IN THE SUPREME COURT OF FLORIDA

RICHARD HAROLD ANDERSON, :

Appellant, :

vs. : Case No. 72,127

STATE OF FLORIDA, :

Appellee. :

_____:

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

INITIAL BRIEF OF APPELLANT

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

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On July 15, 1987, the Hillsborough County Grand Jury indicted the Appellant, Richard Harold Anderson, for the first-degree premeditated murder of Robert Grantham on May 7, 1987, in violation of section 782.04, Florida Statutes (1987). (R2747-2748)[1]

Appellant was tried by jury before the Honorable M. William Graybill, Circuit Judge, on February 8-18, 1988. (R1, 5, 2148) The jury found Appellant guilty of first degree murder (R3008) and recommended the death penalty. (R3009)

On February 26, 1988, the court adjudicated Appellant guilty of first degree murder and sentenced him to death. (R3017-3020) The court found two aggravating circumstances: (1) prior conviction of another capital offense or of a felony involving use of violence, and (2) the capital felony was committed for pecuniary gain and in a cold, calculated, premeditated manner (treated as one factor). (R3021-3022) The court found one mitigating circumstance: Appellant's accomplice was allowed to plead guilty to third degree murder for a maximum possible sentence of three years imprisonment. (R3023) At the sentencing hearing defense counsel informed the court that the accomplice, Miss Beasley, was sentenced to one year and one day in prison. (R2282)

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[1] References to the record on appeal are designated by "R" and the page number.

Appellant filed his notice of appeal on March 14, 1988. (R3026) The court appointed the public defender to represent Appellant on this appeal. (R3030)

STATEMENT OF THE FACTS

A. THE STATE'S CASE

Robert Grantham lived in Winter Haven and ran his own roofing business. (R661-662, 666, 776) Grantham drove a blue and white 1979 Ford Thunderbird. (R670-671, 779-780) Grantham was born on May 8, 1935. (R662)

On May 6, 1986, Grantham fell off a roof and broke both his legs. (R374, 394-395) Attorney John Kaylor represented Grantham in the resulting workers compensation case. (R371-373) By April, 1987, Grantham was walking with a cane and receiving a $528.70 disability check every two weeks. Kaylor last saw Grantham on April 7 or 8, 1987. The last time Grantham came to Kaylor's office to pick up his check was April 16, 1987. (R396-398, 415) Kaylor received a check for Grantham for $1380.86 on June 4, 1987, but he mailed it back to the insurance company. (R398) Kaylor had expected to settle Grantham's claim for $40,000 to $70,000 in September, 1987. (R402, 405) However, if Grantham died from a cause other than his injury, the claim expired. (R406, 414)

Grantham was divorced from Jacqueline O'Hara in 1985. (R661) He asked her to help him with his business in the fall of 1986 after his accident. (R663) She helped Grantham purchase airline tickets to fly to Las Vegas on May 4, 1987, and return to Orlando on May 7. (R668-669, 715-734) O'Hara last saw Grantham on Sunday, May 3, 1987, when he came to her house to show her prizes he had won in a golf tournament. (R669) Grantham called

her from Las Vegas on Tuesday, May 5, and Wednesday, May 6. He asked her to bake a cake for his birthday on May 8. (R672-673) He planned to return to Winter Haven on Thursday, May 7. (R684) Grantham also said he was afraid to leave his room because someone might be after him; he had a lot of money in his room. (R696-697)

O'Hara checked Grantham's answering machine on Friday morning around 7:00 a.m. He had left a message that he would see her tomorrow at 9:00 or 9:30. (R686, 689) Grantham did not return on Friday, Saturday, or Sunday. O'Hara called the police on Monday or Tuesday. She never saw or heard from Grantham again. (R690) During their marriage there were many times when O'Hara did not hear from Grantham for some period of time.[2] (698)

Grantham's niece, Robin Boney, testified that she had a close relationship with her uncle. She lived with Grantham from February, 1987, until June. (R773-774) She last saw him on April 23. She last spoke to him on the telephone on May 3. (R774) Grantham had planned to be present when Boney's four-year-old daughter had an operation on May 25, 1987, but he was not there. (R774-775) Boney tried to locate Grantham by running ads in

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[2] At Appellant's bond hearing, O'Hara testified that Grantham had been committed to psychiatric hospitals in Arcadia, Chattahoochee, and Tennessee. (R2358) Grantham had been convicted of robbery, rape, and fraud. (R2359) In 1979 or 1980, Grantham stole her Thunderbird in Memphis, then went to Morgan City, Louisiana, without telling anyone where he was. He returned to Winter Haven a year or two later using the identification of Bob Duke, a man who had been killed in Louisiana. (R2359-2364) O'Hara was the beneficiary of Grantham's $75,000 life insurance. She had not filed a claim because she had no proof Grantham was dead. (R2361-2363)

newspapers, calling the numbers on his telephone bills, calling airports and hospitals, and maintaining contact with the Winter Haven Police. (R780)

Boney said Grantham always stayed in touch with her. He had moved to Louisiana in 1980 and stayed there three years. [3] (R784) In 1983, Boney lost touch with Grantham for about a month. She tried to call, but could not find him. In August, Grantham called her from Tampa and told her to pick him up in Lakeland. (R785-787) Grantham had luggage with the name Bob Duke on it. (R788) A week later, she saw Duke's driver's license and social security card. (R804) In September, she saw a bloody T-shirt in the suitcase. (R807-808)

Leslie Baker, a truck driver from Wauchula, had known Grantham over six years. They played golf together several times a month. (R819-820) Baker last saw Grantham at the golf course on May 2, 1987. Grantham asked Baker to go to Las Vegas with him, but Baker declined. (R821) Grantham had gone away for a year or two in the past, then returned and wanted to play golf. (R822)

Rudy Benton lived in Zolfo Springs and frequently played golf with Grantham. (R829-830) Grantham called Benton five times

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[3] At the bond hearing, Boney testified that Grantham had been convicted of robbery, rape, and fraud. (R2332) He had a history of disappearing without telling anyone but her. He went to Louisiana for 1 1/2 or 2 years. (R2337-2338) A man named Bob Duke was murdered in Louisiana. Grantham took Duke's luggage, returned to Winter Haven, and assumed Duke's identity. (R2332-2335) Boney had not checked to see if Grantham had gone to Morgan City, Louisiana, or Las Vegas, Nevada, the places he had gone in the past. (R2342)

a week. Benton last saw him in April. (R831) He last spoke to Grantham around 9:00 or 10:00 p.m. on May 7. (R832) They talked about playing golf on Saturday. (R833) Their conversation was cut off when the phone suddenly went dead while Grantham was talking. Grantham did not call back. (R833-834)

On May 19, 1987, FDLE agent Manny Pondakos found Grantham's car in the long term parking lot at Tampa International Airport. There appeared to be blood all over the front seat. Pondakos reported this to Officer Houck and showed him the car. (R336-342)

Tampa Airport Police Officer James Houck secured the car and requested assistance from the FDLE mobile crime lab. (R343-345) FDLE crime scene analyst Edward Guenther took photographs of the car and had it towed to the laboratory. (R346, 735-740) Additional photographs were taken at the lab when the car was processed. (R741) Various photos showing the exterior and the bloodstained interior of the car were admitted in evidence. (R741-751) Four .22 caliber spent shell casings were recovered from the front and rear floor boards of the car. (R764-759) A blood sample and two blood stained towels were also recovered. (R752-759) An FDLE serologist determined that all three had human blood type A. (R919-923) Grantham had blood type A. (R969-1005, 3354-3360) A total of twenty-four latent fingerprints and four latent palm prints were found in the car or on items found in the car. (R1042-1055, 1365, 1379) Thirteen of these prints were identified as Grantham's. The rest were never identified. (R1379)

Connie Beasley was divorced. She had two children, ages three and four. (R450, 549, 550) She lived with her parents in Wauchula and sold cars at Remsgar Buick-Pontiac in Bartow. (R442, 447, 563, 569)

Beasley testified that she met Appellant in February, 1987, when he came to Remsgar to buy a car. They began dating and saw each other three or four times a week. (R441, 442, 447-449, 550) They talked about getting married. (R450) Appellant lived in an apartment in Temple Terrace. (R450, 451)

Beasley met Robert Grantham when he brought her father home from golfing in April, 1987. (R451, 550, 551) Grantham began calling her at work. He offered to pay her $30,000 in August if she would become his lover. She told him she wasn't interested and to stop calling her. (R452-455, 552, 553) Beasley did not like Grantham; she thought he was a "scum bag." (R562)

Beasley told Appellant about Grantham's offer. (R456, 556) Appellant told her she should accept. He said he would be willing to have sex with or kill Grantham for $30,000. (R457, 556, 557) Appellant said he had checked and found out Grantham had a lot of money. Appellant wanted Beasley to call Grantham and offer to go to bed with him one time for $10,000. Beasley made the offer when Grantham called. Grantham told her she would be well compensated, but he did not specify an amount. (R458, 459)

On Sunday, May 3, 1987, Beasley went to a golf tournament and dinner with her parents and children. (R460, 461) Grantham joined them for dinner. He was talking about going to Las Vegas.

