IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK, :

Appellant, :

vs. : Case No. 73,076

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

On July 14, 1987 a Pasco County grand jury returned an indictment charging Appellant, Samuel Jason Derrick, with the premeditated murder of Rama Sharma. (R862-863) The indictment alleged that Appellant stabbed Sharma with a knife on June 24-25, 1987. (R862)

Appellant, through his counsel, the public defender's office, filed his demand for discovery on July 17, 1987. (R865)

The pretrial motions Appellant filed included seven motions to dismiss. (R901-915) The Honorable Lawrence E. Keough heard these motions on March 11, 1988, and denied them. (R841-843, 916, 917)

Appellant also filed a motion to suppress statements he made to law enforcement authorities. (R929-930) The Honorable Edward H. Bergstrom, Jr. heard this motion on May 10, 1988, after Appellant's jury had been selected, but not yet sworn. (R194-214) After hearing the testimony of Detective Clint Vaughn of the Pasco County Sheriff's Office and arguments of counsel, Judge Bergstrom denied the motion. (R196-213, 936)

After the State rested its case at his trial, Appellant moved for a judgment of acquittal as to both premeditated and felony murder. (R468) The court denied the motion. (R468)

Appellant asked the court to instruct the jury on the lesser included offense of third degree felony murder, with grand theft as the underlying felony, but the court refused. (R540-544) The court did accede to a defense request to delete language from

the jury instructions which told the jury they were not responsible for the penalty in any way because of their verdict. (R556-564)

On May 12, 1988 the jury found Appellant guilty of murder in the first degree as charged by the indictment. (R672, 939, 944)

Appellant filed a motion on May 13, 1988 to strike Randall James as a witness at penalty phase or, in the alternative, to continue the penalty phase. (R956-958) Judge Bergstrom denied the motion (R684), and the penalty phase was held on May 13. (R690-831) Both the State and Appellant presented additional evidence. (R691-777)

At the jury charge conference, Appellant proposed three special penalty phase jury instructions, all of which the court denied. (R785-790, 946-948)

The court instructed the jury on the following aggravating circumstances (R822-823): the crime was committed while Appellant was engaged in a robbery; the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; the crime was committed for financial gain;[1] the crime was "essentially" wicked, evil, atrocious, or cruel; the crime was committed in a cold, calculated and premeditated manner

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[1] At the penalty phase jury charge conference, defense counsel argued that it would constitute an improper doubling for the jury to be permitted to consider in aggravation both that the homicide was committed during a robbery and was committed for financial gain (R779-782), and one of his proposed jury instructions which the court denied was an anti-doubling instruction. (R787-790, 948)

without any pretense of moral or legal justification. The court instructed on the following mitigating circumstances (R823): the age of Appellant at the time of the crime; any other aspect of Appellant's character or record, and any other circumstance of the offense.

The jury returned an advisory verdict recommending that Appellant be sentenced to death, by a vote of eight to four. (R827, 951, 955)

Appellant filed a motion for new trial on May 20, 1988 (R991-993), which Judge Bergstrom heard on June 17, 1988, and denied. (R833-839, 994)

Appellant's sentencing hearing was held before Judge Bergstrom on July 25, 1988. (R844-856, 997) At that hearing Appellant addressed the court and asked Judge Bergstrom to please spare his life. (R847) After hearing arguments of counsel for the State and for the defense, Judge Bergstrom read into the record his order sentencing Appellant to death. (R853-856, 995-996) The court found in aggravation that the capital felony was committed while Appellant was engaged in the commission of or an attempt to commit a robbery, was committed for the purpose of avoiding or preventing a lawful arrest, was especially heinous, atrocious or cruel, and was a homicide that was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R854-855, 995-996) In mitigation the court found Appellant's "youthful age of 20 at the time of the commission of the offense." (R855, 996) Judge Bergstrom found "no other statu-

tory or nonstatutory mitigating circumstances" to apply. (R855, 996)

Appellant filed his notice of appeal on July 26, 1988 (R998), which was amended on September 23, 1988. (R1005)

STATEMENT OF THE FACTS

I. Motion to Suppress

On May 10, 1988 the court below considered Appellant's motion to suppress statements he made to sheriff's deputies. (R196-213)

