d 591 and Curry v. State, 513 So.2d 204 (Fla. 4th DCA 1987). The Confrontation Clause requires that the criminal defendant be afforded the opportunity to confront and cross-examine his accuser. Reliability in the fact finding aspect of sentencing is a cornerstone of Eighth Amendment analysis in death penalty cases. Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982), and the right to confront and cross-examine adverse witnesses applies to capital sentencing proceedings, at least where necessary to ensure the reliability of the witnesses' testimony. Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987).

The pre-sentence investigation was specifically used in the court's finding that the Defendant's age of twenty years old did not present a mitigating circumstance. The judge cited the prior adult record of burglary, grand theft, fraudulent use of a credit card and dealing in stolen property. (R4243).

The use of the pre-sentence investigation report based on extra-record evidence violated Appellant's rights under Article

I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It was fundamentally unfair for the State to present to the fact-finder the hearsay findings and recommendations of a probation officer.

2. Victim Impact Information. The pre-sentence investigation report also contains statements evaluating the "victim impact." The trial court indicated that it would not consider this information, it is still error for the trial court to receive the information when it may not be reviewed by the Appellant Court.

In Booth v. Maryland, 107 S.Ct. 2529 (1987), the jury condemned the Defendant to death after being read a victim impact statement prepared by a probation officer. The State Appeals Court affirmed. On review, the Supreme Court reversed the sentence, holding that use of the victim impact statement violated the Eighth Amendment. The court held that evidence of the emotional trauma suffered by the family and the personal characteristics of the victims were irrelevant and "could divert the jury's attention away from the Defendant's background and record, and the circumstances of the crime." Id. 2534. Some of the evidence presented to the trial court came from State Agents rather then the Bell family, Booth applies to statements by State Agents.

The trial court was the ultimate sentencer so information submitted to it before sentencing makes Booth applicable. See

Patterson v. State, 513 So.2d 1257 (Fla. 1987). The court recognizes that it had read the victim impact statement when it stated "victim impact, again, it is not the recommendation that counts it is the evaluation of the evidence under the aggravating and mitigating circumstances." Although the court appears to be indicating that it is going to ignore the victim impact statement, it was error for the court to receive such a statement before sentencing.

3. Non-Statutory Aggravating Circumstances. Consideration of evidence of a non-statutory aggravating circumstance is error subject to appellate review without regard to the contemporaneous objection rule because of the special scope of review used in death cases. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). Here this court held that the harmless error rule does not apply to the consideration of such evidence unless there are no mitigating circumstances.

The non-statutory aggravating evidence set out in the pre-sentence investigation report includes the juvenile and adult record of the Appellant as well as the Defendant's statements.

The court wrote in Elledge, it is necessary to guard against any unauthorized aggravating factor going into the equation which might tip the process in favor of death. Id at 1003. One cannot know how the non-statutory aggravating evidence effected the judge's weighing process.

WHEREFORE, Appellant prays that this case be remanded to the trial court for re-sentencing.

D.

APPELLANT'S DEATH SENTENCE IS INVALID DUE TO TRIAL COURT'S IMPROPER FAVORITISM OF PRO-DEATH JURORS AND IMPROPER EXCLUSION OF PROSPECTIVE JUROR'S WHO OPPOSED THE DEATH PENALTY: ALL IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY.

The trial court exhibited bias toward those jurors who opposed the death penalty and excused seventeen prospective jurors who stated the would try or could follow the law but had strong feelings against the death penalty Among the seventeen excused prospective jurors were:

Juror #377, Kathleen M. Murray, who was excused although she stated she could follow the law regarding the death penalty in a situation where the State had proven pre-meditation. (R1580).

Juror #388, Betty Rice, who was also excused despite her statement, "I have always felt that I believed in capital punishment... and ... it is probably possible that I could vote for the death penalty." (R947).

The court also erred in denying defense a chance to rehabilitate juror #303, Irene Anderson, who, when asked if she could follow the law stated, "I don't know." The State moved to strike the witness over defense's objection and the court excused the juror. (R1463-1465).

Juror #381, Wesley Olson, who stated that, although he had strong feelings against the death penalty, he "would follow the

judge's instructions." (R698).

