IN THE SUPREME COURT OF FLORIDA

JOHNNIE C. BOUIE, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,208

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JOHNNIE C. BOUIE, JR.,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 72,278

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On September 19, 1984, the state (Appellee) filed an information charging Johnnie C. Bouie, Jr. (Appellant) with the second-degree murder of Barbara Lynne Smith. (R929) On October 15, 1984, the Fall Term Grand Jury in and for Volusia County, Florida, indicted Bouie for the first-degree murder of Barbara L. Smith. (R931) Bouie filed a pro se Demand for Discovery which was later followed by a similar demand from Bouie's counsel. (R932-934) The state filed an answer on November 5, 1984. (R935-937)

This cause was originally tried in June of 1987. That trial ended in a mistrial after the jury was unable to reach a unanimous verdict. (R1007,1018-1032,1049-1050) The state sought and received a second indictment on November 4, 1987. (R1069) This cause proceeded to a jury trial on January 25, 27, 28, and 29, 1988 before the Honorable Kim C. Hammond. Following jury

selection and prior to the jury being sworn, the state revealed that their investigators had obtained information indicating that Bouie made incriminating statements to another inmate in the holding cell earlier that week. At that point, defense counsel strenuously objected to continuing the trial. Defense counsel moved for a mistrial and, short of that, requested a continuance to allow time for an investigation of this new evidence. The trial court refused to grant either the motion for mistrial or the motion to continue. **(R266,282-301)** When the state announced its intention to use the testimony of Albert Lee Jones (Bobby Edwards), the inmate in question, defense counsel again objected and sought a continuance. The defense also sought to preclude the testimony of Mr. Edwards. The trial court denied the motion to preclude the testimony, denied the motion for continuance, and denied the motion for mistrial. **(R546-574)** Defense counsel also made an oral motion to withdraw based on an ethical conflict of interest. After a brief inquiry into the circumstances, the trial court denied the motion to withdraw. **(R574-575)** The trial court allowed the defense to register a standing motion for mistrial as to this issue. **(R575-576)**

During the testimony of Sergeant Klepper, defense counsel objected to the introduction of certain photographs as cumulative and duplicative. The trial court overruled the objection and allowed the evidence. **(R368-374)** The trial court also overruled defense counsel's objection to David Bayer's use of the term "consistent" when referring to blood comparisons. **(R498-499)**

At the conclusion of the state's case-in-chief, Appellant moved for a judgment of acquittal arguing that the evidence was insufficient to exclude the reasonable hypothesis of innocence contained in Bouie's statement to police. Appellant also renewed the previously made motion for mistrial based on the testimony of Bobby Edwards. The trial court denied both motions. (R680-681)

The defense presented the testimony of several witnesses. Additionally, Johnnie Bouie testified in his own defense. (R684-727,745-773) Defense counsel renewed the motions for judgment of acquittal and for mistrial after presentation of all of the evidence. The trial court denied both motions once again. (R846) Following deliberations, the jury returned with a verdict of guilty as charged of first-degree murder. (R864-871,1109)

A penalty phase was conducted on February 2, 1988. (R875-927) The trial court allowed the state to introduce certified copies of two misdemeanor convictions. The trial court took judicial notice of these convictions over defense objection. (R876-877) Other than these two misdemeanor convictions, the state relied on the evidence presented at the guilt phase. Appellant presented the testimony of four family members in mitigation. Following deliberations, the jury returned with a nine to three recommendation that the court impose the death penalty. (R919-924,1112)

On March 31, 1988, Johnnie Bouie appeared for sentencing. The trial court adjudicated Bouie guilty and sentenced him to death. (R1113-1115,1129-1134) The trial court failed to file

any written findings of fact in support of the death sentence. The trial court also failed to orally state any findings at the sentencing hearing. Appellant filed a timely notice of appeal on April 15, 1988. (R1118)

STATEMENT OF THE FACTS

Guilt Phase

Johnnie Bouie first met Barbara Smith in August of 1983 when she expressed interest in buying an automobile part that Bouie was selling. Bouie next encountered Smith on September 3, 1984 in Orlando where Smith rented a room from Bouie's uncle. When Smith learned that Bouie had a trip to Daytona planned that weekend, she offered him ten dollars for a ride to her mother's house in Ormond by the Sea. They left Orlando shortly before 9 P.M. that evening traveling east on Interstate 4, then east on Highway 92, before turning onto Eleventh Street. On Eleventh, Bouie felt the rear of his car swerve. He pulled over and noticed that his tire was almost completely flat. As he was changing the tire, the jack broke. He decided to turn around and head back toward Highway 92 hoping to find an open service station. While turning the car around, the disabled tire fell off since Bouie had failed to retighten the lug nuts. Three of the studs broke completely off the wheel. (R745-752)

Robert McKitrack was heading east on the Eleventh Street extension in Daytona Beach, Florida. It was approximately 10:50 P.M. and McKitrack was running late for his shift at the water plant. (R305-306) The road was dark with no lights, houses, or other cars. As he rounded a curve, McKitrack noticed a car parked on the side of the road. McKitrack noticed a woman standing beside the car waving some type of rag. (R306-307) Despite his tardiness, McKitrack stopped his car and backed up to see if he could be of assistance. While the woman stayed by the

disabled car, a black male approached McKitrack. McKitrack identified the man as Johnnie Bouie, the Appellant. (R306-307,311) Bouie explained that his car had a flat tire. The men discussed pushing the car so that it was completely out of the roadway. McKitrack believed his own jack was too small to use on Bouie's Pontiac. Although Bouie wanted McKitrack's help in pushing the car or the use of his jack, McKitrack explained that he was late for work. He told Bouie that he would clock in at work and either come back or send help. (R306-307) Throughout this discussion, the woman waited calmly by Bouie's automobile. (R311) Once McKitrack reached the water plant, he called the police and reported the situation. (R307,313)

Susan Sterthouse was also driving east on Eleventh Street that evening. She was headed for home sometime between 11:15 and 11:30 P.M.. She noticed a car on the side of the road. Sterthouse saw a woman wearing pants and a blouse standing on the roof of the car. Sterthouse heard the woman screaming. The woman appeared to be flailing a white object toward a man in dark clothing. Sterthouse could not determine the race of the man. The man wore a t-shirt and jeans and stood next to the car. Sterthouse only saw the man from the rear. It appeared as if he was simply standing there with his hands folded in front of him. Sterthouse slowed down but decided against returning to the scene. (R316-321) Sterthouse apparently did not notify the authorities.

Bouie returned to his car pondering his predicament. It was at that point that Barbara Smith began making amorous

advances. The couple engaged in some spirited and lustful physical activity culminating in Bouie passionately biting Smith. Bouie suggested that they head for more comfortable accomodations and the couple began walking up the road. (R752-753)

They were barely twenty feet from the car when another automobile stopped on the roadside. Bouie began walking toward the car believing that help had finally arrived. Two white males got out of the car and one of the men began administering a beating to Barbara Smith. As he beat her, he called her a "nigger lover." (R753) The other stranger headed toward Bouie acting and talking in a threatening manner. Bouie, who had no weapons to defend himself, became frightened and ran into the woods. (R753-754)

Thinking that his assailants were close behind, Bouie stumbled and fell as he made his way deep into the surrounding wooded area. He became disoriented and lost all sense of direction. Bouie thought he heard cars driving by and attempted to walk in that direction. When the bushes became so thick that he could not walk, he stopped and rested. He fell asleep and woke up the next morning. In the daylight, Bouie could see narrow trails through the woods. He followed them out to the road where he saw a sheriff's car as well as several other vehicles. The police stopped Bouie as he walked along the road. Bouie attempted to tell the deputy what had happened the night before, but the police insisted in transporting Bouie for questioning. (R754-756)

At the station, Bouie waived his constitutional rights and agreed to answer questions. Corporal Hudson accused Bouie of murdering Barbara Smith. Bouie immediately and vehemently denied

hurting Smith and explained the entire chain of events that led to his spending the previous night in the woods. At Hudson's request, Bouie agreed to submit to a polygraph. When the appointed hour arrived, Hudson told Bouie that they had sufficient evidence without a polygraph. At that point, Hudson arrested Bouie for the first-degree murder of Barbara Smith. (R756-758)

Law enforcement agencies arrived at the crime scene at approximately 11:30 P.M. They found a 1974 Pontiac on the side of the road. Police saw no other cars or people in the vicinity. The officers observed what appeared to be blood on the driver's door and the hood of the car. The right rear tire had been removed and was found approximately 100 feet north of the car. Approximately 70 feet northeast of the car on the opposite side of the road, Deputy Paige found a brassiere saturated with what appeared to be blood. (R322-345) Police also observed quite a bit of blood on the asphalt road. (R341-342)

Police called in a tracking dog and used the bra as a scent indicator. The dog led police into the heavily wooded area across the street from the disabled car. The dog went underneath a barbed wire fence and found the body of a white female approximately forty feet into the woods. (R347-355) The police identified the victim as Barbara Smith. (R360-361) Smith's body was partially nude (i.e. no top, no pants, and underwear partially pulled down.) (R365-374) A subsequent autopsy revealed that Barbara Smith died of multiple stab wounds to the chest resulting in exsanguination. (R402,409) Dr. Botting, the medical examiner, also found certain defensive wounds indicating that Smith

struggled with her attacker. **(R402-403,411)** Dr. Botting estimated the time of death to be around **11:30** P.M. on September **3,** 1984. **(R413)**

The next morning law enforcement officers resumed processing of the crime scene. Deputies spotted Johnnie Bouie walking along the road toward the water plant. **(R423-428, 449-450)** Bouie told the officers his name, explained that he had car problems, and had been forced to spend the night in the woods. Bouie was extremely cooperative and polite in dealing with the police. His disheveled appearance lended credence to his explanation. **(R424-427)** Police transported Bouie to the office of the Criminal Investigation Division. **(R425)**