The sole witness to testify at the suppression hearing was Detective Clint Vaughn of the Pasco County Sheriff's Office. (R196-205) He testified that on June 29, 1987 he had probable cause to arrest Jason Derrick based solely upon information given to him by David Lowry, whom Vaughn knew to be a convicted felon. (R197, 203) Lowry advised Vaughn that Derrick told Lowry he committed the murder of Rama Sharma. (R198) Based upon that information, Derrick was arrested at a convenience store at the corner of 52 and Moon Lake Road. (R198) He was driven to the sheriff's office, arriving there at around 10:00, 10:30, or 11:00 p.m. (R198, 203)

At the sheriff's office, Vaughn advised Appellant of his Miranda[2] warnings from a card. (R198-199) Appellant indicated he understood the rights Vaughn explained to him. (R199) Vaughn denied threatening Appellant in any way, or promising him anything, or coercing him in any fashion before Appellant made statements. (R200, 201) Appellant never asked to see an attorney, and never said he did not want to talk to Vaughn. (R200, 201)

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Appellant initially denied any involvement in the murder. (R200) Vaughn kept telling him that they knew he did it, they knew "where he did it and how he did it and even why he did it." (R200) Appellant then said, "'You don't have anything.'" (R200) Vaughn responded that they had a witness. (R200) Appellant said they did not. (R200) Vaughn said, "Yes, we do. David Lowry." (R200) Appellant said, "'He didn't tell you anything.'" (R200-201) Vaughn said, "Yes. He did." (R201) Appellant said, "'I'd like to have him in front of me. Let him tell me.'" (R201) Vaughn said they could arrange that, and he had Appellant and Lowry sit together in the sergeant's office. (R201)

Lowry looked at Appellant and "kind of broke down and started crying." (R201) He said, "'I can't handle this.'" (R201) At that point Appellant said, "'All right, I did it.'" (R201) Vaughn asked, "You did what?" (R201) Appellant replied, "'I killed him.'" (R201) Appellant said, "'I stabbed him.'" (R201)

There came a time when Appellant asked to see his wife, and she was brought in to talk with him. (R201-202) Appellant made statements to his wife in Vaughn's presence. (R202)

It was around 11:30 to 12:30 when Appellant said he did it, and the interview had been in progress for 30 minutes to an hour. (R204)

Vaughn did not obtain a tape recorded or written statement from Appellant. (R204)

After the interview at the sheriff's office, in the early morning hours, Appellant went with Vaughn to the Moon Lake area to show the sheriff's deputies what happened and where it happened. (R202, 204)

Appellant's counsel argued that Appellant's constitutional rights were violated because law enforcement authorities lacked probable cause to arrest him. (R210-211) Any statement he made thereafter should not be admissible. (R211)

Judge Bergstrom denied the motion to suppress. (R213, 936)

II. State's Case -- Guilt Phase

The Moon Lake area of Pasco County was kind of a wilderness area, where many people carried knives. (R317)

The Moon Lake General Store and the Boondocks Bar were about 20 feet apart. (R299, 337)

Rama Sharma, who was about 55 years old, owned the store. (R228-229,275, 451) He lived about 150 feet behind the store, and walked a pathway through the woods when going between the store and his residence. (R229, 277-278, 282)

The store was open from approximately 8:00 a.m. until 10:00 p.m. (R277)

About once a week Sharma went to Tampa at 4:00 in the morning for produce. (R282-283)

David Lowry and Appellant were such good friends, they were like brothers. (R295-296, 313) In fact, when Lowry did not have any money, he and his girlfriend went to live with Appellant

and his wife. (R313-314, 357) Appellant basically paid all the bills. (R314, 357)

Lowry had been in the Moon Lake General Store with Appellant many times and had seen Appellant talking to Rama Sharma. (R315) It seemed that Appellant and Sharma got along very well. (R315) Appellant asked Sharma for a job, but he said he did not need any help. (R315, 346-347)

Lowry had also been in the store with a short man named Mike or "Craze," who was in his 40s and had tatoos. (R315-316, 345) Lowry thought Craze was Appellant's mother's boyfriend. (R345) Craze carried a knife with a skull handle all the time. (R316)

A week before the instant homicide, Lowry and Craze went into the store to get some sandwiches. (R316, 346) When Rama Sharma asked Craze to wait a minute, he got upset. (R346) He threatened to have the health department shut the store down, then he and Lowry left. (R316, 346)

Lori Atwood, who knew Rama Sharma and sometimes worked for him at the store, spoke with Sharma on the telephone between 10:20 and 10:30 p.m. on June 24, 1987 while he was at the store. (R275-277)