(R461) On Monday, May 4, Grantham called Beasley at Remsgar and asked her to go to Las Vegas with him. She refused. (R462, 463) Grantham called later that day to tell her he was in Las Vegas and had won a couple hundred dollars in a casino. (R463) Grantham called again on Tuesday. He said he would be back on Saturday and asked her to go out to dinner. Again she refused. (R464, 558)

When Beasley told Appellant about this call, he told her to agree to have dinner at the Sabal Park Holiday Inn in Tampa. (R464, 465, 558) Appellant wanted Beasley to get Grantham drunk. When they were leaving, he would rob Grantham. Beasley would go to Appellant's apartment and wait for Appellant to call to pick him up after he abandoned Grantham's car. He said he was going to kill Grantham. He thought Grantham would have a lot of money upon his return from Las Vegas. Beasley thought Appellant was "bullshitting." (R465-467, 558, 559)

Grantham called Beasley again on Thursday. He said he was coming back early and asked her to meet him at the Orlando Airport. She agreed. (R468, 559)

Beasley called Appellant and told him about Grantham. Appellant told her to meet him at the plaza across the street from Remsgar when she got off work at 1:30. She drove there in her Fiero. (R469, 470, 559, 560) Appellant put a satchel containing clothes in her trunk and another satchel on the passenger side floorboard. (R470, 471) Appellant drove her car to the Orlando Airport. She looked in the satchel and saw a revolver. (R471)

On the way to Orlando, Appellant told Beasley he would

follow her and Grantham to Grantham's car. He would hit Grantham over the head and rob him. (R472, 473) When they got to the airport parking lot, Appellant said there was too much security, so they would use the original plan. He would follow Beasley and Grantham to the Holiday Inn. After dinner and drinks, Appellant would rob Grantham. (R473, 474)

Beasley met Grantham at the airport. Appellant was sitting nearby. (R475) When Beasley and Grantham got his luggage and went to his car, she did not see Appellant. (R476, 477) On the way to Tampa, Grantham stopped at a rest area to call his secretary. (R478) Beasley persuaded Grantham to take her to dinner at the Sabal Park Holiday Inn. (R478, 479) Grantham told her about his trip to Las Vegas and said he had $3,000 with him. (R479) They arrived at Sabal Park around 7:30. They had drinks and dinner. Appellant wasn't there. Beasley tried to call him, but he didn't respond. (R480)

Beasley and Grantham drove to Appellant's apartment around 8:30. Appellant wasn't there. (R481) Beasley and Grantham drank tea and watched television. Grantham wanted sex, but Beasley stalled. (R482) She did not see Grantham make any calls, but she was in the bathroom for about eight minutes. (R483) Lou Campillo, Appellant's boss, called. (R483, 484)

Appellant entered the apartment, said he had been drinking, and asked for a ride home. Grantham agreed. (R484-486) They got in Grantham's car. Appellant got in the back seat, Beasley was in the front passenger seat, and Grantham drove.

(R486, 487) Appellant directed him to a place called Breckenridge on Highway 301. Appellant put on black leather gloves. (R487) He had a small silver gun with a brown handle. (R487, 488) When Grantham turned into Breckenridge, Appellant told him it was the wrong place and to make a U-turn. Grantham complied. (R488, 489)

Appellant shot Grantham four times. He fell into Beasley's lap, bleeding. (R489) Beasley shifted into park to stop the car. Appellant got out and pushed Grantham's body to the floor. Beasley got into the back seat. (R490) Appellant got into the driver's seat. He laughed and said that was the ultimate high, to kill someone. He said, "Well, it took a sick son-of-a-bitch to shoot someone four times because the first time when I shot him, he was probably dead, but I shot him three more times." (R491) Appellant told Beasley not to say anything. (R491) Grantham did not move or make any noise. (R444, 497)

Appellant drove to a wooded area, pulled Grantham out of the car onto a pile of sand, and threw his suitcase near the body. (R492-496) Appellant told Beasley to thank God she kept her mouth shut because he was thinking he might have to kill her, too. (R497) On the way to Appellant's apartment, he said he had gotten a police officer named Sal to drive him to Bartow to pick up his car and establish an alibi. (R498) Appellant said they should move the body to Orlando, but they did not. (R499)

At Appellant's apartment, Beasley showered and changed clothes. (R500, 501) Appellant ripped Grantham's satchel apart looking for money. He had Grantham's wallet, money, and diamond

ring on the table. He said, "I can't believe I just fuckin' killed somebody for $2,600." (R501) Beasley put her clothing, pocketbook, and shoes in a garbage bag. Appellant put the money in a drawer. (R502)

Appellant drove Grantham's car to the Tampa Airport parking lot. Beasley followed in her car. (R503) They returned to Appellant's apartment. Appellant showered and changed clothes. He put his clothes and Grantham's satchel in the garbage bag with Beasley's clothes and took them to a dumpster. (R512, 513) Appellant drove Beasley's car to the 56th Street bridge and threw the gun and a box of shells into the river. (R513, 514) He drove off the bridge, turned around, stopped on the bridge again, and threw his gloves in the river. (R514) Appellant then drove to Kay Bennett's apartment and picked up his car. (R514-516)

Appellant and Beasley drove back to his apartment. Appellant ate, Beasley had a drink, then they went upstairs to bed. (R516, 517) Appellant again said he couldn't believe he killed someone for $2,600, laughed, and repeated that it was the ultimate high to kill someone. (R516) He called Beasley a murderess, told her she was equally responsible, and said if she told anyone she would go to the electric chair or to prison for life. Then they made love. (R517)

Appellant left for work early the next morning. (R517) He called around 9:00 a.m. and said he was drinking beer with a friend. Beasley left the apartment around 1:00 p.m. to buy a pair of shoes. She encountered Appellant on the way to the store.

(R518)

The prosecutor proffered Beasley's testimony that Appellant showed her a machine gun in the trunk of his car. He said that if the heat was ever on, he could take a couple of people out with it, and he was going to take it home. (R522, 523) The prosecutor argued that evidence of Appellant's desire to evade prosecution or to resist arrest was relevant to consciousness of guilt. (R524, 525) Defense counsel argued that Beasley's testimony was not probative of consciousness of guilt and not related to what happened the day before. (R525, 526) The court overruled defense counsel's objection. (R526, 527) Beasley repeated the proffered testimony before the jury. (R529)

After work that night, Beasley returned to Appellant's apartment, but he did not come home. (R530, 531) Appellant called twice and said he was 300 or 400 miles away, but he wouldn't say where. (R533-535) Beasley became frightened and went next door to Sal's apartment to spend the night. (R535, 536) The next day Appellant called Beasley at his apartment and at work. He came to her parents' house for dinner. (R536-538) He would not tell her where he had been, but people there had told him Grantham had a lot of money. (R539)

FDLE Agent Velboom interviewed Beasley in early June. (R540) She lied to him because she was scared and did not want to admit her involvement. (R541) She told Appellant about the interview, but he said they would never figure anything out, they had nothing to go on. (R541, 542)

Velboom interviewed Beasley again on July 1. (R444, 445, 560, 561, 574) After he left, Beasley called Appellant and warned him to get out of town.[4] Velboom returned and arrested Beasley for accessory after the fact to murder. (R444, 447, 542, 568) When she was interviewed after her arrest, Beasley again lied to the FDLE agents and said Appellant told her he killed Grantham. (R543, 569, 574, 579, 580) She tried to convince them she had nothing to do with it. (R576) She showed them where Appellant threw the gun in the river. (R542)

On July 15, 1987, Beasley testified before the grand jury which indicted Appellant. (R543, 583, 584, 587, 588) At trial, she admitted that she lied to the grand jury and that she had committed perjury in testifying before the grand jury. (R543, 544, 587, 593-595) She told the grand jury that she, Grantham, and Appellant were at Appellant's apartment on May 7, 1987. Grantham left with Appellant. She did not see Appellant with a gun when they left. (R589) When Appellant returned there was blood all over the front of him and on his hands. His eyes were wild. He told her he killed Grantham and threatened to kill her unless she did what he told her. (R590) She told the grand jury Appellant forced her to help him take a car to Tampa Airport. (R590, 591)

On July 16, 1987, Beasley requested another interview with the FDLE agents. (R596, 597) This time she told them

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[4] A tape recording of the call was admitted into evidence after the court denied Appellant's motion to suppress. (R418-425, 433-436, 445-447, 2706-2713, 2867-2869, 2893, 2894)

Grantham was trying to rape her on May 7, when Appellant walked in. (R599-601) Appellant pulled Grantham off of her and told her to get dressed. (R602) Appellant said they were all going for a ride. (R603) Appellant opened a drawer, pulled out a gun, and told Grantham he was going. (R604) When one of the agents asked whether Appellant had gloves, she said she never saw any and that Appellant had blood in his fingernails. (R606)

On July 24, 1987, Beasley negotiated with the prosecutor for a plea to third degree murder and a maximum sentence of three years. She then told the prosecutor the version of the homicide related in her trial testimony. (R544, 545, 584-587) The plea to third degree murder was entered on September 9, 1987. Beasley's sentencing was postponed until after Appellant's trial. (R608)

Sometime after her arrest, Beasley showed the agents the area where the body was left. (R545, 546) At trial, she identified photographs of that area and Breckenridge, Appellant's shoes, the firearm thrown into the river, photographs of the car, and photographs of Appellant's shoes. (R545-548)

Maurice Gilliard, Connie Beasley's father, testified that he played golf with Grantham and last saw him at a golf tournament on May 3, 1987. (R808-810) Grantham met Beasley about a month before when he picked up Gilliard to play golf. (R811) Beasley was dating Appellant. (R815, 816) She told Gilliard that Grantham was asking her out. Gilliard told Grantham that Beasley did not want to go out with old men. (R814, 815) Grantham called Gilliard on May 5 or 6 and said he won some money and was going to remain

in his room to keep from losing it. (R812, 813)

Lou Campillo, president of Tampa Forklift, testified that he employed Appellant as sales manager for Polk County. (R857-863) Appellant earned $28,409 in the year he worked for Campillo. (R864-868) Campillo knew Appellant's girlfriend, Connie Beasley. (R861) One evening around eight o'clock, Campillo called Appellant's apartment. Beasley answered and said Appellant was not there. (R862) Campillo did not send Appellant to Georgia or Jacksonville on May 8 or 9, 1987. (R864) Appellant had use of a company telephone credit card. (R863)

Tampa Police Officer Saul Ruggiero testified that he met Appellant through Kay Bennett, Appellant's girlfriend. (R1072-1073) Appellant did not ask Ruggiero to drive him to Bartow to pick up his car in May, 1987. (R1075)

Kay Bennett testified that she had lived with Appellant in the past, and they remained friends. (R841-844) One evening around 6:30 p.m. Anderson dropped by her office and asked her to take him to pick up his car. He was driving a Fiero. They drove past a phosphate mine to a shopping center to pick up Appellant's Buick. (R846-848) Appellant left his car at Bennett's apartment and drove away in the Fiero. (R849) Around 11:30 p.m. Appellant returned with Beasley to pick up his car. (R850, 854, 855) Another evening she spoke to both Beasley and Appellant on the telephone. She told Appellant Beasley was looking for him. (R852, 853)