Investigator David W. Hudson of the Volusia County Sheriff's office interviewed Johnnie Bouie at the office of the Criminal Investigation Division. Bouie agreed to waive his constitutional rights. Bouie explained that he had met Barbara Smith in Orlando at a boarding house belonging to Bouie's uncle. She offered Bouie ten dollars for a ride to her mother's home in Ormond by the Sea. Once the pair entered Volusia County, Bouie noticed that his right rear tire was leaking badly. Following Smith's directions, Bouie turned around on Eleventh Street and headed back to Highway **92** hoping to find an open service station. When Bouie turned the car around, the tire fell off. While Bouie worked on the car, a water plant worker stopped by briefly. After he left, two white males in a Buick or Oldsmobile stopped next to Bouie's car. The men began to administer a physical beating to Barbara Smith who was standing nearby. A fearful

Johnny Bouie ran into the woods where he became disoriented. He spent that night in the woods. Bouie told Investigator Hudson that he cut his finger on the barbed wire fence as he vaulted over it. Bouie described the assailants to Hudson. One was approximately six feet tall, 200 pounds with no facial hair. The other man was about five feet seven inches and wore blue jeans. Bouie later added that one had a beard. (R626-636)

Blood found inside the pocket of a pair of jeans found next to Smith's body was consistent with Bouie's blood but inconsistent with Smith's. (R497-498) It was also consistent with 11.5% of the general population (over 26 million people). (R505-511) Blood on the bra found at the scene was consistent with Smith's blood and inconsistent with Bouie's blood. (R500) Some of the blood on the blouse found at the scene could have come from Johnny Bouie's circulatory system and could not have been from Smith. (R500-501) It could also have come from 10.5% of the general population (more than 24 million folks). (R505-511) Investigators found human blood on Smith's abdomen that was inconsistent with Smith's blood type but consistent with Bouie's. (R502-503) It was also consistent with 4.5% of the general population (over 10 million people). (R505-511) The serologist also examined blood samples from various parts of Bouie's car. (R505-509) Blood from the hood of the car and from the rear window was consistent with Bouie's (and 2% of the general population - close to 5 million people) and inconsistent with Smith's blood type. (R505-511) Tests on the blood found on the roof of the car on the driver's side led to inconclusive

results. State's exhibit 17-E (21-C) containing a latent fingerprint lifted from a blood stain on the automobile was consistent with Bouie's blood (and 4.5% of the general population) and inconsistent with Smith's. (R505-511) The serologist emphasized that consistency did not result in an identical match. Blood evidence is not like fingerprint or signature-type evidence. (R512-516)

The latent fingerprint lifted from the blood stain on the car matched the left middle finger of Johnnie Bouie. (R520-526) Experts were unable to determine whether or not the fingerprint was placed on the car door before or after the blood was placed there. (R531-533)

A dentist and a forensic odontologist found that a bite mark on Smith's arm matched the bite mark of Johnnie Bouie. (R536-546,642-680) One of the dentists opined that Bouie inflicted the bite while he and Smith were face-to-face in a prone position. (R663-665) The dentist also concluded that Bouie bit Smith while he was in an agitated condition, i.e., an excited emotional state although not necessarily in anger. (R677-678)

The state produced the testimony of Albert Lee Jones a/k/a Bobby Louis Edwards, a/k/a Tim Lewis [1/], who was one of many inmates in the holding cell with Johnnie Bouie on the day that jury selection for Bouie's trial began. Edwards was also going to court that day where he was sentenced to five years in

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1/ Although Albert Lee Jones was apparently this witness' legal name, he was usually referred to as Bobby Edwards which is the name Appellant will use in this brief.

prison after pleading to an outstanding escape charge. (R580-581) Edwards testified that he and Bouie began talking in the holding cell and Bouie proceeded to tell Edwards about how he had murdered Barbara Smith after she refused his sexual advances. Bouie supposedly told Edwards that, after killing Smith, he removed a tire and concocted a story involving two white males chasing him from the scene. This scenario placed blame for Smith's murder on the two strangers. **(R581-600)** Many of the details that Edwards testified Bouie mentioned did not match the state's theory of the case. (R305-309,316-319,331-337,347-352,581) Edwards claimed that the only benefit that he received from the state for his testimony against Bouie was the state's promise to protect him in prison. **(R586-587)** Edwards did admit to previous convictions for escape, bank robbery, burglary and multiple counts of grand theft dealing with numerous worthless checks. **(R586,608-609)** Edwards admitted that he could be paroled at any time on the escape sentence but would probably not be released due to a seventeen year guideline sentence out of Pinellas County. **(R612-614)**

Four inmates who were also in the holding cell with Johnnie Bouie and Bobby Edwards described the physical set-up of that cell. The general concensus was that it would be extremely difficult if not impossible for two inmates to converse without others hearing their conversation. **(R684-687)** Donald Hartman was handcuffed to Edwards. Hartman testified that it was Edwards who was the blabbermouth that day in the holding cell talking to anyone who would listen. Hartman swore that Bouie "never, never"

talked to Edwards that day. (R686,700-701) Timothy McFarland agreed with Hartman. (R723-725) Other inmates who were present confirmed that Edwards was the talkative one and that Bouie never confessed to anyone. (R691-696) In contrast to Edwards' claims, two inmates testified that Bouie repeatedly proclaimed his innocence. (R695, 723-725) One inmate testified that an investigator for the state threatened him in an attempt to solicit damaging testimony against Johnny Bouie. (R701-703)

PENALTY PHASE

The state introduced evidence of two misdemeanor convictions. Bouie had a 1974 Volusia County conviction for attempting to carry a concealed weapon. He also apparently had a 1982 Orange County misdemeanor conviction for carrying a concealed weapon, to wit: a knife. (R876-877,1100-1101) Aside from the introduction of this evidence, the state relied on the evidence presented at the guilt phase. (R877)

Bouie presented testimony of four witnesses at the penalty phase. (R877-892) Bouie lived with his uncle during part of his youth. Bouie also worked for his uncle at night. He was always a good worker and never caused any problems at all. While his uncle doubted Bouie's guilt, he thought Bouie to be a likely candidate for rehabilitation. (R877-881)

Bouie never gave his father and namesake any problems as a youngster. Johnnie always tried to help his family when they were in need. He also got along well with his fellow man and went out of his way to help others. (R882-885) Bouie was

also a dependable husband who provided for his wife and two sons. He is a good and loving father who would be deeply missed by his family and friends. **(R886-888)** Bouie's parents and wife also expressed great doubt as to his guilt. **(R885,888,891)** Bouie's mother called him "the best" as a son. **(R890)** His mother raised him with a religious background and they frequently prayed together. **(R889-890)** She never saw him be cruel to anything or anyone. **(R891)** Bouie was evidently such a good samaritan that his mother sometimes became jealous of his attention to others. **(R891)**

Bouie served his country honorably after he was drafted into the army in **1979**. He did a fourteenth month tour in Korea and received an honorable discharge. **(R759,883)** After completing his primary and secondary education, Bouie completed **1246** hours of drafting at Orlando Vocational School. He also had one semester of accounting at Jones College. **(R759)**

SUMMARY OF ARGUMENTS

POINT I: The trial court has yet to enter written findings of fact in upport of the death sentence imposed. The trial court also failed to orally recite any explanation of the various aggravating and mitigating circumstances that the court either did or did not find applicable. Section 921.141(3), Florida Statutes (1987) requires a sentence of life imprisonment where the court fails to support a death sentence by specific written findings of fact. Van Royal v. State, 497 So.2d 625 (Fla. 1986) and its progeny mandate a reduction of Bouie's death sentence to a sentence of life imprisonment.

POINT 11: Five minutes before the jury was sworn, the state announced its intention to call Bobby Edwards as a witness. Bouie allegedly made incriminating statements to Edwards in the holding cell two days before. Defense counsel requested a continuance of at least one week *so* that he could adequately investigate and prepare for Edwards' testimony. The trial court abused its discretion in denying this very reasonable request. Appellant points to specific omissions by defense counsel to illustrate the prejudice caused by the trial court's ruling. Defense counsel also moved to withdraw based on the fact that the Office of the Public Defender, Seventh Circuit, represented both Edwards and Bouie. The trial court summarily denied this motion after a cursory inquiry. Appellant contends that prejudice should be presumed from the obvious appearance of impropriety.

Additionally, Appellant points to specific problems that occurred as a result of the ethical conflict.

POINT 111: The trial court should have granted the motion for judgment of acquittal in the instant case. The state's case was almost entirely circumstantial. The testimony of Bobby Edwards is inherently incredible and should be disregarded. The physical evidence is entirely consistent with Bouie's testimony and statement to the police at the time of his arrest. Bouie provided an extremely reasonable hypothesis of innocence which placed responsibility for Smith's murder on two white men who encountered the couple that night. These two racists are the murderers of Barbara Lynn Smith.

POINT IV: At the beginning of the penalty phase, the state successfully introduced, over objection, two documents indicating that Johnnie Bouie had two prior misdemeanor convictions. This constituted evidence of a non-statutory aggravating circumstance prohibited under State v. Dixon, 283 So.2d 1 (Fla. 1973). The state introduced the evidence prior to any defense assertion relating to the mitigating circumstance of no significant history of prior criminal activity. The evidence was particularly prejudicial in that it tended to suggest that Bouie made a habit of arming himself with a knife. Appellant also contests the quality of the evidence on other grounds.

POINT V: Two photographs of the victim were admitted into evidence over defense objection. The photographs were cumulative and whatever slight relevance they had was outweighed by the potential prejudice. The gory nature of the photographs undoubtedly prejudiced the jury.

POINT VI: This point involves a claim under Caldwell v. Mississippi, 472 U.S. 320 (1985). Comments, argument, and instruction by the prosecutor and the trial court misled the jury as to the applicable law. This could have misled the jury into believing that its role was unimportant.

POINT VII: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida, Appellant urges reconsideration particularly in light of the evolving body of case law which, in some cases, has served to invalidate the very basic cases on which the death penalty was upheld in the State of Florida.

POINT I

SECTION 921.141(3), FLORIDA STATUTES, VAN ROYAL V. STATE, INFRA, AND ITS PROGENY, AND THE FEDERAL CONSTITUTION MANDATE THAT APPELLANT'S SENTENCE BE REDUCED TO LIFE WHERE THE JUDGE FAILED TO RECITE EITHER ORAL OR WRITTEN FINDINGS OF FACT.