The next morning at approximately 6:30, Harry Lee, who also knew Sharma, found his body along the path in the woods. (R229-230) Lee went home and called the police. (R230)

There was a trail of blood down the path on which Sharma's body was found. (R255, 260, 450) A larger pool of blood

approximately 20 feet from the body indicated that a struggle may have occurred at that location. (R428, 459-460)

The sheriff's deputies who responded to the scene noticed a set of shoe prints leading to and from the area of the body that appeared to have been made by tennis shoes. (R241, 367-368, 427) Plaster casts were made of these shoe prints. (R291-293) The path was well-traveled, and there were quite a few footprints along it. (R238, 241-242, 391) One set of footprints belonged to Harry Lee. (R404-405)

There were a lot of tire tracks in the area, including some in a dirt driveway leading up to Sharma's carport area. (R274, 293, 369) The sheriff's deputies were going to take casts of the tracks in the driveway, but they ran out of sunlight, and it began to rain. (R369)

The deputies recovered a piece of T-shirt that was about eight feet from Sharma's body. (R248-249, 260, 375, 987) They did not have any tests conducted on this piece of cloth. (R398-399)

There was a plastic or tin file box in the area. (R255, 369) The surface of the box was such that it would not allow fingerprints to be taken off it. (R369-370)

Other items found at the scene included half a hot dog and a foam container. (R255)

Near Sharma's residence there was what appeared to be the tip of a knife. (R258) It appeared to have been there quite awhile. (R258-259)

Lori Atwood entered the Moon Lake General Store with sheriff's deputies on the morning of June 25, 1987 and noticed a half-eaten hot dog on the counter, which she found unusual, as Rama Sharma was a vegetarian. (R279)

Doctor Edward Corcoran, the associate medical examiner, performed an autopsy on Rama Sharma on June 26, 1987. (R447-448, 450) There were 33 "defects" to the body of Rama Sharma, 31 of which were stab wounds, and two of which "were similar, but much more superficial than puncture wounds." (R455) Twenty of the stab wounds were to the back, and 11 or a little less than that were to the front. (R461) Three of the wounds could be considered defensive wounds. (R455-456) The totality of the wounds would have caused death, but there were six major wounds. (R456-457)

The cause of Sharma's death was multiple stab wounds, and the mechanism was a combination of bleeding and air getting around the lungs. (R456)

The wounds were consistent with a knife, which Corcoran estimated was up to three inches in length. (R457) Several of the wounds had a sharp end and a blunt end, indicating a single-edged knife. (R457)

Corcoran was not able to determine which wounds occurred first, nor could he give the length of time from the first stab wound to the time of death. (R456, 459) Death probably occurred several minutes, most likely 10 to 15 minutes, after the last

wound, but consciousness would have been lost probably several minutes prior to death. (R459, 464)

Corcoran drew fluid from the eye of the body to measure potassium in order to estimate the time of death. (R462) He estimated that Sharma died at approximately 6:00 a.m. (R462) Corcoran initially testified at Appellant's trial that the test "isn't real accurate" (R462), but later said that "in general and in most cases this is pretty accurate, within two hours." (R467) Some of the literature indicated that the time of death arrived at by this test could be off by 10 hours, plus or minus, while other studies reported five-hour variability. (R465-467)

Upon questioning by defense counsel at Appellant's trial, Corcoran testified that he was familiar with the term "frenzy," which he described as "uncontrolled, pretty much, violent activity." (R463) He was not permitted to define what he meant by uncontrolled violent activity, nor was he allowed to say whether Sharma's killing was consistent with a frenzy killing. (R463)

The Pasco County Sheriff's Department had absolutely no evidence that Appellant was involved in the homicide of Rama Sharma until Detective Clinton Vaughn spoke with David Lowry on June 29, 1987. (R370, 388)

According to Lowry and his wife, Kristen, they saw Appellant at his mother's house on the evening of June 24, 1987. (R296-297, 353) When they arrived, there were knives on a coffee table in front of the couch, including a butterfly knife and a

double-edged knife that was about six to eight inches long, and had a black handle. (R300-301, 353-354)[3]

Appellant told Lowry he was not with his wife at his mother-in-law's house, where Appellant had been residing prior to June 24, because they had gotten into an argument over Appellant not having a job and never having any money for the family. (R297-298)