David Barile, a warehouse supervisor in Tampa, testified

that Appellant came to the warehouse on Friday, May 8, 1987, around 3:30 p.m. (R629, 633) They sat around drinking beer and talking. (R634) Appellant made a couple of telephone calls. (R635-637) Appellant said he was in trouble with the police. (R636) He said he shot and killed someone. He thought the man had a large amount of money, but the man had only $2,000 or $3,000. Appellant said he picked the man up at the airport, shot him four times and killed him, and dumped the body in the woods. (R636-638) Appellant did not say anything about anyone else being involved. (R638, 639) Barile did not believe Appellant. (R639, 641, 652) Barile told a co-worker, Francie Black, what Appellant said. She did not believe it either. (R640) Black testified that Appellant was there drinking beer with Barile. She did not hear their conversation. (R878-886)

Appellant's neighbor, Sal Lodato, testified that Beasley came to his apartment around 4:00 a.m. on May 9. She was afraid because Appellant had not come home. Lodato allowed her to stay. She left around 7:00 a.m. (R839, 840)

Larry Moyer, David Barile's uncle, testified that Appellant came to his engine shop in Tampa on June 2, 1987. (R1235-1239) Moyer had talked to Barile about Appellant two or three weeks before. (R1239) Moyer said he thought Appellant left town. Appellant replied that he did, but it was a false alarm. Moyer said he heard Appellant killed a man. (R1240) Appellant said, "We wasted a guy that was supposed to have a million dollars, and he only had $3,000." (R1240, 1241) He also said they dumped

the body behind Appellant's house. Moyer did not believe him. (R1241) Moyer asked who "we" were. Appellant said he and his girlfriend. (R1253) Moyer's girlfriend, Brenda Larson, testified that Moyer introduced her to Appellant in June. She did not hear their conversation. (R1255-1258)

FDLE Agent Raymond Velboom testified that he interviewed Connie Beasley at Remsgar Buick in Bartow at 7:25 p.m. on July 1, 1987. He told her he thought she and Appellant were involved in the murder of Grantham. Beasley denied any involvement, but she admitted that she knew Appellant. (R436, 437) Velboom left Remsgar at 8:30 p.m. He called the Tampa FDLE office, then returned to Remsgar to arrest Beasley around 8:45 p.m. (R438-440)

FDLE Agent E.J. Picolo was in charge of the investigation. Both Beasley and Appellant were under surveillance. They had a court order to intercept telephone calls and a remote video camera monitoring Appellant's apartment. (R887-889) After Velboom interviewed Beasley, she called Appellant, and Appellant left his apartment. (R890-892) FDLE agents Patricia Rodgers, Maxwell Dey, and Rich Pyles testified that they followed and arrested Appellant on July 1. (R893-908) Appellant's car was impounded, but an inventory search revealed nothing of significance. (R908, 909)

FDLE Agent Rosemary Giansanti and Detective Kevin Johnson testified that they recovered a small .22 caliber automatic pistol from the Hillsborough River near the 56th Street bridge. (R910-917, 1033-1037) Ira Bruce Andrews testified that he sold a similar

gun to Appellant in 1986. (R1017-1020) FDLE firearms expert Joseph Hall testified that the four discharged .22 caliber cartridge cases found in Grantham's car were fired from the gun. (R1059-1067)

FDLE serologist Mary Cortese found a spot of human blood on one of Appellant's shoes. There was not enough blood to conduct any further testing. (R919, 923-930) FDLE microanalyst Yvette McNab compared hairs found in Grantham's car with Appellant's known hair samples and concluded that they were different. (R1206-1215, 1375-1377)

FDLE fingerprint expert Edward Guenther compared the known prints of Grantham, Connie Beasley, and Appellant with latent prints found in Grantham's car and Appellant's apartment. (R1283-1286, 1341-1374) Guenther found that some of the latent prints from the car were made by Grantham; none were made by Appellant or Beasley. (R1363-1368, 1378) Twelve of sixteen prints from Appellant's liquor bottles were made by Appellant; none were made by Grantham or Beasley. (R1373, 1374, 1378) Guenther did not find any latent prints on the pistol found in the water, nor on the cartridges found in the car. (R1368, 1369, 1374, 1375)

The State introduced parking lot records to show when Grantham's car was at the Orlando and Tampa airports. (R347-359, 961-967) The State introduced various telephone company records from Jacksonville, Georgia, and GTE in Tampa. (R954-960, 1011-1016, 1259-1280)

The trial court overruled defense counsel's hearsay

objection and allowed the State to present FDLE Agent Velboom's testimony that on the night of her arrest Beasley told him Appellant committed the murder and she knew about it. (R1385-1396) On July 2, 1987, Beasley pointed out where the murder weapon was thrown from the bridge. (R1396, 1397) The agents searched the entire Sabal Park area from July 2 to July 6, 1987, but they did not find the body. (R1397-1403) They searched a wooded area off of Williams Road on July 17 and July 22, 1987. They could not find the body, even with the aid of police dogs. (R1403-1406, 1412-1414)

The court again overruled defense counsel's hearsay objection and allowed Velboom to testify that on August 20, 1987, Beasley told him Appellant said they should return to the place where they left Grantham's body and take it to Orlando. (R1411, 1412) The police dogs used in the search for the body were also used to examine the trunk of Appellant's car. No evidence was found. (R1414)

The State proffered a videotape of a news broadcast on July 8, 1987. The tape was identified by Ruth Peeples, records custodian for television channel 13 in Tampa. (R1078) Defense counsel objected to the tape on the ground that it showed Appellant in jail clothes being led to a secure facility by Hillsborough County Jail authorities. He argued that the tape was not probative of anything and that its prejudicial effect outweighed any relevance it might have. The court reserved ruling. (R1082-1085) Peeples identified the tape for the jury. (R1085-1087)

Kenneth Gallon testified that he was in jail with Appellant in July, 1987. (R3457) They watched the news on channel 13 at 5:00 p.m. on July 8, 1987. (R3458) Defense counsel again objected to admission of the videotape because of the prejudicial effect of the jury seeing Appellant in jail clothes in custody. The court overruled the objection. (R3459-3462)

Gallon testified that he was 24 years old and had 24 prior felony convictions. (R3464) He was originally subject to a possible life sentence, but he obtained an agreement for a sentence of 17 to 22 years, or even as low as 12 to 17 years, in exchange for his cooperation. (R3465, 3466, 3538-3543) Gallon pled guilty to several counts of armed robbery and aggravated battery. (R3535-3537)

Gallon first met Appellant on July 2, 1987. (R3466) They were in the same cell for about three weeks. (R3467) Appellant talked about wanting someone to kill "Miss Gillion." (R3468) Defense counsel objected to evidence of another crime which placed Appellant's character in issue and moved for a mistrial. (R3468, 3469) The prosecutor argued that the evidence was relevant to show consciousness of guilt. (R3469, 3470) The court overruled the objection. (R3470)

Gallon and Appellant watched the five o'clock news on July 8. (R3471, 3472) Gallon saw Appellant in the court room, Miss Gillion, and the man Appellant was charged with murdering. (R3472) The videotape was played for the jury. (R3474) Gallon testified that when they showed Miss Gillion Appellant pointed his

hand like a gun and said, "Boom, bitch, you're dead." (R3473, 3475, 3490) When they showed a boat, Appellant said to stay right there, if the body was there, the alligators ate it by now. (R3473, 3475, 3491) When they showed a man on a three-wheeler, Appellant said get out of that area. (R3473, 3475, 3491)

Later, Appellant asked if Gallon could have Miss Gillion killed. He said he would pay $2,000 or $3,000 to have her killed. (R3476) Appellant told Gallon where her house was and that he could get in a side window. (R3477, 3500) On July 10, Gallon told Kevin Fitzpatrick, a sergeant for the Hillsborough County Sheriff's Department, what Appellant had said. (R3478) On July 11, Gallon told FDLE agents what Appellant had said. (R3479)

Gallon admitted that he read a newspaper article about Appellant's case, but he denied that he learned facts about the case from the paper instead of what Anderson said. (R3489) Gallon denied trying to influence Tony House to agree with his testimony. (R3506, 3528) Gallon asked a man named Hayes to write a letter for him, defense exhibit one. (R3507-3509, 3544, 3545) But he denied sending the letter to House to tell him what to say. (R3528, 3529, 3546, 3547) Gallon claimed the letter never left his possession until he gave it to Agent Velboom. (R3548, 3549)

The prosecutor clarified his plea agreement with Gallon. The deal was for a sentence of 17 to 22 years in exchange for Gallon's full cooperation. (R3552, 3553)

B. THE DEFENSE

Defense counsel moved to dismiss the indictment because

it was based upon Connie Beasley's perjured testimony. (R939-949, 1233, 1234, 1436-1439, 1473, 1474, 1881-1883, 2962, 2963, 3015) The court denied the motion. (R942, 952, 2274) After the trial, defense counsel also moved to arrest the judgment for the same reason. (R3013) The court denied the motion. (R2274)

Appellant testified that he was 39 years old, divorced, and had a fifteen-year-old son. (R1487) Appellant never met Robert Grantham. (R1490) Connie Beasley complained three or four times that Grantham was calling her at work and offering her money for sex. (R1490, 1491) Beasley was insulted. She called Grantham a "scum bag" and a "jerk." (R1491) When Beasley said Grantham offered her $10,000, Appellant said he would go to bed with him for that. (R1492, 1494) He denied saying he would kill Grantham for the money. (R1499) Beasley wasn't interested in having sex with Grantham, but she wanted the money. (R1492) Appellant offered her the use of his apartment for the liason. (R1499, 1500, 1502, 1571) They planned for Beasley to meet Grantham at the airport when he returned from Las Vegas. Beasley would take him to Appellant's apartment, have sex with him, and obtain the money. (R1503)

On May 7, 1987, Beasley told Appellant that Grantham was returning and wanted to meet her that night for dinner and sex. (R1503, 1503) At Beasley's request, Appellant drove to the shopping center in Bartow, parked his car, and drove Beasley to Orlando in her car. (R1505, 1571) Appellant told Beasley he would wait in the bar at the airport for 30 or 40 minutes. He did not see her or Grantham. (R1506, 1572) Appellant returned to Tampa

and asked Kay Bennett to drive him to Bartow to pick up his car. (R1507-1510, 1572-1574) Anderson later told Beasley that Saul Ruggiero helped him get the car because Beasley was jealous. (R1510,1511) After leaving Bennett's apartment, Appellant bought beer and a sandwich, then stopped at a college campus to watch a basketball game. (R1511, 1512, 1576)