On February 1, 1988, the jury found Johnnie Bouie guilty as charged of first-degree murder. (R869,1109) On February 2, 1988, following a penalty phase, the jury recommended, by a nine to three vote, that the trial court sentence Bouie to death. (R921,1112) On March 31, 1988, Johnnie Bouie appeared before the Honorable Kim C. Hammond, Circuit Judge, for sentencing. (R1129-1134) In sentencing Bouie to death, the trial court's only mention of aggravating and mitigating circumstances was:

> The Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determined that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. (R1132)

The trial court rendered its written judgment and sentence on April 8, 1988. (R1113-1115) The written judgment and sentence referred to the aggravating and mitigating circumstances in a similar manner as the trial court's oral pronouncement:

> The court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determined that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. (R1115)

The trial court has never rendered any written findings of fact in support of the death sentence imposed.

Johnnie Bouie filed a notice of appeal on April 15, 1988. (R1118) On May 27, 1988, this Court received the record in this case. On June 15, 1988, the Office of the Attorney General served a "Motion To Remand To The Trial Court For Supplementation of the Record on Appeal." Appellee correctly pointed out that the transcript of the March 31, 1988, sentencing was not included. At that point, Appellee also obviously recognized that the trial court had not prepared any written findings of fact in support of the death sentence. In its motion, the state pointed out:

> It is obviously impossible for this court to review the instant sentence of death without a transcript of the sentencing proceeding of March 31, 1988 and, accordingly, Appellee moves that this cause be remanded to the Circuit Court to allow for supplementation of the record in this regard. This Court has, of course, also recognized that section 921.141(3), Florida Statutes (1983) provides that written findings of fact in support of any sentence of death be contained in the record. See, e.g., Grossman v. State, 13 FLW 127 (Fla. February 18, 1988), on denial of rehearing, 13 FLW 349 (Fla. May 25, 1988). Remand to the circuit court would also allow such court to assure that the provisions of the above statute have been fully complied with, prior to the certification of the complete record on appeal. Cf. Jones v. State, 332 So.2d 615 (Fla. 1976).

On July 20, 1988, this Court denied Appellee's motion, however, this Court ordered the record supplemented with the sentencing proceeding of March 31, 1988. (R1128)

It is abundantly clear that the trial court never rendered any findings of fact regarding the aggravating and mitigating circumstances. Appellant has searched the trial file below, as Appellee has obviously done also, and has discovered that no order exists. See attached appendix. Section 921.141(3) provides in pertinent part:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the record of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s775.082. (emphasis added)

The trial court in the case at bar has yet to render any written findings of fact. It is also clear that the trial court never orally recited any findings of fact. (R1129-1134)

This Court initially dealt with this particular issue in Van Royal v. State, 497 So.2d 625 (Fla. 1986). The Van Royal trial judge entered its written findings as to aggravating and mitigating factors approximately five weeks after the record on appeal was filed with this Court. This Court was satisfied that the trial court's oral pronouncement of the death sentence was sufficient to supply jurisdiction in this Court. In Van Royal, this Court distinguished Cave v. State, 445 So.2d 341 (Fla. 1984); Ferguson v. State, 417 So.2d 639 (Fla. 1982); and Thompson v. State, 328 So.2d 1 (Fla. 1976). The records on appeal in those cases also did not contain the separate written findings of fact on which the death sentences were based. This

Court stated that those three cases differed significantly from Van Royal's, since the Van Royal judge did not orally recite the findings on which the death sentences were based. The failure of the record to reflect either oral or written findings of fact resulted in this Court vacating Van Royal's death sentences and remanding for imposition of life sentences in accordance with Section 921.141. In reaching this conclusion, this Court stated:

> We appreciate that the press of trial judge duties is such that written sentencing orders are often entered into the record after oral sentence has been pronounced. Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem. Here, however, there are three factors present which we consider significant. First, the findings were not made until after the trial court surrendered jurisdiction to this Court. Second, we are faced with a mandatory statutory requirement that death sentences be supported by specific findings of fact. Unlike Cave, Ferguson and Thompson the record on appeal is devoid of specific findings. A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision: they do not merely serve to memorialize it. . . thus, the sentences are unsupported. Third, although we could order that the record be supplemented in accordance with Florida Rule of Appellate Procedure 9.200(f) as was done in Cave and Ferguson, we are not inclined to do so when the record is inadequate and not merely incomplete. See committee notes to rule 9.200.

497 So.2d at 628. In a concurring opinion, Justice Erlich stated that "the trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable . . .

that any meaningful weighing process can take place otherwise." 497 So.2d at 630.

This Court addressed this same issue on at least three occasions in 1987. In Muehleman v. State, 503 So.2d 310 (Fla. 1987), this Court vigorously stressed that written findings should be prepared contemporaneously with the imposition of sentence, but did not impose a life sentence since, among other reasons, the written findings were filed two months prior to the certification of the record to this Court. 503 So.2d at 317. In Nibert v. State, 508 So.2d 1 (Fla. 1987) this Court concluded that the record reflected that the trial judge made the findings and conducted the weighing process necessary to satisfy the requirements of the statute, even though the trial court instructed the state attorney to prepare the sentencing order. This Court pointed out that defense counsel did not object to that particular procedure. However, this Court strongly urged trial judges to prepare their own written statements of findings, commenting that the failure to do *so* does not constitute reversible error "*so* long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." 508 So.2d at 4.

In Patterson v. State, 513 So.2d 1257 (Fla. 1987), this Court was again faced with a trial judge's improper delegation of the duty to prepare written findings to the state attorney. The Patterson judge imposed the death sentence, orally stating that the aggravating circumstances outweigh the mitigating circumstances, and commenting that Patterson showed "little or no

remorse." The trial court then directed the prosecutor to prepare the sentencing order. The judge eventually signed an order that set forth three aggravating circumstances. This Court commented that the statement by the trial judge in open court did not articulate or explain the specific aggravating or mitigating circumstances but, "merely summarized the sentencing factors as they were presented to the jury." 513 So.2d at 1260. However, this Court concluded that Van Royal did not require the imposition of a life sentence since the trial court rendered an erroneous sentencing order as part of the record on appeal rather than no sentencing order at all.

This Court most recently dealt with this issue in Grossman v. State, 425 So.2d 833 (Fla. 1988). The Grossman trial judge did not enter his written findings until three months after oral pronouncement of sentence. However, the trial judge's written findings, although filed after the notice of appeal, were made prior to the certification of the record to this Court. This Court distinguished Grossman's situation from that presented in Van Royal, pointing out that the trial court retains concurrent jurisdiction for the preparation of the complete trial record for filing in this Court. 525 So.2d at 841. In the disposition of this issue, this Court stated:

> Since Van Royal issued we have been presented with a number of cases in which the timeliness of the trial judge's sentencing order filed after oral pronouncement of sentence has been at issue. In Van Royal and its progeny, we have held on substantive grounds that preparation of the written sentencing order prior to the certification of the trial record to this Court was adequate.

> At the same time, however, we have stated a strong desire that written sentencing orders and oral pronouncement be concurrent. Patterson v. State, 513 So.2d 1257 (Fla. 1987); Muehleman. We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of Van Royal and its progeny. Nevertheless, we consider it desireable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under Article V, section 2(a) of the Florida Constitution, effective thirty days after this decision becomes final, we so order. (emphasis supplied).

525 So.2d at 841. The effective date of the Grossman procedural rule was June 24, 1988.

The trial judge in the case at bar sentenced Johnny Bouie on March 31, 1988. While this date falls before the effective date of the rule, the rule is a procedural one which this Court felt compelled to promulgate in light of Van Royal and its progeny. The action of the trial judge in the instant case substantively violates section 921.141, therefore the violation of the procedural rule need not be reached in the case at bar. Johnnie Bouie's trial judge certainly had the benefit of this Court's opinion in Van Royal since it was published a full eighteen months prior to Bouie's sentencing, Grossman had also been published, although it was not yet final. Van Royal's progeny were also available to Bouie's trial judge.

The instant case even goes a step beyond Van Royal, since Johnnie Bouie's sentencing judge never articulated, written,

oral, or otherwise, his findings on any of the aggravating and mitigating circumstances. This case is therefore distinguishable from Cave, Ferguson, Thompson, Muehleman, Nibert, Patterson, and Grossman. The trial judge has yet to render any findings in support of the death sentence imposed on March 31, 1988. Since this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in Section 921.141(5) and (6), the sentence is unsupported. Under Section 921.141(3) this Court must vacate Johnnie Bouie's death sentence and remand for imposition of a life sentence in accordance with section 921.141. Bouie's death sentence is unconstitutional. Amends. **V**, **VIII**, and **XIV**, U.S. Const.

Appellant asks this Court to reduce his illegal death sentence to a life sentence no matter how this Court treats the other issues raised. The statute requires such a reduction at the outset of the consideration of this appeal. Even if this Court reverses Bouie's conviction and remands for a new trial, the maximum penalty at that new trial must be life imprisonment. Any other outcome would be manifestly unjust.

POINT II

IN CONTRAVENTION OF APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL, THE TRIAL COURT ERRED IN OVERRULING NUMEROUS DEFENSE OBJECTIONS, DENYING A CONTINUANCE AND ALLOWING THE DEVASTATING TESTIMONY OF BOBBY EDWARDS WHERE BOUIE'S ATTORNEY HAD INSUFFICIENT TIME TO PREPARE AND ALSO HAD A CLEAR ETHICAL CONFLICT OF INTEREST IN THAT COUNSEL'S LAW FIRM REPRESENTED BOTH BOUIE AND EDWARDS.

Factual Backaround

On the second day of jury selection (Wednesday, January 27, 1988) Albert Lee Jones [2/], a/k/a Bobby Louis Edwards, a/k/a Tim Lewis, contacted the prosecutor's secretary and informed her that Johnnie Bouie had confessed to Edwards in the holding cell earlier that week. The prosecutor instructed investigators from his office to interview Bobby Edwards. At approximately three o'clock that afternoon, those investigators reported to the prosecutor that Edwards accused Bouie of making several incriminating statements in the holding cell when both were waiting to go to court on Monday, January 25. At that point, the prosecutor informed defense counsel and the court of this new information. Edwards had appeared in front of Judge Hammond (Bouie's trial judge as well) that day represented by Bennett Ford, an assistant working in the Public Defender's Office, Seventh Judicial Circuit. Edwards pled to an outstanding escape

2/ Although Albert Lee Jones was apparently this witness' legal name, he was usually referred to as Bobby Edwards which is the name Appellant will use in this brief.

charge and Judge Hammond sentenced him to five years concurrent to the sentence he was already serving. Although the thirty days in which Edwards could seek an appeal had not passed, the trial court was of the opinion that the Office of the Public Defender no longer represented Edwards. Defense counsel requested an opportunity to investigate this incident prior to the swearing of the jury. The trial court went ahead and swore the jury and allowed defense counsel to place the circumstances of this development on the record after the state's opening statement.