Between 8:00 and 8:30 Appellant, who did not have a car at the time, asked David Lowry to take him to a friend's house. (R298-299) Lowry dropped Appellant off a couple of blocks from the Boondocks Bar. (R299) Appellant asked Lowry to come back in a few hours to pick him up. (R301)

When Lowry dropped Appellant off, Appellant was wearing dark-colored jeans, a white shirt, and tennis shoes. (R302) When Appellant stepped out of the car, Lowry noticed what looked like the black handle of a knife in a sheath in the back of his pants. (R300, 321) The handle was the same color as that of the double-edged knife Lowry had seen earlier. (R300-301)[4]

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[3] David Lowry testified that Appellant showed him some knives (R300), while Kristen Lowry testified that Appellant was "putting them [the knives] on his person." (R354) David Lowry testified that he "played with a couple of" the knives (R316), while his wife testified that Lowry was "just looking at them." (R358) Kristen Lowry also testified that it was not unusual for her husband to have a knife, and he owned a knife. (R358)

[4] Kristen Lowry testified that Appellant hooked a double-edged knife on the front of his pants when they were at his mother's house. (R354)

Lowry went back later to pick Appellant up, but he was not there. (R301) Lowry drove around the block a couple of times, then eventually went home and went to bed. (R301-302)

About 1:00 or 1:30 a.m. Appellant knocked on the Lowrys' bedroom window and woke them up. (R302, 354-355) He was still wearing dark-colored pants and tennis shoes, but no shirt. (R303) He seemed nervous and all hot and sweaty, "like he'd been real active." (R304) Lowry did not see any blood on Appellant. (R338)

Appellant asked Lowry to give him a ride home to his mother's house, which Lowry did. (R302) Appellant gave Lowry twenty dollars for gas, which Appellant got either from his shirt rolled up or a bag or something that he was holding. (R303)

When they got in the car and proceeded to drive, Appellant told Lowry that he had robbed the Moon Lake General Store. (R304)

Lowry heard the next day that the owner of the Moon Lake General Store had been killed. (R305)

That evening, Lowry and his wife went to Appellant's mother's house between 5:30 and 6:00. (R305) Appellant was there. (R305) He had a brown Buick Electra that Lowry had not seen him with previously. (R305-306) Appellant told Lowry he had gotten the car that day. (R306) It was approximately a late '70s model. (R306) It was "pretty junky," and was not even close to new, but it was operable. (R306, 315) Lowry estimated the car's worth at $200 to $300. (R314)

Appellant and Lowry took the car to Cox Lumber, where Appellant had been working, to pick up his check. (R306, 314) On the way, Lowry asked Appellant "if he was the one that murdered Rama, the store owner." (R306) His answer was, yes, that he did, he stabbed him 13 times. (R307) Lowry asked why he stabbed him so many times. (R307) Appellant said that he [Sharma] kept screaming. (R307) Then Appellant "kind of laughed and said it was easy." (R307)

After Appellant told him this, Lowry was not sure whether Appellant had really done it. (R334)

Lowry did not go to the police immediately with the information he had because he was scared. (R307-308) He contacted the sheriff's department on June 29 and told them what he knew. (R308-309)

That night, around 10:30 p.m., Lowry assisted the deputy sheriffs in arresting Appellant at a Circle K store. (R309, 340, 361-362, 370, 428)

When Detective Clinton Vaughn told Appellant he was under arrest and was being charged with the murder of Rama Sharma, Appellant said, "'No way.'" (R394)

Appellant was transported to an office in the sheriff's department. (R370-371) There Vaughn advised Appellant of his constitutional rights. (R371-373, 417)

Appellant initially said he did not know anything about the murder of Rama Sharma. (R373, 417) Vaughn kept telling him they had a witness whom Appellant had told. (R374) Appellant

said, "no, you don't". (R374) Vaughn responded, "yes, we do." (R374) Appellant asked who that witness was, and Vaughn responded that it was David Lowry. (R374) Appellant said he would like to see Lowry. (R374) Vaughn said that could be arranged. (R374)