Beasley was supposed to signal Appellant on his beeper to come home when she was through with Grantham. (R1508) Appellant returned when she beeped him. (R1512, 1577) Beasley was hysterical, pacing back and forth, and smoking a cigarette. (R1513, 1514, 1578) She said she shot Grantham and thought she killed him. She said Grantham was in his car. Appellant went outside and found Grantham slumped over in his car. (R1514, 1579, 1580)

Appellant told Beasley he would call an ambulance. Beasley said, "No, no, they'll take my babies. ... Please help me." (R1515, 1581) Appellant agreed to help her. Appellant told Beasley to follow him in her car. She said she couldn't drive, so he told her to get in Grantham's car. (R1515, 1582) Appellant drove to Williams Road, pulled off the road, and left Grantham and his suitcase there. (R1516, 1584)

Appellant and Beasley returned to his apartment. Beasley showered and changed clothes. (R1517, 1518) Beasley said Grantham gave her $2,600 and said he wanted to see her a couple more times. (R1518, 1585) He threatened to tell her father if she said anything or bothered him about it. (R1518, 1519, 1585) Beasley

became angry because she did not want to have sex with Grantham and because he was rough with her. (R1519, 1586)

Appellant drove Grantham's car to the Tampa Airport. Beasley followed. (R1519, 1520, 1584) Appellant then drove her car to Bennett's apartment and picked up his car. (R1520, 1521) Appellant and Beasley returned to his apartment. They both showered. Appellant put their clothes, including his shoes, in separate trash bags. (R1522, 1590) Appellant found his gun on an end table by the sofa. He kept it in a drawer in the bathroom. (R1523) He had showed Beasley where it was. (R1524) He put the trash bags in dumpsters at other apartment complexes. (R1525) He threw the gun in the river, then went home. (R1526) Each had a drink and went to bed. (R1527)

Appellant went to work the next morning and called Beasley from his office. (R1527) He told her to go to work. (R1528) Later, they passed each other on the street and pulled into a parking lot to talk. (R1528) They sat in Appellant's car. Beasley commented about a rifle in the back seat. (R1529, 1531) Angel, a truck driver for the forklift company, had offered to sell the rifle to Appellant. Appellant put it in his back seat. (R1529, 1530, 1591, 1592) He did not tell Beasley he would use it to kill anyone. (R1531) Later that afternoon Appellant returned the rifle to Angel's car. (R1531, 1591)

Appellant went to the warehouse and drank beer with David Barile. (R1534-1539, 1594) Appellant told Barile that someone he knew shot and killed some guy over some money, and he helped hide

the body in the woods. (R1539)

After leaving the warehouse, Appellant wanted to be alone, so he drove north on Interstate 75. (R1540, 1541) He drove all the way to Savannah, Georgia. (R1541, 1542, 1593) He called Beasley from Savannah. (R1543, 1544) He drove back to Tampa through Jacksonville and Orlando. (R1544, 1545) He called Beasley from Jacksonville and again from his sister's house in Orlando. Beasley told him to come to Wauchula for dinner. (R1545, 1546) Appellant arrived at home around noon. (R1546) He went to Beasley's parents' house for dinner and spent the night there. (R1547, 1548) He denied threatening her that night or any other time before his arrest. (R1548, 1549)

The day Appellant talked to Larry Moyer, Appellant told him his girlfriend shot some guy because they had a quarrel over some money. He told Moyer he helped her hide the body in the woods. (R1550, 1551)

When Beasley called on July 1, Appellant drove to Kay Bennett's house. She did not answer her door, so he decided to go to a bar. He was stopped and arrested. (R1552-1555)

When Appellant was in jail with Gallon and saw the news broadcast he said, "I can't believe this bitch is doing this to me." He also told Gallon that it was all a bunch of lies. (R1556-1558)

Appellant denied going to Breckenridge with Grantham and Beasley. He denied shooting Grantham. He denied moving the body. (R1558) Appellant found the money on a dresser in his guest

bedroom. He put it in a drawer in his liquor cabinet. He and Beasley spent it. (R1560-1562, 1597) Appellant had two prior felony convictions in 1974. (R1567)

Roy Dedmon was the security guard at the front gate of the Breckenridge complex on the night of May 7, 1987. He worked from 6:00 p.m. to 1:00 p.m. In addition to monitoring any traffic at the front gate, he also made rounds of the complex to check buildings. (R1602-1611) Dedmon testified that he did not hear anything unusual, such as gunfire, that night. (R1610)

Paulette Scannell spent the night of May 7, 1987, with her fiancee, Sal Lodato, in the apartment next door to Appellant's apartment. (R1811-1813, 1821, 1822) She testified that she went to bed between 9:30 and 10:00 p.m. Something woke her up about an hour later. She then heard three gun shots. (R1814-1816)

Hillsborough County Sheriff's Deputy John Hatten testified that Larry Moyer told him Appellant said he was in trouble because a girl had killed someone and he had hidden the body. (R1760-1762)

FDLE crime lab analyst Leroy Parker examined the blood stains in Grantham's car. (R1713-1736) In his opinion, it was most likely that Grantham was shot while seated in the driver's seat by someone outside the car. (R1736-1741) However, the stains could have been consistent with someone in the back seat shooting someone in the driver's seat. (R1742-1744)

Tony House testified that he was in the same jail cell as Appellant and Gallon when they watched the news report about

Appellant's case. (R1612-1614) Appellant did not make any statements about his case during the broadcast or at any other time while they were in the cell together. (R1614, 1656) Appellant did not point his finger like a gun and say, "Bitch, you're dead." (R1614, 1650) House did not hear Appellant say anything about alligators eating the body or ask if Gallon could have someone killed for him. (R1650)

Gallon tried to persuade House to testify against Appellant and told him what to say. (R1615, 1616) When House refused, Gallon argued with him and hit him in the head with a broom. When House reported this incident, he was transferred to another cell. (R1617) Gallon sent House a letter, defense exhibit 1-A, telling him what he wanted House to say about Appellant. (R1617-1619, 1622, 1644) The letter stated what Gallon claimed Appellant said during the news broadcast, that Appellant wanted to know if Gallon could have someone murdered, and that Appellant offered to pay Gallon $3,000 to have Miss Gillion murdered. (R1647, 1648)

On August 13, 1987, House made a statement to the prosecutor, Mr. Skye. (R1657, 1662) House was under the influence of Gallon, the State, and thorazine at the time. (R1658) Although Skye said no promises were being made, he also said he would help House any way he could. (R1658, 1659, 1675) House told Skye what someone else told him Appellant said. (R1662) House did not remember telling Skye that when they were watching the news Appellant said stay right there when the boat was shown, get out

of there when four-wheelers were shown in a field, or that he was going to "kill that bitch." (R1663-1668) House did not remember telling Skye that Appellant asked whether House or Gallon could have someone killed, and offered a couple of thousand dollars to kill the girl. (R1668-1670)

House told his attorney, Mr. Lopez, and defense counsel's investigator, Mr. Ashwell, that the statement to Skye was not true. (R1621, 1672) On January 20, 1988, House gave a sworn affidavit to Ashwell in which he said the events described in his August 13 deposition were untrue. He made the statements against Appellant at Gallon's request. He never heard Appellant say anything about his case, threaten anyone, or ask that anyone be killed. (R1672, 1673, 1689, 1697, 1703-1705, 1709)

House denied telling FDLE agents that the statement to Skye was true. He denied that they held up both statements, the one to Skye and the one to Ashwell, asked him which was true, and that he pointed to the statement to Skye. (R1674)

The court denied defense counsel's request to instruct the jury on the definition of accessory after the fact as the theory of defense. (R1886-1890, 1907)

C. THE STATE'S REBUTTAL

FDLE Agent Velboom testified that he interviewed Paulette Scannell on July 5 or 6. She said she heard bangs or noises on the night of May 7, but she wasn't sure whether they were gun shots. (R1823, 1824) She was familiar with guns. The noises she heard were rapid fire. (R1829)

Velboom interviewed Tony House on February 2, 1988. Velboom held up the deposition taken by Skye and the affidavit taken by Ashwell. He asked House which statement was true. House pointed to the deposition. (R1826-1828, 1830, 1831) House said he signed the affidavit without reading it to avoid coming to court and because he was angry about the sentence he received. (R1828, 1829, 1833)

Court reporter Patty Zajkowski took Tony House's statement in Skye's office on August 13, 1987. He was under oath. (R1837, 1838) Defense counsel objected to admission of the prior statement because it was improper impeachment. He argued that House admitted making the prior statements but neither admitted nor denied making prior inconsistent statements. (R1839, 1848, 1849) The prosecutor argued that House's prior inconsistent statement was admissible as substantive evidence because House was under oath when he made it and because House said he could not recall whether he made the statements. (R1839-1850) The court overruled defense counsel's objections. (R1850, 1851)

Zajkowski read House's entire statement to the jury. (R1858-1867) House said that when the news broadcast concerning Appellant's case was on television, it showed people in a boat searching for the body, and Appellant said to stay right there. (R1862-1864) When it showed four-wheelers in a field, Appellant said to get out of there. When it showed a girl's picture, Appellant said he was going to kill "that bitch." (R1864) Appellant later asked House if he could have someone killed. When

House said no, Appellant asked about Gallon. Appellant asked Gallon to do it. Appellant offered him a couple thousand dollars. (R1865) A day or two later Appellant spoke to the girl from the news broadcast on the phone. He told House he was going to kill her. (R1865, 1866) A couple of days later, Appellant had the impression Gallon and another prisoner were telling on him and threatened to kill "that son of a bitch." (R1866) Appellant said he was trying to keep the girl from coming to court. House said his statement was based on what he heard Appellant say, not what Gallon told him. (R1867)

Deputy Jimmy Hicks testified that he was present when House was interviewed in Skye's office on August 13, 1987. No threats or promises were made. (R1869-1871)