In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985), the U.S. Supreme Court re-affirmed its prior decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980) as enunciating the proper standard for determining when a prospective juror may be excluded for cause because of his or her view on capital punishment.

> "That standard is whether the juror's views would substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" at 852.

The colloquy between the trial court, the prosecutor and the aforementioned witnesses was ambiguous and did not rise to the standard enunciated above.

Although jurors Murray, Rice and Olson originally stated opposition to the death penalty, they also testified that they could follow the law and recommend the death penalty if so instructed.

In Lockhart v. McGree, 476 U.S. 162, 106 S.Ct. 1758 (1986), Justice Rehinquist instructed:

> "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death sentence is unjust may never the less serve as juror in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in defense to the rule of law." Lockhart v. McGree, 476 U.S. 162, 106 S.Ct. 1758 (1986).

In a case where a juror had a strong feeling favoring the death penalty, the Judge allowed rehabilitation and refused to grant defense's objections to the juror, Harriet Wojick, #422. Mrs. Wojick stated, when asked about her feelings toward the death penalty, "I was glad to see them put it back." Mrs. Wojick was also the wife of a retired police officer and was employed by the Clerk of Court. Denial of the Defendant's Motion to Strike for Cause was error.

The trial court was inconsistent in applying the Wainwright/Adams rule by allowing pro-death jurors rehabilitation but in denying several jurors rehabilitation of their anti-death penalty stand by agreeing to honor this oath and follow the court's instructions. Accordingly, Appellant's sentence of death should be reversed.

E.

FLORIDA'S DEATH PENALTY STATUTE, SECTION 921.141 IS UNCONSTITUTIONAL AS APPLIED; JURY IS DEFACTO SENTENCER AND THEIR RECOMMENDATION IS UNREVIEWABLE

The Florida Death Penalty Statutory scheme as currently applied, is unconstitutional. While F.S. 921.141 was held to be constitutional on it's face in Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1960), the present procedure mandated by Tedder v. State, 322 So.2d 908 (Fla. 1975) whereby the trial judge (supposedly the ultimate sentencer) must give great weight to the jury's recommendation is not constitutional. This recommendation, in Appellant's case was made without any findings of fact upon which the death was recommended. The sentencer has nothing to weigh and the Appellant Court has nothing to review. This result is an arbitrary and capricious sentence of death in violation of the Eighth and Fourteenth Amendments, contrary to Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1976) and progeny.

In Profitt, the U.S. Supreme Court reasoned that since the trial court, who is by statute the ultimate sentencer, must set forth in writing its findings of fact upon which the death penalty is based and that these findings are subject to automatic review, the "rationally reviewable" mandate of Woodson v. North Carolina, 428 U.S. 303, 96 S.Ct. 2978 (1976) is met. Proffitt

concluded that F.S. 921.141, on its face, prevented the imposition of the death penalty upon the unbridled and unreviewable actions of a jury forbidden by Furman, supra.

Florida's death penalty statue had been so altered by the holding in Tedder v. State, supra, that the sentencing procedure no longer allows meaningful review. Tedder held:

> "The jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." ID at 910.

Tedder's rule has been applied to jury recommendations of death. See Stone v. State, 378 So.2d 765 (Fla. 1979); Grossman v. State, 525 So.2d 833 (Fla. 1988). The Tedder Court failed to explain why the jury recommendation was entitled to great weight. The court failed to consider the language of the Section 921.141(3) which provides "non-withstanding the recommendation of the majority of the jury, the Court, after weighing the aggravating and mitigating circumstances, shall enter a sentence..."

Tedder, supra is in obvious conflict with the statute and has been enforced by the Florida Supreme Court at the expense of the statute. These ruling have raised a legitimate question as to who is the ultimate sentencer under 921.141 as it is applied. Tedder's mandate that the jury's recommendation be given great weight has made the jury the "de facto" ultimate sentencer.

Accordingly, Furman would dictate that the jury's recommendation be based upon factual findings which could be "rationally reviewed" so as to safeguard against the arbitrary and capricious imposition of the death penalty.