Vaughn put Appellant in his sergeant's office and brought Lowry into the room. (R374) Lowry, who was sitting across from Appellant, broke down and said, "I just can't take this any more, I can't handle it." (R374) At that moment Appellant started crying and said, "all right, I did it." (R374, 413) Vaughn asked, "you did what?" (R374) Appellant said, "I killed him." (R374) Vaughn asked how. (R374) Appellant said he stabbed him. (R374) Vaughn asked why. (R374) Appellant said, "I went to rob him and he was walking out of the store, I jumped out, he turned to run back to the store, I grabbed him, he turned around and saw who I was and he started screaming, and I stabbed him to shut him up." (R374)[5] Appellant said he used a double-edged hunting or throwing knife that was about five or six inches long to stab Sharma about 13 times in the back and the side area. (R374-375, 380, 384, 419, 432, 434)[6] He took money that was in an envelope inside of Sharma's shirt and ran through a wooded area, stopping at an abandoned truck to count the money, which

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[5] Deputy Harold Johnson of the Pasco County Sheriff's Office testified that Appellant confessed in these words: "I was just going to rob him, but he turned around and saw me and I had to kill him." (R417)

[6] Deputy Johnson testified that Appellant mentioned using a throwing knife in a sheath (R419), while Sergeant Gary Fairbanks of the Pasco County Sheriff's Office testified that Appellant said he had used a big hunting knife. (R432, 434)

amounted to $360. (R376, 378, 419, 431) Appellant said he lost the money. (R379, 432) He threw the knife as far as he could throw it into the woods. (R419, 432) He discarded his pants and shoes in a pond or creek. (R378-379, 419-420, 432-433)[7]

It was around 10:30 at night when the incident took place. (R383)

Vaughn asked Appellant whether he had used the piece of T-shirt found at the scene to wipe the knife. (R375) Appellant responded that the knife had brushed against his T-shirt after the stabbing, and he had torn a piece from his shirt and dropped it. (R375)

David Lowry was in the room with Appellant for approximately five minutes. (R375) He was removed from the room after Appellant made his initial inculpatory statements. (R374-375)

Appellant's wife was brought into the room at his request. (R376, 417-418) Appellant stood and embraced her. (R376) They were both crying. (R376, 418, 430, 435-436)

Appellant said he did not know why he did it, and asked if it was true that he stabbed Sharma over 30 times. (R376, 430, 435-436) Sergeant Fairbanks indicated in the affirmative. (R376, 430, 435-436)

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[7] Detective Vaughn referred to the body of water as a pond (R378), while Sergeant Fairbanks and Deputy Harold Johnson of the Pasco County Sheriff's Office said it was a creek. (R419-420, 432-433)

Appellant mentioned that an aunt of his had said he was an animal and would kill someone some day, and said this would confirm her comment. (R376, 430)

After the interview at the sheriff's office, Appellant went with the deputies to the Moon Lake area and showed them where he was dropped off, where he hid in the bushes or palmettos to wait for Sharma, etc. (R377, 418-420, 430-431)

The sheriff's office used a dive team to search the body of water into which Appellant said he threw his clothing, and metal detectors to search the woods for the knife, but they found nothing. (R398)

Appellant gave the sheriff's office permission to search his mother's home, and Detective Vaughn obtained a pair of sneakers from the room in which Appellant had been staying. (R380) Vaughn sent them to the FBI lab in Washington. (R380-381)

Special Agent David Attenberger of the FBI compared the soles of the sneakers with three plaster casts of footprints taken in the vicinity of Sharma's body. (R442-445) He concluded that there was a possibility the shoes could have made two of the impressions he examined, but he could not say for sure that those shoes made those footprints. (R445-446) With regard to one of the casts, Attenberger was unable to say whether either of the shoes corresponded to that impression in any areas. (R444-445)

The Converse shoe Attenberger received and its design were quite common. (R447) He could not tell for certain whether the footprints were even made by a Converse shoe. (R447)

III. Defense Case -- Guilt Phase

Senthia Hardesty lived in Moon Lake. (R469) She knew Rama Sharma and traded on occasion at the Moon Lake General Store. (R469-470)

On June 24, 1987 at approximately 8:30 or 8:40 p.m., Hardesty went by the Moon Lake General Store, intending to buy some milk on credit. (R470-471) She had her two daughters and her small baby in the car with her. (R470)

As Hardesty was about to pull into the parking lot, a very nicely dressed man in a suit came toward her with his hand extended out at her. (R470, 475) She did not hear the man say anything. (R479) Hardesty also noticed three people on a picnic table in front of the store. (R471) She felt intimidated and very frightened. (R470-472) Hardesty did not stop at the store, but pulled back out and went home. (R471)