First and foremost, Johnnie Bouie denied making the confession. Defense counsel requested sufficient time to make an adequate and thorough investigation of the incident. Additionally, defense counsel moved for a mistrial based upon the late hour at which the evidence arose. Defense counsel pointed out that Bouie had been in custody continuously since September 4, 1984, and had made no admissions during those four and a half years. This period of time included a trial in the summer of 1987 which terminated in a mistrial after the jury was unable to reach a verdict. Defense counsel objected to proceeding further, requested a continuance, and moved for a mistrial. (R282-291)

The state pointed out that the prosecution was not guilty of any misconduct in its handling of this situation. The state informed both defense counsel and the court as soon as the prosecutor was able to confirm that Bouie had allegedly confessed to an inmate. The state incorrectly categorized the situation as a discovery violation which required a Richardson hearing. The prosecutor suggested that a motion for mistrial was premature

since the witness would not testify until Monday at the earliest. The state submitted that this would allow the defense plenty of opportunity to depose the witness, investigate the incident, and take whatever action defense counsel deemed to be necessary. (R291-292)

The trial court seemed inordinantly preoccupied with the three years that it had taken to bring this case to fruition. The judge pointed out that the case had been continued more than a dozen times. The trial court made it clear that if Johnnie Bouie had indiscreetly confessed, that fact could not be used to delay his trial further. The trial court stated that it was incumbent upon the Public Defender's Office to use all of its resources to investigate this matter in order that the trial could proceed. If, after full investigation, defense counsel still had an objection to proceeding, he was to so inform the court. With that action, the trial court allowed defense counsel to postpone his opening statement and deferred ruling on all other matters. The court then excused the jury for the day. (R293-301)

The trial reconvened on Thursday, January 28, at 9:00 a.m. The state presented the testimony of eight witnesses that morning. (R305-394) That afternoon the state presented the testimony of four more witnesses and court adjourned at 4:30 p.m. (R396-469) On Friday, January 29, court reconvened at 9:00 a.m. (R470) That afternoon, the state announced its intention to call Albert Lee Jones, a/k/a Bobby Edwards, a/k/a Tim Lewis as a

witness. (This was contrary to the state's previous assertion that Edwards would testify on Monday at the absolute earliest.)

Defense counsel argued that the witness should be excluded based upon the fact that the state disclosed the witness five minutes before the jury was sworn. Defense counsel contended initially that a discovery violation had occurred and that the witness should be excluded under Richardson v. State, 246 So.2d 771 (Fla. 1971). (R546-647) When the trial court questioned defense counsel as to when the state found out about the witness, defense counsel stated his belief that the state knew of the witness as early as Wednesday morning, the day that the jury was sworn. (R547-549) Defense counsel reminded the trial court that he had requested a continuance to investigate all the circumstances surrounding not only the statement itself, but the receipt of the witness' statement. (R549) The trial court then proceeded to conduct a quasi-Richardson hearing. (R549)

Defense counsel deposed Bobby Edwards that Wednesday night after court had recessed for the day. (R549-550) Other than that deposition, defense counsel had not taken any statements from Edwards. (R550-551) From that deposition, defense counsel obtained the names of other possible witnesses and deposed them Thursday night after trial had recessed for the day. (R551) The trial court asked defense counsel what more he wished to do in the way of investigation. (R552) Defense counsel stated:

> MR. CASS: Well, there is one matter that I can think of and that is to have adequate time to think or to uncover a possible motive. Now, I -- for this man making the statement. From what I can ascertain, it does not appear that an

> investigation was made as to whether or not this was really a reliable witness.
>
> Now, I can't tell somebody else how to practice law nor do I intend to, but there was or appear to be -- five people that were present at that time and place that say entirely to the contrary of what Mr. Edwards states. (R552)

The prosecutor stated on the record that Bobby Edwards had apparently attempted to contact his office on Monday and Tuesday of that week. Edwards was unsuccessful in his attempts due to the prosecutor's trial schedule. Mr. Edwards finally contacted the prosecutor's secretary shortly after noon, Wednesday. She informed the prosecutor that Edwards indicated that he had information about Bouie's case. The state sent two investigators over to the jail at approximately three o'clock that afternoon, they returned and informed the prosecutor that Edwards claimed that Bouie confessed to him Monday in the holding cell. The prosecutor informed defense counsel and the court of this information at the next recess. (R553-554)

The prosecutor's assessment of Edwards' credibility differed from that of defense counsel. The prosecutor stated that one inmate in the holding cell supported Edwards' claim that Bouie made incriminating statements that day. That particular inmate, Mr. Toole, stated that he was too frightened to come forward. (R555) The prosecutor stated that the other inmates differed in their recollections of what occurred. Some said that Bouie was talking about his case but never made any incriminating statements. Some said that Bouie never talked to Edwards at all. (R555-556)

As for Edwards' motive, the state insisted that Edwards had asked for nothing and been promised nothing other than placement in a safe haven when he was returned to the Department of Corrections. Edwards told the prosecutor that the murder had disturbed him. Edwards stated that he could not conceal that type of information with a clear conscience. (R556)

The trial court wondered about the applicability of Richardson and asked defense counsel if he had a copy of the case. Defense counsel did not and complained about conducting legal research on this issue during his spare time while trying a first-degree murder case. (R558) Defense counsel received transcripts of the depositions on Friday morning and admitted that he had not had a chance to even read them prior to Edwards testifying. (R558) Under the circumstances, defense counsel contended that Johnnie Bouie was unjustly prejudiced. (R559)

The trial court seemed overly preoccupied with the assessment of blame. The trial court stated on the record that this particular problem was not the fault of the trial court, the state, or defense counsel. The trial court seemed to place the blame squarely on the shoulders of Johnnie Bouie. The court implied that Bouie might have deliberately confessed at this late day in order to further delay his trial. (R559-568) The trial judge analogized the instant situation with that of a disruptive defendant. The trial court did not believe it fair that a defendant could jump up and insult a venire, thereby forcing the state to secure another jury pool thus successfully obtaining a delay in his trial. (R564)

After a short recess during which both counsel and the court did a little research, defense counsel conceded that the court was not presented with a Richardson situation. (R571-572) Nonetheless, defense counsel maintained that the court should have granted a continuance once this witness was disclosed. Defense counsel pointed out that the witness appeared five minutes before the jury had been sworn and, therefore, prior to the attachment of jeopardy. (R571-572) Under those circumstances, defense counsel submitted that the trial court should have granted the requested continuance *so* that defense counsel could "do a responsible and professional investigation of the circumstances." (R572) Defense counsel stated that such an investigation would take at least a week to complete. Appellant renewed his objection to the testimony of Edwards and renewed the previously made motion for continuance. (R572)

The trial court agreed that no discovery violation occurred. The court also stated that it could find no prejudice that resulted in the manner that the state had handled the matter. The court further found no one in the court system at fault. The trial court denied the motion to exclude Bobby Edwards' testimony. The trial court also denied the requested continuance concluding that there was no sound basis or justification. (R573) At that time, defense counsel placed a motion for mistrial on the record based upon the testimony of Bobby Edwards. The trial court denied that motion. (R573-574)

Defense counsel added another motion:

> MR. CASS: Your Honor, there was the other matter, I also believe I am under

an ethical constraint to move to withdraw the services of the public defender on the basis of the fact that technically Bobby Edwards is still our client. He has been sentenced, but for thirty days -- I understand he was sentenced this Monday. Thirty days for the filing of an appeal has not run at which time we still bear our professional responsibility to Mr. Edwards.

THE COURT: Have you had any contact with Mr. Edwards other than in this case?

MR. CASS: No, sir.

THE COURT: You have not represented him?

MR. CASS: He is represented in your division, Your Honor, by Mr. Bennett Ford.

THE COURT: Have you come by any information in the handling of this matter as a result of your office?

MR. CASS: Yes, sir, I have examined Mr. Edwards' case file.

THE COURT: In the Public Defender's Office?

MR. CASS: Well, I have the file here.

THE COURT: Of course, Mr. Edwards is not in jeopardy at this point, is he?

MR. CASS: No, Your Honor.

THE COURT: He had pled and has been convicted?

MR. CASS: You have sentenced him, Your Honor, Monday I believe.

THE COURT: I am going to deny the motion to withdraw and direct you to proceed. (R574-575) (emphasis added)

The trial court allowed defense counsel to register a standing motion for mistrial throughout the duration of the trial. (R575-576)

Albert Lee Jones, a/k/a Bobby Edwards, a/k/a Tim Lewis then testified to several incriminating statements that Johnnie Bouie allegedly made to Jones/Edwards/Lewis while both sat in a holding cell; Bouie to pick a jury for his trial and Edwards to cop a plea to yet another felony in his past. (R580-614) Edwards' testimony was obviously devastating to Bouie's case. With Edwards' testimony, the jury convicted Bouie of first-degree murder as charged. Without Edwards' testimony at Bouie's previous trial, the state was unable to convince a jury of Bouie's guilt of any offense.

A. The Trial Court Abused its Discretion in Denying Appellant's Motion for Continuance Resulting in a Deprivation of Bouie's Federal Constitutional Rights to Effective Assistance of Counsel, Due Process, and a Fair Trial.

The granting or denial of a motion for continuance is within the sound discretion of the trial court and will not be overturned absent a palpable abuse of discretion. Not only does this standard apply to capital cases, it usually arises in capital cases. Lusk v. State, 446 So.2d 1038 (Fla. 1984). Lusk's original trial counsel withdrew, and the trial court appointed another lawyer approximately eight weeks prior to the trial date. Approximately two weeks before trial, the new attorney sought a thirty-day continuance alleging problems in getting depositions transcribed and in getting prison witnesses interviewed. The trial court directed immediate transcription of

the deposition material but denied the motion for continuance. The trial court also denied an amended motion for continuance approximately five days before trial. This Court held that no abuse of discretion appeared clearly and affirmatively on the record.