Appellant realleges and readopts the arguments presented prior to Phase II trial in his motion to preclude sentencing pursuant to Section 775.082(1) Florida Statutes (R4507-4514) and the Motion for Entry for order pursuant to Section 921.141 Florida Statutes, imposing life sentence with mandatory minimum of twenty five years. (R4549). Both these motions were denied.

Appellant contends that the Tedder standard virtually forbids the sentencing judge from overriding a jury recommendation of death. At the least, the jury recommendation becomes an integral and vital determining factor in the Appellant's ultimate sentence of death. As such, the Appellant has a constitutional right to have the jury's findings of fact in making that recommendation reviewed. It renders the Supreme Court's review of the ultimate order of death little more than a guessing game. This trial court's order contains mere speculation as to what facts and conclusions were relied upon by the jury in reaching their recommendations. The reviewing court then is left to wonder at jury's reasoning and engage in its own speculation as illustrated by Porter v. State, 429 So.2d 293 (Fla. 1983) where a jury override was held proper because "a jury might well have been swayed" by defense counsel's vivid description of an execution by electrocution; Jacobs v. State,

396 So.2d 713 (Fla. 1981) in which a jury override was not proper because the jury may have considered Jacob's status of a mother, could have found her role passive and minor, may have felt that Jacobs perceived the actions as necessary; Thomas v. State, 456 So.2d 454 (Fla. 1984) where the court speculated as to what non-statutory mitigating factors the jury considered; and Francis v. State, 473 So.2d 674 (1985) where the judge's override was held to be proper because perhaps the jury recommendation of life was the result of the emotional closing argument of defense counsel. This speculation is of constitutional proportion.

The failure to provide a mechanism for determining the factual basis of the jury's recommendation is inconsistent with "the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson, supra, at 2991. The cases cited above indicate that Florida's capital sentencing structure produces the "level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980) and, as in Jacobs, above, it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." See Lockett v. Ohio, supra.

Furman mandated that "standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of the death penalty." The sentencing procedure produced by Fla. Stat. 921.141 after Tedder produces wanton jury discretion without objective standards to guide and

regularize the jury, or to make rationally reviewable the process employed by them in imposing a sentence of death contrary to Woodson, supra.

The jury should be required to articulate in writing their factual findings supporting their recommendation in order to eliminate the speculation and guessing now required in an effort to review death sentences. The Florida Supreme Court has recognized the crucial relationship between the jury's recommendation and the ultimate sentencer when it acknowledge the Defendant's right to have a jury properly instructed:

> "If the jury's recommendation upon which the judge must rely results from an unconstitutional procedure, then the entire sentencing process is tainted by that procedure" Riley v. Wainwright, 517 So.2d 656 (Fla. 1987). (emphasis added).

Appellant contends that because Florida's present procedure does not require the jury to make factual findings justifying its recommendation, and Tedder, supra, requires the judge to afford that recommendation "great weight," the reviewing court is unable to review any of the factors which actually led to the recommendations, and thus, the sentence. This lack of review renders Fla. Statute 921.141 unconstitutional as applied.

F.

PROPORTIONALITY

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). Its application is reserved solely for the "most aggravating, the most indefensible of crimes." State v. Dixon, 283 So.2d 1 (Fla. 1973). Substantive proportionality must be maintained in order to ensure that the death penalty is administered even-handedly. Substantive proportionality is also required by the Cruel and Unusual Punishment Clause.

The death penalty is disproportionate in this case due to a wide variety of factors. Primary to the consideration is the fact that Young killed Bell in his attempt to flee from an auto theft. Bell's death also was caused partially as a result of Bell's provocation of Young by his bizarre behavior and overaggressive hostility which occurred after Young's apprehension.

For the sake of this argument, Appellant will assume that this court accepts the State's position that the death did occur as a direct consequence of Young's attempted burglary of the car. Appellant has already illustrated to the court that the aggravating factors of "cold, calculated, and premeditated" and "avoiding or preventing a lawful arrest" do not apply. The trial court found three statutory mitigating factors. The three

juveniles who participated in the burglary were not charged with the homicide. (R4567-4568). The Appellant was involved in church activities. The court also found evidence that the Appellant could conform to prison rules and regulations as demonstrated by his conformity to the rules and regulations of the Palm Beach County Jail while Young was awaiting trial.