Hardesty had known Appellant for years. (R472, 482) She did not see him at the Moon Lake General Store that night. (R472)

The following morning, Hardesty heard that Rama Sharma had been killed. (R472) She went to the store and found two uniformed officers in a squad car in front of the store. (R473) Hardesty told them what had happened the previous evening. (R473) The officers did not take a written statement from Hardesty, and did not take her name. (R473)

Shannon Loyce was 17 years old. (R490) She was quite familiar with the Moon Lake General Store, and had done inventory there once. (R493) She knew Rama Sharma pretty well. (R494)

Loyce drove by the store on June 25 [1987] between 2:15 and 2:30 a.m. (R492-493) All the lights were on, and Sharma was standing behind the counter. (R494) It looked as if he was doing some paperwork for the store. (R494, 500)

The defense announced Appellant as the third defense witness. (R509) At that point in the trial a lengthy discussion ensued among the court and counsel outside the presence of the jury. (R509-530) The prosecutor said he had received a note from one of his investigators approximately an hour earlier, after the defense called its first witness, indicating that Detective Clint Vaughn was contacted that morning by an inmate named Randall James. (R510, 515) James told Vaughn he had spoken with Appellant in November or December and asked him, "What are you in here for?" (R510, 525) Appellant replied, "Murder." (R510) James asked, "Did you do it?" (R510) Appellant answered, "Yeah, I killed the motherfucker and I may kill again." (R510)

Randall James was being represented on charges pending against him by Stephen Dehnart, one of the two assistant public defenders representing Appellant at his trial. (R511) Defense counsel argued that they had a "major conflict" in representing both Appellant and James. (R512) The court said he could remove the public defender's office from representing James, but Dehnart

noted that such an action would not remove his ethical obligations. (R516)

Appellant's attorneys also observed that their strategy would have been completely different had they been aware of James prior to putting on the defense case; they probably would not have called the two witnesses they did, thus giving up the right to first and last closing argument, without being able to call Appellant as well. (R514-515, 522-523)

Defense counsel also argued that Appellant's case was prejudiced because they had already called Appellant's name as a witness. (R513) They moved for a mistrial. (R514, 523, 529-530)

The prosecutor argued that he should be allowed to present James as a rebuttal witness if Appellant testified that he had nothing to do with the murder. (R518-521)

The court refused to grant a mistrial, and said they were "going to move ahead." (R515-516, 529) The court did express a willingness to allow defense counsel to talk to James. (R512-513)

The court removed the public defender's office from representing Randall James, and said other counsel would be appointed for him. (R527-528)

Defense counsel told the court Appellant did not feel he was able to testify, although obviously he wanted to. (R523)

Thereafter, in the presence of the jury, defense counsel announced, "In light of the court's ruling, the defense would rest at this point." (R533)

The next day defense counsel attempted to move to strike Randall James from the witness list and disallow his testimony, but the court refused to entertain the motion. (R569-571)

IV. Penalty Phase

Before penalty phase testimony began, defense counsel moved to strike Randall James as a witness or, in the alternative, continue the penalty phase. (R956-958) Counsel had deposed James during the jury's guilt phase deliberations, and argued that James' deposition revealed the need for counsel to depose other individuals if James was going to testify. (R675-682) Appellant's attorneys needed to depose James' wife, who was the first person to whom James had confided that he had heard Appellant's alleged admission. (R676-677) They needed to depose Detective Clint Vaughn, who had spoken with James concerning Appellant's statement on the next to last day of the guilt phase, but Vaughn was in Washington, D.C. (R676-677) Counsel also needed to obtain James' medical records from the jail and to depose Dr. Teaman, the jail psychiatrist, as James had been moved to the medical wing after being in a pod with Appellant. (R677-678) Dr. Teaman had prescribed Novane and Prolixin for James, which are psychotropic drugs used for the treatment of psychotic behavior. (R677) Defense counsel also wanted to talk to other individuals who were in jail when Appellant allegedly made his statements to James. (R678) Defense counsel further argued that any testimony James could give would be irrelevant. (R684) The court denied

the defense motion to strike James as a witness or to continue the penalty phase. (R684)

A. State's Case

The State's case at penalty phase consisted solely of the testimony of Randall James. (R691-711) James came into contact with Appellant in approximately the second week of November, 1987, when James was placed in H Pod at the Pasco County Jail, the same cell block in which Appellant was housed. (R692-693) The pod held eight inmates, one inmate to a cell. (R692-693)