In Echols v. State, 484 So.2d 568 (Fla. 1985) this Court held that the trial court did not abuse its discretion in denying the defendant's motion for continuance where counsel sought to obtain appointment of voice print experts and their analysis of tape recordings made by an informant. This Court noted that the defendant had known for months that the state had the tapes in question. Echols reserved until the eleventh hour the argument that it was not his voice on one of the tapes. This Court stated that such a tactic suggested an effort to further delay the trial.

In the past few years, this Court has addressed this issue in several other capital cases. In Woods v. State, 490 So.2d 24 (Fla. 1986) the trial court appointed a new lawyer nine weeks before trial began. After granting one continuance, the trial court refused to continue the case again, and Woods claimed that his defense could not be prepared adequately. Woods' counsel argued that he needed more time to investigate the possibility that an inmate group coerced Woods into attacking the victims. This Court pointed out that a prison investigation had never connected Woods to that group. This Court labeled counsel's contentions as nothing more than conjecture and speculation.

Finding no abuse of discretion, this Court affirmed the conviction and sentence.

Six days before Douglas Jackson's murder trial, defense counsel sought and received a continuance based upon, inter alia, incomplete discovery and investigation. Trial was postponed for two months. Five days before the newly set trial date, defense counsel sought another continuance based primarily on the adverse effect of medication prescribed as a result of the lawyer's recent head injury. In Jackson v. State, 464 So.2d 1181 (Fla. 1985) this Court found that the trial court abused its discretion in denying Jackson's second motion for continuance. This Court found that the unrefuted facts established that the physical condition of Jackson's trial attorney prevented him from adequately representing his client.

At first blush, the facts in Diaz v. State, 413 So.2d 1045 (Fla. 1987) appear to be analogous to those in the case at bar. Diaz's attorney made an ore tenus motion for continuance after the state announced its intention to call Gajus as a witness. Diaz allegedly discussed the crime with Gajus who occupied a neighboring cell during Diaz's pre-trial incarceration. One week before trial, the state notified the defense of its intention to call Gajus as a witness. Defense counsel immediately deposed Gajus but, on the first day of trial, moved for a continuance, claiming insufficient time to discuss the statements with Diaz or to investigate their truth. This Court found no abuse of discretion in the trial court's denial of Diaz's requested continuance.

The facts of the instant case are clearly distinguishable from those in Diaz. Johnnie Bouie and his defense counsel found out about the state's intention to call Bobby Edwards after jury selection and approximately five minutes before the jury was to be sworn. Diaz's defense counsel had one week prior to jury selection to depose the witness and prepare accordingly. Diaz deposed Gajus a full week before Diaz's trial commenced. Johnnie Bouie deposed Bobby Edwards after Bouie's trial began and less than forty-eight hours before Bobby Edwards testified at Johnnie Bouie's trial. All Johnnie Bouie's defense counsel asked for was what Angel Diaz's defense attorney had, i.e. one week to do adequate investigation. Diaz's counsel was also not in the difficult situation that Bouie's trial counsel was in, i.e. conducting investigation at night while trying a first-degree murder case during the day. Undoubtedly, the bulk of Bouie's defense attorney's energy was expended conducting trial during the day and preparing for the next day's session at night. He complained on the record of his inability to investigate this new development in his non-existent spare time. Let us not forget that he also undoubtedly required some rest in order to think clearly and perform adequately in court the following day.

The trial court's action in denying Bouie's requested continuance resulted in a denial of his right to effective assistance of counsel. Amend. VI, XIV, U.S. Const.; and Art. I, §16, Fla. Const. The First District Court of Appeal recognized the relationship between a requested continuance and the right to counsel in Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983).

> A number of cases detail circumstances rising to the level of a palpable abuse of discretion. Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981); Lightsey v. State, 364 So.2d 72 (Fla. 2d DCA 1978); and Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975). The common thread running through each of these cases is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defenses. This right is inherent in the right to counsel. Harley, at 384, citing Brooks v. State, 176 So.2d 116 (Fla. 1st DCA 1965), cert. denied, 177 So.2d 479 (Fla. 1965). Further, it is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial. Harley, at 383-384; See also Sumbry, 310 So.2d at 447.

Brown, 426 So.2d at 80. Brown's defense counsel learned of a critical hypnosis session of a key state witness shortly after that session transpired on the Friday before the trial was scheduled to begin on the following Tuesday. Counsel was not furnished the opportunity to depose the police hypnotist until Monday, the day before trial. The district court stated that, "Surely, due process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence." 426 So.2d at 81. The court concluded that the trial court's denial of the requested continuance restricted defense counsel's ability to effectively cross-examine the state witness.

Johnnie Bouie's trial counsel was placed in a similarly untenable position. He was unable to depose the state witness until Wednesday night, after trial had commenced, and less than forty-eight hours before that witness testified. Defense counsel did not have an opportunity to depose other inmates who were in

the holding cell at the time of the alleged conversation until Thursday night, less than twenty-four hours before Bobby Edwards testified. Defense counsel's investigator was interviewing these potential sources of information on Thursday while trial counsel continued to try the case. A delay of one week to investigate such an important and complex evidentiary development is not too much to ask, especially when one considers the seriousness of the offense and the finality of the sentence.

Jailhouse snitches are usually very difficult to refute. Combating their testimony frequently requires in depth scrutiny and investigation of the circumstances of the alleged statements as well as the criminal history of the snitch. The situation is usually rendered more complex by the hesitancy of other inmates to come forward with relevant information which could help discredit the snitch's story. Not only do inmates worry about possible physical retaliation in the violent setting of county jails and state prisons, they also are concerned about angering the prosecution. The state literally holds the inmates' fate its powerful hands.

The case at bar does not present one in which the defendant himself has been remiss in some way. Contrary to the trial court's opinion, it was the state's eleventh hour decision to call Bobby Edwards as a witness. Johnnie Bouie's request for a continuance is distinguishable from a similar request in McKay v. State, 504 So.2d 1280 (Fla. 1st DCA 1986) where McKay, three days before trial, retained private counsel to replace appointed counsel. The trial court denied the requested continuance but

stated that private counsel would be permitted to join the public defender as co-counsel. Private counsel declined the invitation and McKay's trial commenced. The district court pointed out that an accused's right to counsel of choice is not absolute and, at some point, must bend before countervailing interests involving effective administration of the courts. In finding that the trial court did not abuse its discretion, the district court pointed out that McKay waited three months to retain counsel and that McKay demonstrated no prejudice.

A similar situation is found in Loren v. State, **518** So.2d 342 (Fla. 1st DCA **1987)** where defense counsel did not commence discovery until ten days prior to trial. Loren's first indication that a continuance would be necessary did not come until five days before trial. The district court came to the inescapable conclusion that most, if not all, of the difficulties experiences by counsel in his last-minute preparation efforts were the product of both Loren and her counsel's own pre-trial decisions, rather than any lack of diligence or improper tactics on the part of the prosecuting officials, or erroneous ruling by the trial court. **518** So.2d at 346.

Certainly Appellant does not accuse the prosecutor of any lack of diligence in the instant case. Nor can Appellant accuse the state of improper tactics. Appellant does question the state's judgment in its insistence on calling Bobby Edwards as a witness given the late hour as well as Edwards' credibility problems. Rather, Appellant contends that the fault lies with the trial court in its erroneous ruling denying Appellant's

extremely reasonable request (under the circumstances) for a one week continuance given the appearance of this last-minute witness. It would have been a simple matter to instruct the selected jurors to avoid any media exposure about the case before their return to hear the trial one week from the date of selection. Appellant cannot conceive of any potential prejudice to the state given the fact that the case was more than three years old at the time of the scheduled retrial. Although the continuances prior to the first trial were obtained by Bouie, the state did not deny that the prosecutor did not object to any of these continuances. Certainly one more week could not have made any difference in the state's position.

Under the instant facts, Appellant believes that prejudice can be presumed. Prejudice must be presumed when the state calls an eleventh hour witness who relates the first incriminating statements that an accused has made in almost four years of incarceration and through one mistrial. The prejudice appears readily apparent when one considers that a previous jury refused to convict Johnnie Bouie of any offense after hearing the same evidence minus the testimony of Bobby Edwards. It is thus clear what part Edwards' testimony played an important role in Bouie's subsequent conviction.

Appellant also believes that prejudice is apparent on the face of the record. The most blatant example of prejudice occurred when defense counsel attempted to impeach Bobby Edwards on cross-examination by delving into Edwards' prior criminal record. The state objected on the grounds that defense counsel

should not inquire about other convictions without extrinsic evidence of that fact. (R599-601) The prosecutor claimed that Edwards' rap sheet contained in the computer printout reflected some convictions that were more accurately attributable to Bobby Edwards' brother. (R603-604) The record reflects that defense counsel was using the rap sheet furnished to the defense by the prosecutor. (R601) In ruling on this evidentiary matter, the trial court stated:

> THE COURT: But, you know, the exact nature of the charge, unless you know he's made some sort of, told some sort of lie or you've got some certified copy, you're pretty much resigned to accept what he offers concerning that point. (R602)
>
> * * *
>
> THE COURT: I understand that, you know, you don't accuse somebody of committing a crime that you can't, don't have a justifiable basis and a printout on a rap sheet is probably not sufficient basis to be accepted into the record as evidence. So you're pretty much stuck with the answers that that man gives you under oath in these proceedings. (R604)

Defense counsel complained about the state furnishing the defense with Edwards' prior record and then disputing its accuracy. (R604) The court responded:

> Now, if he says they are not *so,* unless you've got evidence to prove to the contrary, it's not *so,* you know, if they wish to believe that. . . But I caution you, now, that I don't think that justifies accusing anyone unless you've got information to back it up, and I think you'll probably have to have more than that rap sheet. But if he's convicted of such and such a crime on such and such a date and he says no, then what are you going to do?