In addition to the three mitigating factors found by the court, there can be no doubt that the circumstances of the slaying indicate that the death was partially due to the "irrational acts" of Mr. Bell. While Mr. Bell's actions may not justify his slaying, they certainly contributed and provoked Young's action. Such circumstances may be considered as mitigating. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

The State has presented competent evidence of only one aggravating circumstance; is that the death was the result of Appellant's attempt to flee from auto burglary. Appellant has presented evidence of four mitigating factors.

A review of the Supreme Court decisions require that the imposition of the death penalty on this record is proportionality incorrect, and consequently, the death penalty must be vacated and a life sentence imposed. See Lloyd v. State, 524 So.2d 396 (Fla. 1988); Rembert v. State, 445 So.2d 337 (Fla. 1984); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Booker v. State, 441 So.2d 148 (Fla. 1983); Caruthers v. State, 465 So.2d 496 (Fla. 1985).

G.

UNCONSTITUTIONALITY OF THE FLORIDA DEATH PENALTY STATUTE

Our death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Our law has failed to meet these requirements and therefore violates the Eighth Amendment.

1. The Jury

The jury plays a crucial role in capital sentencing. Its penalty verdict is to be overridden only where no reasonable person could agree with it. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict. Pope v. State, 441 So.2d 1073 (Fla. 1984) forbids jury instructions limiting and defining the meaning of the "heinous, atrocious or cruel" aggravating factor under State v. Dixon, 283 So.2d 1 (Fla. 1973). This assures arbitrary application of this aggravating circumstance in violation of the dictates of Proffitt and Maynard v. Cartwright, 108 S.Ct. 1853 (1988). *1. The standard instruction regarding the knowing executed "great risk of death to many people" aggravating factor is similarly infirm. It simply tracks the

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*1 Through use of the contemporary objection rule, a procedural technicality, the State has thwarted Appellate review of the improper standard jury instruction of this point. Smalley v. State, 14 FLW 342 (Fla. July 6, 1989). This institutionalizes arbitrary application of the aggravating circumstance.

vague terms of the statutes. The vagueness of the statute, and hence its susceptibility to uneven application, is shown by the fact that this court has been unable to apply and construe it consistently.

The jury instruction respecting nonstatutory mitigating circumstances provides:

> Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> * * *
>
> 8. Any other aspect of the Defendant's character or record, or any other aspect of the offense.

Florida Standard Jury Instructions in Criminal Cases, West's Florida Criminal Laws and Rules (1989) 806 (emphasis supplied). A jury can reasonably take this to constitute but a single mitigating circumstance, even though the evidence may (and in this case did) support several distinct nonstatutory mitigating circumstances. A reasonable jury can also take this to mean that this circumstance allows only consideration of character traits other than mental illnesses or defects, and forbids consideration of mental or emotional disturbance or duress less than "extreme," and forbids consideration of impairment of the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law that is less than substantial. Similarly, a reasonable jury can take the instruction to mean that the instruction forbids consideration a history of prior criminal history which, while significant, is

not such as to mark the Defendant for death. Hence, reasonable jurors in some cases will take the instruction to allow consideration of a broad range of nonstatutory mitigating circumstances while others will take it to mean that broad classes of nonstatutory mitigating circumstances are off limits for consideration.

The jury instruction on the standard of proof as to mitigating evidence is improper. The standard instructions provide (and the jury at bar was instructed):

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

Florida Standard Jury Instructions in Criminal Cases, West's Florida Criminal Laws and Rules (1989) 806. The constitution requires consideration of all relevant evidence in capital sentencing. Jurek v. Texas, 428 U.S. 262, 271, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). But the instruction limits the jury's consideration to such evidence as is so reasonably convincing as to establish a mitigating circumstance. Further, the "reasonably convincing" standard itself violates the Eighth Amendment. The phrase "reasonably convinced" instructs the jury to disregard much of the evidence which the United States Supreme Court has recognized as vital for an individualized sentencing hearing. In defining a similar phrase, this court has noted:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered...The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitation, as to the truth of the allegation sought to be established.