D. THE PENALTY PHASE

Defense counsel informed the court that he had found numerous witnesses who could testify favorably to Appellant: Dr. Robert M. Berland, Appellant's father William Anderson, his brother David Anderson, his sisters Vickie Barber and Griffin Simmons, his son Kyle Anderson, Joyce Wilson, Chaplain William Hanawalt, Correctional Officer Sammy Hill, Department of Corrections Superintendent Ray Henderson, Kay Bennett, and Appellant's employers and employees. (R2166, 2167) Although defense counsel told Appellant it would be in his best interest to have these witnesses testify, Appellant commanded defense counsel not to call the witnesses. (R2168)

Appellant concurred in defense counsel's statements and

said he would rather not have any witnesses testify on his behalf. (R2169) The court asked Appellant whether he was on any kind of drugs or medication that would affect his ability to understand what was going on. Appellant replied, "No sir, not at all." The court did not make any further inquiry into the matter. (R2169)

Over defense counsel's objection, the court admitted a certified copy of Appellant's judgment and sentence for first degree murder in 1974. (R2173-2177)

Investigator Scott Hopkins of the Sixth Circuit State Attorney's Office testified that he met Appellant on July 11, 1973. (R2177, 2178) He arrested Appellant. He identified the judgment and sentence entered upon Appellant's guilty plea to first degree murder on May 29, 1974. (R2180)

On July 11, 1973, Appellant told Hopkins he asked Patrick Johnson to help him steal stocks and bonds from James H. Winens. Winens was 68 years old and lived in a retirement hotel in St. Petersburg. (R2181) Appellant's brother was Winens' stockbroker. Appellant and Johnson introduced themselves as friends of the stockbroker. Winens agreed to go with them to look at some commercial real estate. They tried to strong-arm Winens into giving them his stock, but Winens refused. (R2182)

Appellant drove to a wooded area near the Clearwater Airport and got out of the car. Johnson drove into the woods, shot Winens with a .38 automatic pistol, and stole his room key. Appellant went to Winens' room and stole his safe deposit box key. On May 25, 1972, they went to Winens' bank and stole his stock.

(R2183) They went to Miami and attempted to sell $18,000 worth of stock. (R2183, 2184) Appellant returned to Clearwater and left Johnson to collect the money. A few days later Johnson returned to Clearwater and told Appellant that Winens' attorney had contacted the brokerage house and called Johnson. Johnson flew to San Francisco. Appellant abandoned the car at the Tampa Airport and threw the murder weapon off the Skyway Bridge. (R2184)

In a second interview, Appellant told Hopkins he had solicited Johnson to kill Winens. He also said that he read about Johnson's arrest, then returned to the crime scene to destroy evidence. He found a skull, pelvic bone, and leg bone. He took the bones to another location and smashed the skull. (R2185) Appellant took Hopkins to the place where he left the bones. (R2186) Johnson was sentenced to life. (R2186, 2187) Appellant pled guilty and was sentenced to twenty years. (R2187)

Defense counsel Ober informed the court that he intended to present testimony by defense counsel Fuente that the State offered Appellant a life sentence for a guilty plea in this case as a factor in mitigation. The court sustained the State's relevancy objection. (R2190, 2191)

The court overruled the State's objection and admitted as a defense exhibit the information charging Connie Beasley with third-degree murder. (R2192-2200, 2207)

SUMMARY OF THE ARGUMENT

I. Connie Beasley admitted at trial that she committed perjury when she testified before the grand jury about the events of May 7, 1987. The prosecutor discovered that her grand jury testimony was false a few days after the indictment was returned but failed to take any corrective action. The knowing use of or failure to correct false testimony violates due process. The prosecutor had a duty to inform defense counsel, the court, and the grand jury of Connie Beasley's perjury. His breach of this duty violated Appellant's right to due process of law. The trial court erred by denying Appellant's motions to dismiss the indictment and arrest the judgment. Appellant's conviction must be reversed, and the indictment must be dismissed.

II. Connie Beasley's credibility was critical to the State's case because she was the only purported eyewitness to the shooting, and Appellant testified that she killed Robert Grantham. The trial court erred by overruling defense counsel's hearsay objections and allowing FDLE Agent Velboom to relate Beasley's prior consistent statements. These statements were made long after the offense occurred, and Beasley had ample time to fabricate. She admitted that she lied to the investigators to protect herself. The improper bolstering of her testimony through the officer's testimony was highly prejudicial and requires reversal for a new trial.

III. Over defense counsel's objections the court admitted evidence of Appellant's possession of a machine gun not connected to the murder of Grantham and of Appellant's discussion with a cellmate of his desire to kill "Miss Gillion." This evidence was not probative of Appellant's consciousness of guilt for the murder and was not relevant to any material issue at trial. Instead, the evidence was solely relevant to Appellant's bad character or propensity to violence and was extremely prejudicial to his defense. The court's error in admitting this evidence requires reversal and remand for a new trial.

IV. Over defense counsel's objections, the trial court allowed the State to show the jury a videotape of a television news broadcast which featured scenes of Appellant wearing jail clothes while in the custody of jail authorities. Those portions of the videotape were irrelevant to any material issue and therefore inadmissible. Admission of those portions of the videotape violated Appellant's Fourteenth Amendment rights to be presumed innocent and to have a fair trial. This Court must reverse and remand for a new trial.

V. Over defense counsel's objections, the trial court allowed the State to introduce Tony House's prior, sworn, inconsistent statements to the prosecutor as substantive evidence. Allowing the prosecutor to impeach House with the prior inconsistent statements was improper because he did not remember making them. Furthermore, prior inconsistent statements to a prosecutor or the police during a law enforcement investigation are

not admissible as substantive evidence. The statements contradicted Appellant's testimony, damaged his credibility, and substantially harmed his defense. The conviction must be reversed and the case remanded for a new trial.

VI. Appellant's defense was that Beasley killed Grantham and he helped her conceal the crime after it was committed. Yet the trial court refused defense counsel's request to instruct the jury on the definition of accessory after the fact. Due process of law required the court to give complete jury instructions on the law applicable to Appellant's defense. The court's refusal to give the instruction precluded the jury from understanding Appellant's defense, weighing the evidence, and reaching a proper decision. This Court must reverse and remand for a new trial.

VII. Under the Sixth, Eighth, and Fourteenth Amendments, Appellant had the right to effective assistance of counsel in discovering and presenting mitigating evidence. Upon being informed that Appellant had commanded defense counsel not to call several favorable witnesses, the court asked only whether Appellant was on drugs or medication. The court accepted Appellant's waiver of his rights to counsel and to present mitigating evidence without conducting the necessary inquiry to determine whether the waiver was voluntary, knowing, and intelligent. The death sentence must be vacated and the case remanded for a new sentencing hearing before a new jury.

VIII. The trial court excluded evidence offered by the defense during the penalty phase of the trial that the State had

offered Appellant a plea agreement for a life sentence. The Eighth and Fourteenth Amendments require consideration of all relevant mitigating evidence by the jury and judge in a capital sentencing proceeding. Evidence of the plea offer was relevant as a mitigating factor because it was information which reasonably might bear upon the appropriate sentence for Appellant for this offense. The court's error in excluding the evidence requires this Court to vacate the sentence and remand for a new sentencing proceeding.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS TO DISMISS AND FOR ARREST OF JUDGMENT BECAUSE THE STATE VIOLATED DUE PROCESS BY FAILING TO CORRECT THE PRINCIPAL WITNESS'S PERJURED TESTIMONY BEFORE THE GRAND JURY.

On July 15, 1987, Connie Beasley testified before the grand jury which indicted Appellant. (R543, 583, 584, 587, 588) At trial, she admitted that she had lied and committed perjury in testifying before the grand jury. (R543, 544, 587, 593-595) The perjured testimony concerned the events of May 7, 1987. She told the grand jury that she, Grantham, and Appellant were at Appellant's apartment. Grantham left the apartment with Appellant. She did not see Appellant with a gun when they left. (R589) When Appellant returned alone, Beasley saw blood all over the front of him and on his hands. His eyes were wild. He told her he killed Grantham and threatened to kill her unless she did what he told her. (R590) Appellant then forced her to help him take a car to the Tampa Airport. (R590, 591)

On July 16, 1987, Beasley told the FDLE agents a completely different story. She said Appellant walked into the apartment while Grantham was trying to rape her. (R596-602) Appellant pulled Grantham off of her and told her to get dressed. (R602) Appellant said they were all going for a ride. When Grantham refused, Appellant removed a gun from a drawer, and told

Grantham he was going. (R604)

On July 24, 1987, Beasley negotiated with the prosecutor for a plea to third degree murder and a maximum sentence of three years. Beasley then told the prosecutor the version of the homicide related in her trial testimony. (R544, 545, 584-587) That is, that Beasley was present when Appellant shot and killed Grantham in accordance with a pre-arranged plan. (R464-467, 486-489)

Thus, the State knew, or should have known, that Beasley's grand jury testimony regarding the basic facts of the case was perjured no later than July 24, 1987, within days after the indictment was returned July 15, 1987. (R2747, 2748) Yet there is absolutely no indication in the record that the prosecutor ever did anything to correct the taint of Beasley's perjury prior to Appellant's trial, which did not commence until February 8, 1988. (R1, 5)

After Beasley admitted her perjury before the grand jury at trial, defense counsel moved to dismiss the indictment. (R939-949, 1233, 1234, 1436-1439, 1473, 1474, 1881-1883, 2962, 2963, 3015) The court denied the motion. (R942, 952, 2274) After trial, defense counsel moved for arrest of judgment because the indictment was based upon Connie Beasley's perjured testimony. (R3013) The court also denied this motion. (R2274)

It is well-established that the prosecution's knowing use of or failure to correct false evidence to obtain a conviction violates the defendant's constitutional right to due process of

law. Giglio v. United States, 405 U.S. 150, 153-154, 92 S.Ct. 763, 31 L.Ed.2d 104, 108 (1972); Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221 (1959); U.S. Const. amend. XIV. For example, in Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), the defendant killed his wife and claimed heat of passion upon finding her kissing the State's only eyewitness. This witness lied about his relationship with the wife at trial. He claimed they had only a casual relationship when in fact they were lovers. The Supreme Court held that the prosecutor's knowing use of false testimony by the only eyewitness to the killing violated due process. 355 U.S. at 31-32, 2 L.Ed.2d at 11-12.