> MR. CASS (defense counsel): If --
>
> THE COURT: Excuse me. Answer that question.
> You ask him the question if he was convicted of such and such a crime on such and such a date and he says no, what are you going to do? No is the answer unless you've got evidence to the contrary.
>
> MR. CASS: That's part of my problem for a motion for continuance, Your Honor.
>
> THE COURT: Well, I understand that, but we've crossed that threshold.
> Okay. Put the jury back in, please. (R604-605)

Defense counsel then continued his cross-examination to the best of his ability in this extremely difficult situation.

Other evidence of prejudice appears on the record. On redirect examination of Edwards, the state elicited further details of the statements that Bouie allegedly made to Edwards in the holding cell. (R611) Edwards testified that Bouie told him that a man named McDonald was the last person to see Bouie with the victim. This man worked at the water plant at the time of the murder, but now worked as a mail carrier. Edwards testified:

> He said that was the only one that the last person that could have seen him. And he indicated that he should get that person, you know, out of the way, he'll be good to go. (R611)

This testimony was clearly objectionable since it was evidence of uncharged, collateral crimes. Williams v. State, 110 So.2d 654 (Fla. 1959); S90.404(2)(a), Fla. Stat. (1983). This testimony constituted a pure character assassination of Johnnie Bouie. It informed the jury that Bouie would not hesitate to "bump off" a witness who might prove damaging to his cause. Defense counsel

undoubtedly was surprised at this revelation on redirect. That surprise is evidenced by the lack of objection. Defense counsel's ineffectiveness was very likely due to the lack of time to properly prepare for this witness. This situation could have easily been remedied if the trial court had granted defense counsel's justifiable request for a continuance of at least one week. Defense counsel made the request prior to the swearing of the jury. The state could not show any prejudice in continuing the case and did not even object to Appellant's request. The trial court abused its discretion in denying the motion. This resulted in a deprivation of Bouie's federal constitutional rights to effective assistance of counsel, to due process of law, and to a fair trial. Amends. V, VI, and XIV U.S. Const.

B. The Trial Court's Denial of Defense Counsel's Ore Tenus Motion to Withdraw Based on Ethical Conflict Resulted in a Deprivation of Johnnie Bouie's Federal Constitutional Rights to Effective Assistance of Counsel, Due Process, and a Fair Trial.

As set forth in the preamble to this point, the state announced its intention to call Bobby Edwards as a witness on the second day of testimony. In addition to moving for a continuance, defense counsel moved to withdraw based upon an ethical conflict. Ray Cass, Bouie's defense counsel, is an Assistant Public Defender for the Seventh Judicial Circuit. That same law firm, through Bennett Ford, another Assistant Public Defender, represented Bobby Edwards in his case before the very same trial judge on Monday of that week. In spite of the fact that the Office of the Public Defender still represented Mr. Edwards and that Bouie's defense counsel had possession of Edwards' file, the trial court

denied the motion to withdraw and directed defense counsel to proceed. R574-575) The trial court apparently based its ruling on the fac that Mr. Edwards had already pled and was no 1 nger in jeopardy.

It is clear that the public defender's office of a given circuit is a "law firm" within the general meaning of that term. Roberts v. State, 345 So.2d 837 (Fla. 3d DCA 1977) and Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976). The Sixth Amendment right to the assistance of counsel contemplates legal representation that is effective and unimpaired by the existence of conflicting interests being represented by a single attorney. Glasser v. United States, 315 U.S. 60 (1942); Baker v. State, 202 So.2d 563 (Fla. 1967). A lawyer forced to represent clients with conflicting interests cannot provide the adequate legal assistance required by the Sixth Amendment. Holloway v. Arkansas, 435 U.S. 475 (1978). "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). "An actual conflict of interest that adversely affects a lawyer's performance violates the Sixth Amendment and cannot be harmless error." Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984).

In Foster v. State, 387 So.2d 344 (Fla. 1980), this Court held that a defendant in a first-degree murder trial was denied his right to effective assistance of counsel by joint representation of the defendant and a state witness. This Court stated that a denial of a motion for separate representation,

where a risk of conflicting interests exists, constitutes reversible error. Even in the absence of an objection or motion below, reversible error occurs where an actual conflict of interest or prejudice is shown. 387 So.2d at 345.

The United States Supreme Court has recently addressed this area in Wheat v. United States, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 140 (1988). The Wheat court held that, where a court justifiably finds that an actual conflict of interest exists, the trial court can decline a waiver of that conflict by the defendants and insist that they be separately represented. 100 L.Ed.2d at 150.

In Jennings v. State, 413 So.2d 24 (Fla. 1982) this Court granted Jennings a new trial where defense counsel refused to cross-examine an inmate who testified concerning incriminating statements Jennings made while in jail awaiting trial. At the time of his testimony, the witness was not represented by the public defender, but had been in the past. While this Court refused to determine the correctness of the public defender's refusal to cross-examine the witness, the fact that Jennings did not receive an opportunity for full and complete examination of a critical witness denied him a fair trial. 413 So.2d at 26.

Johnnie Bouie's defense counsel moved to withdraw when Edwards was called as a witness and the ethical conflict arose. After a cursory inquiry which more clearly defined the actual conflict, the trial court summarily denied defense counsel's motion to withdraw. (R574-575) The trial court did not even attempt to inquire of Edwards regarding his inclination to waive

the obvious conflict of interest. The trial court also did not ask Edwards of his plans to pursue an appeal. These questions are extreme y pertinent to the conflict under these particular facts. When Bouie's defense counsel indicated that he had examined Edwards' public defender case file, the trial court appeared legitimately surprised. **(574-575)** Defense counsel admitted that he held Edwards' file in his hand even at that moment. **(R575)** However, the trial court's only concern appeared to be whether or not any further jeopardy attached to Edwards' case.

Aside from the obvious appearance of impropriety, the ethical conflict became an obstacle during Bouie's cross-examination of Edwards. On direct examination, Edwards admitted to four previous felony convictions, i.e., escape, armed robbery, grand theft, and burglary. **(R486)** On cross-examination defense counsel reiterated three of these convictions (omitting the grand theft conviction). **(R599)** Defense counsel then attempted to ask Edwards about any convictions involving dishonesty or false statement. The state objected and the trial court excused the jury. **(R599-600)** The state's objection was two-fold; (1) the state had elicited Edwards' prior criminal record on direct and further inquiry should be prohibited, and **(2)** defense counsel should not inquire about other convictions without extrinsic evidence. **(R600-601)** Defense counsel pointed out that the grand theft conviction involved dishonesty and fraud since the conviction stemmed from worthless checks. **(R601-602)** The state did not believe such a conviction involved false statement. **(R602)**

When the trial court overruled the objection, the prosecutor pointed out that Edwards' computer printout contained some convictions that were more accurately attributable to Edwards' brother. (R603-604) Defense counsel responded that Edwards' public defender case file did not support this latest contention by the prosecutor. (R604) The prosecutor then stated on the record:

> MR. SMITH (prosecutor): I believe that in reviewing cases that re before this Court, in fact, with the plea, the indications were that the only conviction from the Public Defender's Office they were aware of that the Defendant had were the armed robbery and a prior burglary. That communication came from his own public defender who, I assume, talked to him about it.
>
> THE COURT: Okay.
> But, I'm still not going to permit this public defender representing this accused person to inquire into these issues. (R606)

Bouie's defense counsel added that, so there would be no confusion, "I am an Assistant Public Defender for Mr. James B. Gibson who is the primary counsel in this case and was also primary counsel for Mr. Edwards, also known as Lewis and also known as Jones." (R607)

It is clear that the public defender's representation of both Edwards and Bouie constitutes an appearance of impropriety. The attempted cross-examination reflects an actual conflict. The very same judge at Bouie's trial, sentenced Edwards to a concurrent five years of incarceration for the escape. (R612) Edwards testified that the sentence was not consecutive since it was "on the old guidelines." (R612) Bouie's defense counsel did not

confront the trial court with the statutory requirement that sentences imposed on escape charges must be consecutive. §944.40, Fla. Stat. (1987). The trial court's denial of the public defender's motion to withdraw resulted in a deprivation of Bouie's constitutional rights to effective assistance of counsel, due process, and a fair trial. Amends. V, VI, XIV U.S. Const.

POINT III

IN CONTRAVENTION OF BOUIE'S FEDERAL CONSTITUTIONAL GUARANTEE TO DUE PROCESS OF LAW THE TRIAL COURT ERRED IN FAILING TO GRANT BOUIE'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE ONLY COMPETENT, CREDIBLE EVIDENCE WAS CIRCUMSTANTIAL EVIDENCE THAT DID NOT EXCLUDE BOUIE'S VERY REASONABLE HYPOTHESIS OF INNOCENCE.

This Court is well aware of its mandatory duty in capital cases to review the evidence to determine if the interest of justice requires a new trial. Fla.R.App.P. 9.140(f). This duty is mandatory even where the insufficiency of the evidence is not an issue presented for review. Johnnie Bouie moved for a judgment of acquittal based upon the insufficiency of the evidence at the conclusion of the state's case-in-chief. Bouie renewed that motion at the close of all of the evidence. (R680-681,846) The trial court denied both motions.

Initially, Appellant will deal with his most difficult hurdle. Although not available at the first trial where the jury deadlocked, Bobby Edwards testified for the state at this trial. (R580-614) Appellant has dealt with the inherent problems with Edwards' testimony in Point II of this brief. In addition to the lack of time to prepare for the witness and the ethical conflict of Bouie's defense counsel, Appellant also points out the inherent unreliability and inconsistencies in Edwards' testimony. Edwards' testimony conflicted with the state's own theory of the case. According to Edwards, Bouie allegedly told him that the crime occurred on Interstate-95. (R581) Not only did this conflict with the state's theory, it also conflicted with the physical

evidence in that the victim's body and Bouie's car were found on Eleventh Street, not the interstate. (R305-309, 316-319, 331-337,347-352)

The physical evidence pointing to Johnnie Bouie as the murderer was non-existent. The state presented evidence that Robert McKitrack had seen Bouie with a white woman next to Bouie's disabled car approximately forty minutes before Barbara Smith's death. (R305-307,311) McKitrack noted that the woman was in no apparent distress at the time. (R311) Susan Sterthouse, another passing motorist, saw a woman standing on the roof of the car approximately thirty minutes after McKitrack had stopped to aid the couple. Sterthouse heard the woman screaming and saw the woman apparently flailing a white object toward a man in dark clothing. Sterthouse got such a brief look at the situation that she could not even determine the race of the man. (R316-321) Both of these witnesses support Johnnie Bouie's version of the events that night.