State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). Much of the evidence in mitigating a capital crime consists of the life history of the Defendant. The witnesses who most often testify to these circumstances are usually family members or old friends of the family. Their testimony is always open to impeachment as biased. Instructing the sentencer not to consider such evidence unless "reasonably convinced" that the testimony of family members establishes "a mitigating circumstance" severely restricts the Defendant in presenting a case for life in violation of the Eighth Amendment and Article I, Section 17 of our Constitution.

Further, the jury is not informed of the great importance of its penalty verdict, that it is to be overridden only if no reasonable person could agree with it. Instead, in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) it is told that its verdict is just "advisory."

2. Counsel

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So.2d

998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance), Grossman v. State, 525 So.2d 833 (Fla. 1988) (no objection to victim impact information forbidden by Eighth Amendment), Smalley v. State, 14 FLW 342 (Fla. July 6, 1989) (no objection to jury instruction forbidden by Eighth Amendment), Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (counsel acted under actual conflict of interest in 1977 appeal, to Appellant's detriment), Rutherford v. State, 14 FLW 300 (Fla. June 15, 1989) (failure to object to improper evidence used to support aggravating factor), Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), (failure to develop and present mitigating evidence), Spaziano v. State, 14 FLW 302 (Fla. June 15, 1989) (failure to assert grounds in first motion for post-conviction relief), Alvord v. Dugger, 541 So.2d 598 (Fla. 1989) (failure to argue and present nonstatutory mitigating evidence in 1974 trial), Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (presuming that Appellate counsel will purposely fail to present arguable issues). Of course a complete list would fill a volume. The quality of counsel is so bad that this Court has excoriated Appellate capital attorneys as a class for failing to serve their clients by filing briefs containing "weaker arguments." Cave v. State, 476 So.2d 180, 183, n.1 (Fla. 1985) ("neither the interest of the client nor the judicial system are served by this trend"). *2

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*2 See also Rose v. Dugger, 508 So.2d 321, 325 (Fla. 1987) (Appellate counsel "has either not clearly read the record or has not accurately presented its contents to this court").

Notwithstanding this pathetic history, Florida law makes no provision for the appointment of adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

Notwithstanding this pathetic history, Florida law makes no provision for the appointment of adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is pretty much bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other hand, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 14 FLW 342 (Fla. July 6, 1989). This ambiguity and other problems minimize evenhanded application of the death penalty.

As an initial matter, trial court judges do not seem to be up to the demands of capital litigation. For instance, the first quarter of the fourteenth volume of Florida Law Week reports seven direct appeals from death sentence. In six of those seven cases, the court has been compelled to reverse by trial court errors, notwithstanding the strong appellate presumptions against reversal. And it is small wonder that our conscientious trial

judges are in trouble. Our capital punishment statute is couched in such vague terms as to constitute a maze set of traps for the unwary, and the courts are ill served by attorneys of doubtful competence or professionalism. See, e.g., Cave v. State, 476 So.2d 180, 183, n.1 (Fla. 1985), Rose v. Dugger, 508 So.2d 321, 325 (Fla. 1987), and Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984).

As already noted, the trial judge is largely bound by the jury's recommendation. The result is that the great likelihood of error built into the penalty verdict procedure (improper standard instructions and the lack of competent attorneys to challenge them) becomes a great likelihood of error by the judge bound by the jury. *3.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the trial court's role in deciding whether to override the penalty verdict. The trial court has no clue as to which circumstances the jury considered or how they applied them, and has no way of knowing whether the jury acquitted the Defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be

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*3 For example, if the trial court gives the vague standard instructions on "heinous, atrocious or cruel" and "cold, calculated, and premeditated," and defense counsel (as is typical) fails to object, there is a substantial likelihood of jury error in the application of these standards to situations to which they should not apply. Yet the trial judge is pretty much bound by a resulting improper death verdict.

improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate). Similarly, if the jury found the Defendant guilty of felony murder, and not of premeditated murder, then application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment under, e.g., Lowenfield v. Phelps, 108 S.C.t 546 (1988).