Several courts have applied this rule to the prosecution's knowing use of or failure to correct false testimony before a grand jury to invalidate indictments. United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); Escobar v. Superior Court, Maricopa Cty., 746 P.2d 39 (Ariz.App. 1987); People v. Pelchat, 464 N.E.2d 447 (N.Y. 1984); State v. Reese, 570 P.2d 614 (N.M.App. 1977).

In Hogan, the Second Circuit reversed the defendant's convictions and remanded with directions to dismiss the indictment because of prosecutorial misconduct in presenting his case to the grand jury, including the presentation of false testimony. 712 F.2d 761-762. The court ruled, "Due process considerations prohibit the government from obtaining an indictment based on known perjured testimony." 712 F.2d at 759.

In Basurto, the Ninth Circuit ruled that a prosecutor has

a duty not to permit a person to stand trial when he knows that perjury permeates the indictment. 497 F.2d at 785. Thus, a prosecutor who learned of perjury before the grand jury was required to notify the court, defense counsel, and the grand jury, and his failure to do so violated due process. 497 F.2d at 785-786.

In Escobar, the Arizona appeals court held that the presentation of erroneous or misleading testimony to the grand jury and the prosecutor's failure to inform the court and grand jury required dismissal of the indictment. 746 P.2d at 42-43.

In Pelchat, the only evidence before the grand jury connecting the defendant to the crime was the testimony of an officer who later told the prosecutor that he was not able to identify the defendant as a participant. The prosecutor did nothing about the officer's admission, and the defendant was convicted upon entry of a guilty plea. The New York court ruled that the prosecutor's duty of fair dealing to the accused and candor to the courts applied to proceedings relating to the indictment both at presentment and afterwards. The prosecutor's violation of this duty impaired the defendant's right to due process and required reversal of his conviction. 464 N.E.2d at 451. Moreover, the court declared that courts have inherent power to dismiss an indictment challenged because a witness's testimony was perjured even though there was sufficient other reliable evidence presented, or the prosecutor acquired knowledge of the false evidence after the indictment was returned. 464 N.E.2d at

452.

In Reese, the New Mexico court reversed a conviction and sentence for possession with intent to distribute heroin because the only grand jury testimony relating to the defendant's possession was false. The court reasoned,

> An indictment based on false, material evidence is not an indictment of a grand jury conducted according to law. We hold that defendant has the due process right of not being indicted on the basis of false evidence, known to and uncorrected by the prosecutor, if the false evidence is material to the indictment.

570 P.2d at 617.

Since Connie Beasley lied to the grand jury about the basic facts of the case, her false testimony was plainly material to the indictment. Due process of law required the prosecutor to notify defense counsel, the court, and the grand jury of Beasley's perjury so that corrective action could be taken.

The prosecutor could not avoid this duty by reasoning that revelation of the perjury would have affected only Beasley's credibility and not probable cause for the indictment. The prohibition against the use of or failure to correct false testimony applies equally to evidence pertaining to credibility:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness

> and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue v. Illinois, 360 U.S. at 268, 3 L.Ed.2d at 1221.

Nor can the prosecutor's violation of his duty to disclose Beasley's perjury before the grand jury be excused because the trial jury was aware of the perjury and still found Appellant guilty. Article I, section 15 of the Florida Constitution provides, "No person shall be tried for capital crime without presentment or indictment by a grand jury...." Thus, the trial court's jurisdiction to try Appellant was dependent upon the existence of a valid indictment. Since the indictment in this case was based upon false, material evidence, it was a violation of due process of law to bring Appellant to trial upon the invalid indictment. Moreover, Florida Rule of Criminal Procedure 3.610(a) required the court to grant Appellant's motion for arrest of judgment because the indictment was so defective it would not support a conviction and the court lacked jurisdiction of the cause.

In Miller v. Pate, 386 U.S. 1, 7, 87 S.Ct. 785, 17 L.Ed.2d 690, 694 (1967), the Supreme Court proclaimed:

> More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. ... There has been no deviation from that established principle. ... There can be no retreat from that principle

here.

Appellant's conviction must be reversed, and the indictment based upon Connie Beasley's perjured testimony must be dismissed.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF CONNIE BEASLEY'S PRIOR CONSISTENT STATEMENTS TO POLICE OFFICERS MADE AFTER SHE HAD TIME AND MOTIVE TO FALSIFY.

Connie Beasley testified at trial that she was present in Robert Grantham's car on the night of May 7, 1987, when Appellant shot Grantham. (R486-489) Beasley was the only purported eyewitness to the shooting and was, therefore, the State's most important witness at trial. Beasley admitted that she had repeatedly lied to investigators and the grand jury in order to protect herself. (R541-544, 569, 574-576, 579, 580, 583, 584, 587-606) Beasley's credibility was crucial to the State's case against Appellant, especially in light of Appellant's defense that Beasley killed Grantham and he merely helped her conceal the crime after it occurred. (R1512-1526)

FDLE Agent Velboom testified that he interviewed Beasley on the night of her arrest, July 1, 1987. (R1385, 1386) When the prosecutor asked what she said to Velboom, defense counsel objected to hearsay, and the court initially sustained the objection. (R1386) The prosecutor argued that the statement was admissible as a prior consistent statement because it was made before Beasley entered her plea agreement with the State. (R1386-1396) The court then overruled defense counsel's hearsay objection and allowed Velboom to testify that Beasley said, "He did it, and I knew about it." (R1394, 1396)

Velboom testified that Beasley made another statement on August 20, 1987. (R1411) The court again overruled defense counsel's objection and allowed Velboom to testify, "She indicated that Mr. Anderson told her they should return to where Grantham's body had been left and take it to Orlando because it would be easier to hide over there." (R1412)

Both of Beasley's statements to Velboom were hearsay, out of court statements offered to prove the truth of the matter asserted. § 90.801(1)(c), Fla. Stat. (1987). Hearsay is inadmissible under the evidence code unless one of the statutory exceptions applies. § 90.802, Fla. Stat. (1987).

Section 90.801(2)(b), Florida Statutes (1987), provides an exception to the hearsay rule for the prior consistent statements of a witness offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. However, this exception applies only when the prior statement was made before the existence of the fact giving rise to the witness's bias, interest, or other corrupt motive to testify falsely. Jackson v. State, 498 So.2d 906, 909-910 (Fla. 1986); Quiles v. State, 523 So.2d 1261, 1263 (Fla. 2d DCA 1988).

In this case, Beasley admitted that her motive to falsify arose before she made the statements to Velboom. She testified that she lied to the investigators in order to protect herself. (R540-543, 569, 574-576, 579, 580) A witness's prior consistent statements are not admissible when they are made after the events of the crime have long since occurred and the witness has had time

and motive to falsify her original statements to the police. Bianchi v. State, 528 So.2d 1309, 1311 (Fla. 2d DCA 1988); Quiles v. State, 523 So.2d at 1263. See also State v. Jano, 524 So.2d 660, 661 (Fla. 1988) (excited utterance exception to hearsay rule applies only when the statement was made before there was time to contrive or misrepresent); G.M. v. State, 530 So.2d 461, 462 (Fla. 5th DCA 1988) (same as Jano). "The passage of time allows for fabrication on the part of the declarant and diminishes the reliability of such out of court statements." 530 So.2d at 462. Since the shooting occurred on May 7, 1987, and Beasley's statements were made on July 1 and August 20, 1987, she had more than ample time to reflect and contrive a false story to give the investigators to protect herself.

The erroneous admission of a witness's prior consistent statements cannot be deemed harmless when the credibility of the witness is critical to the case. Bianchi v. State, 528 So.2d at 1311; Preston v. State, 470 So.2d 836, 837 (Fla. 2d DCA 1985). It is especially harmful to allow the State to bolster the credibility of such a witness through the testimony of a police officer. Quiles v. State, 523 So.2d at 1263-1264. "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave." Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979).

The trial court's error in allowing the State to

improperly bolster Connie Beasley's credibility through Agent Velboom's testimony regarding her prior consistent statements made long after she had the motive and opportunity to contrive a false story was highly prejudicial to Appellant's defense and could well have resulted in a miscarriage of justice. Quiles v. State, 523 So.2d at 1263-1264. Appellant's conviction and sentence must be reversed and the cause remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF COLLATERAL CRIMES RELEVANT SOLELY TO APPELLANT'S BAD CHARACTER OR PROPENSITY.

The prosecutor proffered Connie Beasley's testimony that on the day after Grantham was killed Appellant showed her a machine gun in the trunk of his car and told her if the heat was ever on he could take a couple of people out with it. (R522, 523) The prosecutor argued that this was evidence of Appellant's desire to evade prosecution and was relevant to consciousness of guilt. (R524, 525) Defense counsel argued that Beasley's testimony was not probative of consciousness of guilt and not related to what happened the day before. (R525, 526) The court overruled the objection and admitted the testimony. (R526-529)

Kenneth Gallon testified that he was in the same jail cell with Appellant in July, 1987. (R3466, 3467) Appellant talked about wanting someone to kill "Miss Gillion." (R3468) Defense counsel objected that this was evidence of another crime which placed Appellant's character in issue and moved for a mistrial. (R3468, 3469) The prosecutor argued that the evidence was relevant to show consciousness of guilt. (R3469, 3470) The court overruled the objection. (R3470) Gallon further testified that Appellant offered him $2,000 or $3,000 to have "Miss Gillion" killed. (R3476)

Evidence of collateral crimes is admissible if it is relevant to any material fact in issue; it is not admissible if it

is relevant solely to the bad character or propensity of the defendant. Castro v. State, 547 So.2d 111, 114-115 (Fla. 1989); Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

In Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), the defendant killed a used car lot owner, then confessed to his girlfriend and his brother-in-law. The trial court admitted testimony by the defendant's cellmate that defendant said he tried to have his brother-in-law killed to prevent him from testifying, to discredit his girlfriend, and to avoid conviction. This Court held evidence that a suspected person in any manner endeavors to evade a threatened prosecution is admissible where it is relevant to show the defendant's consciousness of guilt. 399 So.2d at 968.

This case is different from Sireci because the State's collateral crime evidence was not probative of Appellant's consciousness of guilt for the murder of Grantham. Beasley's testimony concerning Appellant's possession and intended use of the machine gun did not show Appellant was seeking to evade prosecution for the murder of Grantham. It was equally indicative of Appellant's concern for protecting Beasley from arrest for the murder or Appellant's desire to avoid arrest for helping Beasley conceal her crime after she killed Grantham. Similarly, Gallon's testimony concerning Appellant's desire to have Beasley killed was equally indicative of his anger caused by her false accusation that he killed Grantham.