From Bouie's initial confrontation by the police and throughout his incarceration both of his trials, Bouie maintained that he was chased from the scene of his disabled car by two white men. These racist assailants began beating Barbara Smith as they uttered racial epitaphs. The assailants intended a similar fate for Bouie who, being unarmed and frightened, ran into the dark woods where, exhausted and disoriented, he slept until the next morning. (R423-428, 449-450,626-636,753-756)

The jury may have been swayed by the fact that a bite mark on Smith's arm matched Bouie's teeth. (R536-546,642-680)

However, the bite was inflicted while Bouie and Smith were face-to-face in a prone position. **(R663-665)** The expert opined that Bouie b t Sm th while in an agitated condition, i.e., an excited emotional state, e.g., as a result of passion. **(R677-678)** This evidence is also consistent with Bouie's statements and testimony that Smith became amorous after the couple were stranded. They engaged in some passionate and lustful physical activity which culminated in the bite. **(R752-753)**

The state also presented a vast amount of serology evidence. This evidence is, at most, inconclusive. The serologist emphasized that finding one blood sample consistent with another does not result in an identical match. Blood evidence is not like fingerprint or signature-type evidence. **(R512-516)** The blood was not subjected to DNA tests, the latest fad in forensic evidence. Although the blood found in Smith's pocket was consistent with Bouie's, it was also consistent with **11.5%** of the general population (over **26** million people). **(R497-498,505-511)** Blood found on Smith's abdomen was consistent with Bouie's blood sample, but was also consistent with **4.5%** of the general population (over ten million people). **(R502-503,505-511)** Some of the blood found on Smith's blouse was consistent with Bouie's blood, but was also consistent with **10.6%** of the general population (more than **24** million folks). **(R500-501,505-511)** Blood from the hood of Bouie's car was consistent with his own and also consistent with **2%** of the general population (close to **5** million people). **(R505-511)** The blood stain on Bouie's car which had Bouie's fingerprint was consistent with Bouie's blood and was

also consistent with 4.5% of the general population (over 10 million). (R505-511)

The state's theory of the case had Bouie stabbing Smith by the roadside before dragging her into the woods. During his attempt to rape her, Bouie bit Smith on the arm as he lay on top of her. Given these circumstances, one would surely expect to find large quantities of blood on Bouie's clothing and on the bottom of his shoes. The state never proved that Bouie had any blood stains on his clothing. This was clearly the same clothing that Bouie had been wearing the night of the murder. His clothes were seized right after his arrest and police did not allow him an opportunity to clean up. These findings refute the state's contention that Bouie killed Smith. The facts support Bouie's statements and testimony.

Johnnie Bouie testified at trial as to exactly what happened that night. All of the physical evidence is absolutely consistent with Bouie's version of the facts. Certainly, Bouie's testimony is as reasonable a hypothesis of innocence as the one accepted by this Court in Jaramillo v. State, 417 So.2d 257 (Fla. 1982), wherein this Court reversed two convictions for first-degree murder, vacated two death sentences, and remanded with instructions to discharge Jaramillo. In Huff v. State, 437 So.2d 1087 (Fla. 1983), this Court pointed out that circumstantial evidence alone is sufficient to convict in a capital case in the absence of a reasonable alternative theory. Johnnie Bouie's testimony and statements to police at the time of his arrest offer such a reasonable alternative theory. See also MacArthur

v. State, 351 So.2d 972 (Fla. 1977). In McKnight v. State, 341 So.2d 261, 262 (Fla. 1977) this Court stated that a directed verdict should be granted "when it is apparent that no legally sufficient evidence has been submitted from which a jury could legally return a verdict of guilt."

At the very least, the state failed to conclusively prove premeditation. For killing to constitute premeditated murder in the first-degree, it must be established by the state, not only that the accused committed an act resulting in death, but that before the commission of the act he had formed a definite purpose to take life, and had deliberated on his purpose for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968). Premeditation is the one essential element which distinguishes first-degree murder from second-degree murder, and thus, a premeditated design to effect the death of a human being is more than simply an intent to commit a homicide and more than an attempt to kill must be proven to sustain a first-degree murder conviction. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983). Appellant submits that the circumstances of the instant case are not inconsistent with the hypothesis that the Appellant intended to kill without premeditation. The state's evidence is not inconsistent with the occurrence of an argument between the Appellant and Barbara Smith resulting in a killing in the heat of passion. The state's evidence is so paltry that this hypothesis cannot be ruled out. Perhaps the sexual encounter went further than Barbara Smith desired and she rebuffed Bouie. When this

occurred, Bouie conceivably could have killed Smith in a fit of rage.

All of the facts certainly create a reasonable doubt about Johnnie Bouie's guilt. The circumstantial proof adduced against him at trial was entirely consistent with the account of the incident that Bouie first relayed at the time of his arrest. He also testified under oath to these facts at his trial. The state's case was built on inference and suspicion. Circumstantial evidence is not sufficient when it requires the pyramiding of assumption upon assumption in order to arrive at the conclusion necessary for a conviction. Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978). The jury obviously felt that it needed to blame someone for Barbara Smith's murder. Conveniently, the jury chose the only person presented by the state, Johnnie Bouie. Since the state's evidence failed to exclude the extremely plausible and reasonable hypothesis of innocence offered by Johnnie Bouie, the trial court should have granted the motions for judgment of acquittal. At the very least, manifest justice requires that this Court grant Johnnie Bouie a new trial on the issue of guilt. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

POINT IV

APPELLANT'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE WAS ALLOWED, OVER DEFENSE OBJECTION, TO INTRODUCE EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE, TO WIT: EVIDENCE OF TWO MISDEMEANOR CONVICTIONS.

After the jury found Johnny Bouie guilty as charged of first-degree murder, they returned the next day for the penalty phase of the trial. (R866-875) After the trial court preliminarily instructed the jury for the second phase, the following occurred:

> MR. SMITH (prosecutor): Your Honor, we have two certified copies of convictions for Mr. Bouie. One is from October 23rd, 1974, to the charge of attempting to carry a concealed weapon in Volusia County, Florida, from the court of Judge Blount, a certified copy.
>
> THE COURT: Is that a misdemeanor?
>
> MR. SMITH: Yes, Your Honor.
> And, additionally, the crime which is also a misdemeanor of carrying a concealed weapon, to-wit: a knife, that occurred on February, excuse me, the plea being occurred on February 4th, 1982, that being in Orange County. I have a certified copy of that as well.
>
> THE COURT: Any objection?
> Do you offer those into evidence?
>
> MR. SMITH: Yes, Your Honor, and I ask the Court to take judicial notice of these items.
>
> THE COURT: Any objection?
>
> MR. CASS (defense counsel): They haven't got a basis for it, Your Honor.
>
> THE COURT: We will accept the items into evidence. (R876-877)

These two documents were thus entered into evidence over objection. (R1100-1101) While the state did furnish a certified copy of the Volusia County judgment and sentence, the state did not have a similar document on the Orange County case. The state provided only a certified copy of the disposition which was not signed by the judge. (R1101) This document is little more than a piece of paper reflecting court minutes.

The trial court improperly admitted this evidence. Aggravating circumstances are limited to those enumerated to those in Section 921.141, Florida Statutes, and only evidence relevant to that list of factors is admissible in aggravation. See e.g. State v. Dixon, 283 So.2d 1 (Fla. 1973). Prior convictions for violent felonies qualify as aggravating circumstances, but misdemeanor convictions do not. §921.141(5)(b), Fla. Stat. (1987).

Appellant recognizes that evidence of convictions for non-violent felonies (and presumably misdemeanors) may be admitted to rebut a defense argument that the mitigating circumstance of no significant history of prior criminal activity exists. See §921.141(6)(a), Fla. Stat. (1987); Mikenas v. State, 407 So.2d 892 (Fla. 1981). However, such evidence is inadmissible for this purpose if the defense does not assert the existence of this mitigating factor. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Maggard v. State, 399 So.2d 938 (Fla. 1981). When the state successfully introduced evidence of Bouie's two prior misdemeanor convictions, Bouie had not presented any evidence or argument as to this particular mitigating circumstance. If

rebuttal was the state's intent, Appellant contends that the state "jumped the gun" in its attempt to rebut Bouie's anticipated reliance on this mitigating circumstance. If the trial court had ruled correctly on this evidence, the defense might have chosen to avoid any reliance on this mitigating circumstance *so* that the jury would never hear evidence that Bouie made a habit of arming himself. The potential prejudice in the instant case becomes particularly apparent when one examines the Orange County disposition document. **(R1101)** It reveals that Bouie pleaded guilty in **1982** to the offense of carrying a concealed weapon, to wit: a knife. In view of the evidence that Barbara Lynn Smith was stabbed to death, the prejudicial nature of this objectionable evidence becomes obvious.

The trial court did instruct the jury that they could find that the evidence established that Bouie had no significant history of prior criminal activity. **(R915)** Additionally, during summation, defense counsel respectfully suggested that two misdemeanor convictions do not constitute a significant history of prior criminal activity. **(R911)** A look at the state's closing argument at the penalty phase reveals that the prosecutor did not seriously argue that this evidence rebutted that particular mitigating circumstance. **(R895-896)** It is therefore clear that the state's intention in producing this evidence was to disparage the character of Johnnie Bouie. The Orange County conviction for carrying a knife is particularly prejudicial in this regard.

Appellant also contends that this evidence fails as a matter of law to rebut any reliance on the mitigating circumstance of no significant history of prior criminal activity. The Volusia County misdemeanor occurred almost thirty years ago (R1100) and should probably be excluded based on remoteness. See, e.g., Braswell v. State, 306 So.2d 609 (Fla. 1st DCA (1975) Additionally, the Volusia County conviction was for the offense of "attempted carrying of a concealed weapon." (R1100) Appellant submits that no such crime exists. This constitutes another reason for rejecting this evidence. See Adams v. Murphy, 394 So.2d 411 (Fla. 1981) (attempted purjery is non-existent crime); State v. Thomas, 362 So.2d 1348 (Fla. 1978) (attempted possession of burglary tools is non-existent crime). The state failed to produce a certified copy of the judgment and sentence on the Orange County misdemeanor conviction, instead producing a disposition sheet. (R1101) This document is not signed by the judge and Appellant submits that it is not substantial, competent evidence of that misdemeanor conviction.