4. Appellate Review

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the Court upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review:

> The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. 921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to "(guarantee) that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a Defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

428 U.S. at 250-51.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstance is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975).

Id. 252-53.

> Finally, the Florida Statutes has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted Defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases. Nonetheless the Petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.

Id. 258-59.

Mr. Young respectfully submits that what was true in 1976 is no longer true today. History has shown that intractable ambiguities in our statute have prevented the sort of evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

Attempts at construing the vague statutory aggravating standards has led to contrary results as to the "cold, calculated

and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) aggravating circumstances, as well as "great danger to many people." Hence, these aggravating circumstances are unconstitutional because they do not narrow the class of death eligible persons, or channel the discretion of the sentencer. See, Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). Florida's aggravating circumstances mean pretty much what one wants them to mean. The statute itself is therefore unconstitutional. See, Herring v. State, 446 So.2d 1049 (Fla. 1984), (Ehrlich, J., dissenting). As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring, with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring). Compare also Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." CCP applied to the killing of a bailiff who came out of the courtroom while Defendant was trying to kill two police officers), with Amoros v. State, 531 So.2d 1256 (Fla. 1988) (CCP improperly applied to killing of women present when Defendant sought to kill his girlfriend). As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on the same facts). Compare also Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (focus is on "intent and method" of Defendant) with Pope v. State, 441 So.2d 1073, 1078 (Fla.

1984) ("nor is the Defendant's mind set ever at issue"). *4. Compare also Herzog v. State, 439 So.2d 1372 (Fla. 1983) (HAC rejected where victim semiconscious), with Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984), vacated 470 U.S. 1002, rev'd on other groungs 473 So.2d 204 (1985) (HAC applied where victim was unconscious). Compare Brown v. State, 526 So.2d 903 (Fla. 1988) (HAC rejected where victim police officer in agony begged his assailant not to kill him with Grossman v. State, 525 So.2d 833 (Fla. 1988) (HAC applied where victim police officer beaten and killed during struggle for gun and must have known she was fighting for her life). *5

Further, Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances envisioned in Proffitt. Such matters are left to the trial court. See, Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury").

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*4 In Stano v. State, 460 So.2d 890 (Fla. 1985), this court refused to apply Pope retroactively. This result scarcely promotes the evenhanded application of the death penalty required by Proffitt.

*5 For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstances: Narrowing the Class of Death-Eligible Cases Without Making it Smaller," 13 Stetson L. Rev. 523 (1984).

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of aggravating and mitigating circumstances. *10. See, e.g., Rutherford v. State, 14 FLW 300 (Fla. June 15, 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 14 FLW 342 (Fla. July 6, 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighten Amendment). Use of retroactivity principles works similary mischief.

5. Other Problems With The Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating circumstance but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment. Especially troublesome is that our law lets the trial court apply the premeditation aggravating circumstance where the jury may have rejected it.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the Defendant death eligible.

Hence, the lack of unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the State constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution. See, Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). It is conceded that in Hildwin v. Florida, 109 S.Ct. 2055 (1989), the Court rejected a similar Sixth Amendment argument.

b. No Power to Mitigate

Unlike someone serving a sentence for anything ranging from a life felony to a misdemeanor, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure forbids the mitigation of a death sentence. Whatever the reason for this bizarre provision, it violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the State Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

c. Presumption of Death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstances) and in almost every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case). If there is anything left over, it is

covered by that omnium gatherum, "heinous, atrocious or cruel."

Under Florida law, once one of these aggravating circumstances is present, there is a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption. This systemic presumption of death does not square with the Eighth Amendment's requirement that capital punishment be applied only to the worst offenders under, e.g., Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See, Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) and Adamson v. Ricketts, 865 F.2d 1011, 1043 (9th Cir. 1988).

XXI

CONCLUSION

For the foregoing reasons, Mr. Young's convictions must be reversed, and his sentences vacated or reduced or a new sentencing hearing ordered.

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 19th day of December, 1989.

William Jasty
Counsel for Appellant