Evidence of Appellant's possession of a weapon not in any way connected with the murder of Grantham was not relevant to any material fact in issue and should not have been admitted. See State v. Lee, 531 So.2d 133, 133-136 (Fla. 1988) (evidence of defendant's possession of car and gun during prior bank robbery not connected to kidnapping, sexual battery, and armed robbery charges should not have been admitted); Jackson v. State, 522 So.2d 802, 806 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988) (evidence of defendant's possession of weapons and bulletproof vests not relevant to offense charged should not have been admitted).

Evidence that Appellant attempted to hire Gallon to kill Beasley was also irrelevant to any material issue. See Keen v. State, 504 So.2d 396, 400-402 (Fla. 1987) (questioning of defendant about alleged prior attempted murder of his brother's wife was improper); Jackson v. State, 451 So.2d 458, 461 (Fla.1984) (evidence that defendant pointed gun at witness and boasted of being a "thoroughbred killer" was impermissible).

The erroneous admission of irrelevant collateral crime evidence is presumed to be harmful error because of the danger that the jury will take the evidence of bad character or propensity to crime as evidence of guilt of the crime charged. Castro v. State, 547 So.2d at 115; Peek v. State, 488 So.2d 52, 56 (Fla. 1986). The improper collateral crime evidence in this case was especially prejudicial because it indicated that Appellant had a propensity to commit crimes of violence, even murder, in the future. Such

evidence was not only harmful during the guilt phase of trial, as in Peek, it may very well have carried over and affected the jury's recommendation of death in the penalty phase of trial, as in Castro.

The improper admission of collateral crimes evidence cannot be deemed harmless unless the State can show beyond a reasonable doubt that there is no possibility that the evidence affected the verdict. State v. Lee, 531 So.2d at 136; State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Since the central issue in this case was the credibility of Beasley's claim that Appellant killed Grantham versus the credibility of Appellant's testimony that Beasley killed Grantham, the erroneous admission of evidence of Appellant's propensity to violence cannot be found harmless. Keen v. State, 504 So.2d at 400-402. The conviction must be reversed and the case remanded for a new trial.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS BY ADMITTING IRRELEVANT PORTIONS OF A VIDEOTAPED NEWS BROADCAST FEATURING APPELLANT IN JAIL CLOTHING WHILE IN THE CUSTODY OF JAIL AUTHORITIES.

The State proffered a videotape of a news broadcast viewed by Kenneth Gallon and Appellant while they were in jail. (R1078, 3460, 3461) Defense counsel objected to admission of portions of the videotape which showed Appellant in jail clothes being led to a secure facility by Hillsborough County Jail authorities. He argued that those portions were irrelevant and their prejudicial effect outweighed their probative value, infringed on the presumption of innocence, and denied Appellant his right to a fair trial. (R1082, 1083, 3461, 3462) The prosecutor argued that Appellant's response to the broadcast was relevant. (R1084, 1085) The court overruled the objection. (R3462)

Gallon testified before the jury that he was in jail with Appellant in July. (R3467) They saw a news broadcast concerning Appellant's case. Gallon described Appellant's statements and actions during various portions of the broadcast other than the scenes showing Appellant in jail clothes and in custody while the entire videotape was played for the jury over defense counsel's renewed objection. (R3471-3475)

It is well established that the State cannot compel the accused to go to trial in prison or jail clothing because the possible impairment of the presumption of innocence violates the

right to a fair trial under the Fourteenth Amendment to the United States Constitution. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Felts v. Estelle, 875 F.2d 785 (9th Cir. 1989); Torres-Arboledo v. State, 524 So.2d 403, 409 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). It is inherently unfair to try a defendant while garbed in his jail uniform because no "insinuations, indications, or implications of guilt should be displayed before the jury, other than admissible evidence and permissible argument." Brooks v. State of Texas, 381 F.2d 619, 624 (5th Cir. 1967).

In Schultz v. State, 131 Fla. 757, 179 So. 764, 765 (1938), this Court explained,

> Every person is presumed to be innocent of the commission of crime and that presumption follows them through every stage of the trial until they are convicted. It is, therefore, highly improper to bring a person who has not been convicted of a crime, clothed as a convict and bound in chains, into the presence of the venire or jury by whom he is to be tried for any criminal offense and, when such condition is shown by the record to have obtained, in many cases it might be sufficient ground for reversal.

What happened in this case was even more prejudicial to the presumption of innocence and the due process right to a fair trial than compelling Appellant to stand trial in his jail clothes. Television is a very suggestive medium whose impact on its viewing audience cannot be denied. To display for the jury a news broadcast showing Appellant not only in jail clothing but also in

the custody of jail authorities being escorted to a secure facility impaired Appellant's presumption of innocence more certainly than compelling him to wear jail clothes in court. "[I]t is the extent to which the defendant's clothing is communicative of his status as a prisoner which determines whether or not he is denied a fair trial." Torres-Arboledo v. State, 524 So.2d at 409; United States v. Dawson, 563 F.2d 149, 152 (5th Cir. 1977). Nothing could have been more communicative of Appellant's status as a prisoner, and inferentially guilty of the crime charged, than the videotape displaying Appellant in custody in his jail clothes.

Moreover, there was absolutely no relevance to the portions of the news broadcast showing Appellant in jail clothes and in custody. The only relevant portions of the videotape were those showing "Miss Gillion" and the police officers searching for the body to which Gallon claimed Appellant responded. The test for admissibility of evidence is relevancy; the test for inadmissibility is lack of relevancy. Williams v. State, 110 So.2d 654, 660 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). There was no justification for displaying the irrelevant, prejudicial portions of the videotape to the jury, and the court erred by allowing the State to do so.

Moreover, the court's error in admitting the irrelevant portions of the videotape was not rendered harmless by Gallon's testimony that Appellant was in jail. In United States v. Harris, 703 F.2d 508 (11th Cir. 1983), the court rejected the government's argument that evidence of the defendant's arrest rendered harmless

the court's error of denying a mistrial when the defendant was brought into the courtroom in clearly identifiable prison clothes. The court opined,

> Clearly identifiable prison garb does more than clothe a defendant with suitable raiment -- it also clothes him with an unmistakable mark of guilt. ... That the jury will learn of his arrest during the course of the trial does not mitigate the harm occasioned by parading the defendant clothed in a shroud of guilt.

703 F.2d at 512.

The trial court's error in permitting the State to show the jury the videotape of Appellant in jail clothes while in custody was particularly harmful because the primary issue at trial was credibility. The jury was called upon to decide whether Connie Beasley or Appellant was telling the truth. To allow the State to clothe Appellant in a shroud of guilt must have affected the jury's perception of Appellant's credibility and its judgment of his guilt or innocence. The court's violation of Appellant's due process rights to be presumed innocent and to have a fair trial requires reversal and remand for a new trial.

ISSUE V

THE TRIAL COURT ERRED BY ADMITTING A DEFENSE WITNESS'S PRIOR INCONSISTENT STATEMENTS TO THE PROSECUTOR IN A DEPOSITION AS SUBSTANTIVE EVIDENCE.

Defense witness Tony House testified that he was in the jail cell with Appellant and Gallon when they watched the news broadcast about Appellant's case. (R1612-1614) Appellant did not make any statements about his case during the broadcast or at any other time while they were in the cell together. (R1614, 1656) Appellant did not point his finger like a gun and say, "Bitch, you're dead." (R1614, 1650) House did not hear Appellant say anything about alligators eating the body or ask if Gallon could have someone killed for him. (R1650)

On cross-examination, House admitted giving a statement to the prosecutor on August 13, 1987. (R1657, 1662) House did not remember telling the prosecutor that when they were watching the news Appellant said stay right there when the boat was shown, get out of there when four-wheelers were shown in a field, or that he was going to kill "that bitch." (R1663-1668) House did not remember telling the prosecutor that Appellant asked whether House or Gallon could have someone killed and offered a couple of thousand dollars to kill the girl. (R1668-1670)

The State called court reporter Patty Zajkowski as a rebuttal witness. She took Tony House's sworn statement in the prosecutor's office on August 13, 1987. (R1837, 1837) Defense counsel objected to admission of the prior statement as improper

impeachment. He argued that House admitted making the prior statements but neither admitted nor denied making prior inconsistent statements. (R1839, 1848, 1849) The prosecutor argued that House's prior inconsistent statement was admissible as substantive evidence because House was under oath when he made it and because House said he could not recall whether he made the statements. (R1839-1850) The court overruled defense counsel's objections (R1850, 1851) and permitted the State to have Zajkowski read House's entire statement to the jury. (R1858-1867)

In the prior statement, House said the news broadcast showed people in a boat searching for the body, and Appellant said to stay right there. (R1862-1864) When it showed four-wheelers in a field, Appellant said to get out of there. When it showed a girl's picture, Appellant said he was going to kill "that bitch." (R1864) Appellant later asked House if he could have someone killed. When House said no, Appellant asked about Gallon. Appellant asked Gallon to do it and offered him a couple of thousand dollars. (R1865) A day or two later Appellant spoke to the girl from news broadcast on the phone. He told House he was going to kill her. (R1865, 1866) A couple of days later, Appellant had the impression Gallon and another prisoner were telling on him, and Appellant threatened to kill "that son of a bitch." (R1866) Appellant said he was trying to keep the girl from coming to court. (R1867)

The trial court erred by overruling defense counsel's objections and admitting House's prior inconsistent statements to

the prosecutor as substantive evidence. While the State is permitted to use prior inconsistent statements to impeach adverse witnesses, Brumbley v. State, 453 So.2d 381, 384-385 (Fla. 1984), it is not permitted to impeach when the witness has a lapse of memory and does not recall the prior inconsistent statement. Jackson v. State, 451 So.2d 458, 461-463 (Fla. 1984); Smith v. State, 547 So.2d 281 (Fla. 5th DCA 1989); Calhoun v. State, 502 So.2d 1364 (Fla. 2d DCA 1987); Parnell v. State, 500 So.2d 558 (Fla. 4th DCA 1986), rev. denied, 509 So.2d 1119 (Fla. 1987).