The trial court allowed the state to prematurely expose the jury to incompetent and prejudicial evidence. This unconstitutionally shifted the burden of proving the mitigating circumstance relating to no significant prior criminal history to Johnnie Bouie. This results in a constitutionally suspect jury recommendation and the trial court's unconstitutional imposition of the death sentence. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT V

APPELLANT'S CONVICTION AND DEATH SENTENCE ARE INFIRM UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHERE THE TRIAL COURT, OVER OBJECTION, ADMITTED TWO PHOTOGRAPHS OF THE VICTIM THAT WERE CUMULATIVE AND INFLAMMATORY.

During the guilt phase the state offered a total of six photographs of the body of the victim. (R368-374,1083-1084) The photographs were taken at the scene by Sergeant Klepper. (R362-367) Defense counsel objected to several of the photographs on the basis that they were duplicative and cumulative. (R368-370) Specifically, Appellant contended that state's exhibits 2D and 2G were very similar in nature. Appellant had the same objection to state's exhibits 2E and 2B as well as 2F and 2A. (R368-369) Defense counsel also objected to the total number of photographs offered by the state. Appellant argued that any possible relevance of the duplicative photographs was outweighed by unjust prejudice in contravention of Section 90.403, Florida Statutes. (R369-370) Trial court overruled Appellant's objection and allowed all of the photographs into evidence. (R368-371,1083-1084) Sergeant Klepper displayed each photograph to each and every juror while testifying. (R373-375)

The initial test for the admissibility of photographic evidence is one of relevance. Bush v. State, 461 So.2d 936 (Fla. 1985); Straight v. State, 397 So.2d 903 (Fla. 1981). However, even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice."

§90.403, Fla.Stat. (1983). Thus, even though technically relevant, before photographs can be admitted into evidence, "The trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is *so* inflammatory as to create an undue prejudice in the minds of the jury." Leach v. State, 132 So.2d 329, 332 (Fla. 1961).

In the instant case, the photographs to which Appellant objected were duplicative and cumulative. Appellant asks this Court to examine the photographs themselves in making this determination. (R1083-1084) Certainly the state was entitled to produce photographs of the deceased. However, Appellant objected at trial and now contends on appeal that the state was not entitled to a "gallery" of photographs. The photographs added nothing and were "so shocking in nature", see, Alford v. State, 307 So.2d 433, 440 (Fla. 1975), that admission into evidence was erroneous since the probative value was outweighed by the prejudicial effect. Appellant is entitled to a new trial not tainted by this prejudicial, inflammatory evidence. Amend. V, VI and XIV, U.S. Const.; Art. I, Sec. 9 and 16, Fla. Const.

POINT VI

JOHNNIE BOUIE'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE, THE TRIAL COURT, AND THE JURY INSTRUCTIONS DIMINISHED THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

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

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

Caldwell, 472 U.S. at 333. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), held that Caldwell mandates the reversal of a conviction where an advisory jury is misled as to the importance of its role. The trial court in Adams incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself. The trial judge instructed the jury that he could disregard the jury's recommendation, even if the jury recommended life imprisonment. The Eleventh Circuit pointed out that this constituted a misstatement of the law. In fact, Florida law allows for an override of the jury's recommendation of life imprisonment only upon a clear and convincing

showing that it was erroneous. McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Throughout Johnnie Bouie's trial, the jury was repeatedly told that their sentence recommendation was advisory only. They were repeatedly told that the final decision as to the proper sentence was solely the responsibility of the trial judge. (R127,131,136,138,140,141,143,148,157,177, 236-237,239,875-876,892-893) Additionally, the trial court read the standard penalty phase instructions to the jury. In part, those instructions stated:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law . . . and render to the Court an advisory sentence. . . (R914).

The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely his responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder, supra.

In Banda v. State, 13 FLW 451 (Fla. July 14, 1988) this Court held that the Florida Standard Jury Instructions do not violate the dictates of Caldwell which stands only for the proposition that the Constitution is violated if the jury receives erroneous information that denegrates its role. This Court opined that the present standard jury instructions are not erroneous statements of the law. In Combs v. State, 525 So.2d 853 (Fla. 1988), this Court refused to apply the Eleventh Circuit's decisions in Mann v. Dugger, 817 F.2d 1471, reh'g granted

and opinion vacated. 828 F.2d 1498 (11th Cir. 1987), and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987). This Court concluded that the standard jury instructions together with prosecutorial comments which informed the jury that their recommendation is "advisory" do not violate Caldwell.

The rule of law laid down in Caldwell has been the subject of lively discussion in the United States Court of Appeals, Eleventh Circuit. See Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988); Harich v. Dugger, 444 F.2d 1464 (llth Cir. 1988); Mann v. Dugger, 817 F.2d 1471, 1481-83 (llth Cir. 1987), reh'g granted and opinion vacated, 828 F.2d 1498 (11th Cir. 1987); Mann, 817 F.2d at 1485-86 (Fay, J., dissenting); id. at 1489-90) (Clark, J., specially concurring); Harris v. Wainwright, 813 F.2d 1082, 1098-1101 (11th Cir. 1987), reh'g granted and opinion vacated sub nom. Harich v. Dugger, 828 F.2d 1498 (llth Cir. 1987); Adams v. Wainwright, 804 F.2d 1526, 1528-33 (llth Cir. 1986), modified on reh'g sub nom. Adams v. Dugger, 816 F.2d 1493, 1494-1501 (11th Cir. 1987) cert. granted sub nom. Dugger v. Adams, __ U.S. __, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988); Funchess v. Wainwright, 788 F.2d 1443, 1445 (11th Cir. 1986), Cert. denied, 475 U.S. 1133, 106 S.Ct. 1668, 90 L.Ed.2d 209 (1986); Thomas v. Wainwright, 788 F.2d 684, 693-94 (llth Cir. 1986)(Johnson, J., dissenting), cert. denied, 475 U.S. 1113, 106 S.Ct. 1623, 90 L.Ed.2d 173 (1986).

Recently, the Eleventh Circuit has stated simply that jurors and prospective jurors are not to be misled as to the

applicable law on this issue. Stewart v. Dugger, 847 F.2d 1486, 1492 (11th Cir. 1988). On the other hand, the function of the jury and of the individual jurors must not be belittled by misstatement of the law. Id. A defendant is entitled to have the jury made fully aware that the results of the sentencing deliberations will play an important part in the sentencing process. Id. The record on appeal indicates that, at one point, defense counsel told the jury that he had "never seen a seated circuit judge not follow the advisory verdict of a jury." (R109) During individual voire dire the trial court repeatedly told potential jurors that their recommendation was "an advisory opinion." (R127,131,136,140-141,156-157) The trial court also made the following remark to one potential juror:

> . . . the Court may or may not follow that advisory opinion, but it certainly has -- the Court is interested in hearing what the jury has to say on the punishment phase. (R131)

The trial court told another venireman who ended up on the jury:

> Maybe I ought to add this, you understand that you do not or the jury does not impose the sentence, the Court does that. The Judges do that.
>
> You make an advisory opinion which doesn't necessarily mean it's going to be followed. (R141)

The trial court told the entire venire panel at one point that jury recommendations are given great weight and deference. (R148) At another point, the trial court told the entire venire that the recommendation of the jury is normally given great weight and deference when the trial court determines what sentence should be imposed. (R236-237) At still another point in jury

selection, the trial judge told the venire that the court may or may not follow their recommendation but at least the court would give it respect. (R239) The prosecutor told the venire:

> And as we have told you, it's really the Judge that makes the final decision. It's just a recommendation from the jury. (R143) (emphasis added)

The prosecutor began his closing argument at the penalty phase as follows:

> As the Court has already instructed you and as you heard when we were picking you as jurors, we are now at the second phase of the trial, that being the sentencing phase. It is your duty now to render an advisory opinion to the Court as to what sentence should be imposed upon the Defendant, Johnnie C. Bouie, Jr., for committing the murder of Barbara Lynn Smith.
>
> Now, it's important for you to remember that it is a recommendation. The final sentence that will be imposed is decided by Judge Hammond, but that's not to say that your recommendation will not weigh heavily with him. (R892-893) (emphasis added).

Additionally, the trial court read the standard penalty phase instructions to the jury relating to this issue (R914) and also gave the following preliminary instruction at the commencement of the penalty phase.

> . . . the final decision as to what punishment shall be imposed rests solely on the Judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant. (R875) (emphasis added)

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the prosecutor's closing argument which was not corrected by the trial court could have misled the jury into believing that its

role was unimportant, thereby violating Mann's Eighth Amendment rights under Caldwell. In Harich v. Dugger, **844** F.2d **1464** (11th Cir. **1988),** the Eleventh Circuit rejected, under facts very similar to those in Mann, a Caldwell claim. Appellant submits that the totality of the remarks of defense counsel, prosecutor, and the trial court certainly could have misled the jury into believing that its role was unimportant. Johnnie Bouie's death sentence is therefore unconstitutional. Amends. **VIII** and **XIV,** U.S. Const.; Caldwell v. Mississippi, **472** U.S. 320 **(1985).**

POINT VII

IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v.

State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1974) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right

to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 934 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in

King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of the arbitrary and capricious application of the death penalty at every level of the criminal justice system, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Initially, this Court should vacate Johnnie Bouie's illegally imposed death sentence and impose a life sentence. Pursuant to Section 921.141(3), Florida Statutes (1987) Bouie must be sentenced to life regardless of this Court's treatment of the other issues raised herein.

As for the other points raised by Bouie, this Court should vacate Bouie's conviction and remand for a new trial as to Points II and V. As for Point III, this Court should vacate Bouie's conviction and remand for discharge. At the very least, this Court should remand for a new trial in the interest of justice.

This Court need not reach the merits of Points IV, VI, and VII in light of Point I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished through U.S. mail to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, fourth floor, Daytona Beach, Florida 32014 and *to* Mr. Johnnie C. Bouie, Jr., #111099, P.O. Box 747, Starke, Fla. 32091 on this 6th day of January, 1989.

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