More importantly, a witness's prior inconsistent statement to a prosecutor cannot be admitted as substantive evidence. Dudley v. State, 545 So.2d 857, 859 (Fla. 1989). In Dudley, this Court declared,

> The law is clear that, although a prior inconsistent statement may be used to impeach the credibility of a witness, a prior inconsistent statement made by a witness about what another person told him is hearsay and cannot be used as proof of the facts contained therein.

545 So.2d at 859.

In Dudley, the State argued that the witness's prior inconsistent statement to a police detective and an assistant state attorney was admissible as substantive evidence under section 90.801(2)(a), Florida Statutes (1987). That statute provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his

> testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. ...

This Court rejected the State's argument and held that the statement was not admissible as substantive evidence because this type of law enforcement investigation and inquiry was not an "other proceeding" under the statute. 545 So.2d at 859. See Kirkland v. State, 509 So.2d 1105 (Fla. 1987) (prior, sworn, inconsistent statement to police not admissible as substantive evidence); State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986) (same); State v. James, 402 So.2d 1169 (Fla. 1981) (discovery deposition may not be used as substantive evidence at trial).

The improper admission of House's prior inconsistent statements as substantive evidence was harmful error because of the adverse impact of the statements on the jury's perception of Appellant's credibility. House's prior statement about the events in the jail, especially during the news broadcast, contradicted Appellant's testimony. (R1556-1558) Since the ultimate determination of Appellant's guilt or innocence depended upon whether the jury believed Connie Beasley or Appellant, evidence which eroded Appellant's credibility was extremely prejudicial to his defense. The improper admission of evidence which damaged Appellant's credibility requires reversal and remand for a new trial.

ISSUE VI

THE TRIAL COURT VIOLATED DUE PROCESS BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LAW APPLICABLE TO HIS THEORY OF DEFENSE.

Appellant's defense was that he did not kill Grantham, Beasley did, and Appellant helped her conceal the crime after it had already occurred. (R1512-1526) Defense counsel asked the court to instruct the jury on the definition of accessory after the fact as his theory of defense, but the court denied the request. (R1886-1890, 1907)

The court also told defense counsel that he need not submit a written jury instruction to preserve this issue for appellate review. (R1894) The submission of written instructions is not required when the defense requests a Florida standard jury instruction. Holley v. State, 423 So.2d 562, 564 (Fla. 1st DCA 1982). The standard instruction is provided at page 52C of the Florida Standard Jury Instructions in Criminal Cases.

The defendant is entitled to have the jury instructed on the law applicable to his theory of defense upon request when there is evidence which supports the defense. Mathews v. United States, 485 U.S. ___, 108 S.Ct. 883, 99 L.Ed.2d 54, 61 (1988); Gardner v. State, 480 So.2d 91, 92 (Fla. 1985). Due process of law requires the court to completely define every element of the law relative to the defense, and the court's failure to do so is necessarily prejudicial and misleading. Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (1945); U.S. Const. amend. XIV; Art. I, § 9, Fla.

Const. Moreover, the judge should not weigh the evidence to determine whether the instruction is appropriate. Smith v. State, 424 So.2d 726, 732 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983). It is the jury's duty to weigh the evidence after receiving proper instruction on the law. Gardner v. State, 480 So.2d 91, 93 (Fla. 1985).

Appellant is aware that this Court held a defendant is not entitled to a theory of defense instruction on accessory after the fact in Palmes v. State, 397 So.2d 648, 652 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Appellant respectfully suggests that this Court should recede from Palmes. In Palmes, this Court reasoned, "That a person committed a crime other than the one he is charged with is not a legal defense requiring a jury instruction." 397 So.2d at 652. While this proposition may generally be true, it is no longer true regarding the separate crime of accessory after the fact.

In Staten v. State, 519 So.2d 622, 625 (Fla. 1988), this Court recognized that "being a principal offender of any crime and being an accessory after the fact to the same crime are mutually exclusive." This is true because the intent to aid the escape of a known felon formed after the crime has been committed necessarily excludes any intent to aid or participate in the crime formed before or during its commission. 519 So.2d at 626. "The accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice." 519 So.2d at 626.

In Palmes, this Court also reasoned that the defendant was not entitled to an instruction on accessory after the fact because he could not be convicted of that offense as a lesser included offense to first-degree murder. 397 So.2d 652. But the jury's legal inability to convict Appellant under an indictment charging first-degree murder when he was actually guilty of accessory after the fact was precisely the point of Appellant's defense. The jury should have been instructed to acquit Appellant if it found that his evidence of being an accessory after the fact created a reasonable doubt about his guilt of the murder.

The court's violation of Appellant's due process right to have the jury instructed on the law applicable to his defense cannot be deemed harmless. A jury of lay people could not possibly have known or understood the legal basis for the defense without proper instructions from the court. Without such instructions, the jury could not properly perform its duty to weigh the evidence and determine Appellant's guilt or innocence. The conviction must be reversed for a new trial.

ISSUE VII

THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVER OF HIS RIGHT TO HAVE DEFENSE COUNSEL PRESENT MITIGATING EVIDENCE WITHOUT CONDUCTING AN ADEQUATE INQUIRY TO DETERMINE WHETHER THE WAIVER WAS A VOLUNTARY AND INTELLIGENT RELINQUISHMENT OF A KNOWN RIGHT OR PRIVILEGE.

During the penalty phase of trial, defense counsel informed the court that he had found numerous witnesses who could testify favorably for Appellant, including a doctor, Appellant's parents, his brother, his sisters, his son, a chaplain, a correctional officer, a prison superintendent, employers, employees, and others. (R2166, 2167) Defense counsel said Appellant had commanded him not to call these witnesses. (R2168) Appellant agreed and told the court he would rather not have any witnesses testify on his behalf. (R2169) The court asked Appellant only whether he was on any drugs or medication which would affect his ability to understand what was going on. Upon receiving a negative response, the court made no further inquiry. (R2169)

It is well established that a defendant in a capital case has the right to have the judge and jury consider all relevant mitigating evidence under the Eighth and Fourteenth Amendments to the United States Constitution. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 Ed.2d 1 (1982).

Moreover, the defendant has the right to the effective assistance of counsel in discovering and presenting relevant mitigating evidence. Bassett v. State, 541 So.2d 596 (Fla. 1989). As long ago as 1932 the United States Supreme Court recognized the need for counsel in capital cases. In Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed.2d 158, 170 (1932), the Court declared,

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He lacks both the skill and the knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Accordingly, in Bassett, this Court held that defense counsel's failure to discover relevant mitigating evidence entitled the defendant to a new sentencing hearing before a new jury. 541 So.2d at 597.

Of course, like other constitutional rights, these rights may be waived by a mentally competent defendant who voluntarily, knowingly, and intelligently chooses to do so. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (waiver of counsel); Gilmore v. Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976) (waiver of right to appeal death sentence); Hamblen v. State, 527 So.2d 800 (Fla. 1988) (waiver of counsel to present mitigating evidence); Goode v. State, 365 So.2d 381 (Fla.

1979), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979) (waiver of counsel for capital trial and sentencing).

Appellant's act of commanding defense counsel not to call favorable witnesses to testify in mitigation of sentence amounted to a waiver of Appellant's right to effective assistance of counsel during the penalty phase of the trial. Before accepting this waiver, the trial court should have conducted a sufficient inquiry to determine whether Appellant was competent, and whether he voluntarily and intelligently waived the right to counsel after being warned of the dangers of choosing to manage his own defense. See Faretta v. California, 422 U.S. at 835, 45 L.Ed.2d at 581-582; Smith v. State, 407 So.2d 894, 900 (Fla. 1981); Goode v. State, 365 So.2d at 383-384.

Even if this Court were to find that Appellant's actions did not amount to a waiver of counsel requiring a Faretta inquiry, at the very least the trial court should have determined whether Appellant voluntarily, intelligently, and knowingly relinquished his right to present mitigating evidence. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938).

The court's limited inquiry concerning whether Appellant was under the influence of drugs or medication did not satisfy either the general standard for waiver of constitutional rights or the more specific standard for waiver of the right of counsel. Therefore, the court erred in accepting Appellant's waiver. The sentence must be reversed, and the case remanded for a new sentencing proceeding before a new jury.

ISSUE VIII

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY REFUSING TO ADMIT NONSTATUTORY MITIGATING EVIDENCE THAT THE STATE OFFERED APPELLANT A PLEA AGREEMENT FOR A LIFE SENTENCE.

Defense counsel Ober informed the court that he intended to present testimony by defense counsel Fuente that the State offered Appellant a life sentence in exchange for a guilty plea as a factor in mitigation. The court sustained the State's relevancy objection and excluded the testimony from consideration during the penalty phase of the trial. (R2190, 2191)

Under the Eighth and Fourteenth Amendments to the United States Constitution, the sentencer in a capital case may not refuse to consider nor be precluded from considering any relevant mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S.Ct. 1821, 95 L.Ed.2d 347, 350 (1987); Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1, 6 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1, 8 (1982). Even in a non-capital case the United States Supreme Court proclaimed, "The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424, 430 (1984).

In Florida, capital punishment is reserved for "only the most aggravated and unmitigated of most serious crimes." State v.

Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied sub. nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The prosecutor's willingness to offer a life sentence for a guilty plea was an indication that this case was not so aggravated and unmitigated that the only appropriate punishment would be a death sentence. Thus, evidence of the State's offer of a life sentence was information that reasonably might bear on the proper sentence for Appellant for this offense and was, therefore, relevant mitigating evidence.

The trial court's failure to consider, and its refusal to allow the jury to hear, relevant mitigating evidence violated the Eighth and Fourteenth Amendments under Eddings v. Oklahoma. Appellant's death sentence must be vacated, and the case must be remanded for a new sentencing hearing at which all mitigating evidence may be presented to the judge and the jury. Foster v. State, 518 So.2d 901 (Fla. 1987), cert. denied, 487 U.S. ___, 108 S.Ct. 2914, 101 L.Ed.2d 945 (1988).

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and remand this case to the trial court with directions to dismiss the indictment, grant Appellant a new trial, or conduct a new sentencing proceeding with a new jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 15th day of November, 1989.

Respectfully submitted,

Paul C. Helm

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