James began talking to Appellant because James wanted to borrow some paper to write a will. (R693, 698) The two men sat on Appellant's bunk, and James asked Appellant what he was in for. (R693) Appellant replied, murder. (R693) James asked him if he did it. (R693) Appellant answered, "'yeah, I killed the motherfucker, and I'll do it again.'" (R693-694)

James was only in the same pod as Appellant for about one day. (R697) He was then placed in medical wing, where he was treated by Dr. Teaman, the jail psychiatrist, who prescribed the antipsychotic or antidepressants Navane and Prolixin for James. (R698-699, 701)

James had been treated for "depressions" in psychiatric wards before. (R699) He had been twice convicted of a felony. (R702)

On November 14, 1987 James wrote a letter to Mary Rice, an investigator with the public defender's office, asking for her to help him get out of jail. (R704) The letter said James would

do what was required of him to do. (R704) He stated that he feared for his life every day he was in jail. (R704)

About two weeks before his trial testimony, James told his wife, Cathy, during a telephone conversation about the statement he heard Appellant make. (R694-695, 705) She contacted the state attorney's office, and they took James over to see Detective Vaughn. (R695-696)

During cross-examination of James as to his mental problems, defense counsel asked if he was in "pretty bad shape" when he was in Appellant's cell. (R700) James replied, "Not really." (R700) Counsel then asked if James testified the previous day at deposition to being in bad shape. (R700) A State objection was sustained on the ground of no proper predicate because counsel did not have a transcript of the deposition. (R700) Defense counsel thereupon renewed his motion to strike and/or continue the case, noting that the transcript was not ready, even though it was supposed to have been ready that morning, and counsel therefore did not have the ability to cross-examine and impeach James, thus depriving Appellant of the right to effective representation of counsel in the questioning of the witness.[8] The court denied the motion, whereupon counsel moved for a mistrial, which was also denied. (R701)

After James testified, counsel for Appellant again moved for a mistrial. (R711-712) They argued that James' testimony was

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[8] The transcript of James' deposition apparently arrived later, before he left the witness stand. (R710)

highly prejudicial and did not go to any aggravating circumstance. (R711) It showed only that Appellant was not susceptible to rehabilitation, and displayed no remorse. (R712) The prosecutor argued that James' testimony pertained to Appellant's state of mind as it related to the cold, calculated, and premeditated aggravating factor. (R711-712) The court denied Appellant's motion. (R712)

B. Defense Case

Senthia Hardesty had known Appellant for about 10 years because they lived in the same neighborhood. (R714-715) Appellant had taught her oldest son, who was younger than Appellant, how to ride his two-wheeler bicycle, and the two boys had probably fished together in the creek in back of Hardesty's residence. (R715)

Hardesty described an incident that occurred when her son was in second grade, and Appellant was about 13 or 15. (R715-716, 726) Her son had been fighting on the school bus. (R716) Appellant was at the bus stop that day, and Hardesty told him what had happened. (R716) Appellant explained to the younger boy that fighting would not solve anything and was not the way to behave. (R716)

Appellant was one of only three people in the neighborhood Hardesty's children had directions to go to in the event of an emergency. (R716) And Hardesty told her children not to let anyone know they were home alone, but she made an exception for Appellant. (R716-717)

Hardesty described another incident where she was trying to pull down an old stall next to her house with a crowbar, when Appellant came along and pointed out that she was standing underneath the roof, and it would have fallen on her head. (R717) He then helped her finish the job. (R717)

Hardesty had personally seen Appellant do acts of kindness for others. (R717) He was always there if someone needed a tire changed. (R717) Many times Appellant gave Hardesty a jump when her car battery was dead. (R717)

Hardesty did not know of any bad qualities of Appellant, although she might have heard rumors. (R715, 720-721)

Appellant stopped at Hardesty's house when he was planning to get married. (R718) He was very happy and talked about his dreams, hopes, and goals. (R718)

The last time Hardesty saw Appellant was the day after his son was born. (R717)

David Derrick was Appellant's father. (R727-728) Appellant was born April 5, 1967. (R729) He had two brothers and one sister. (R728-729) Appellant was 18 months younger than Travis, who was a slow learner. (R730, 734-735)

Derrick described his son as a "good student" who was not much involved in athletics or other activities while in school. (R734) Derrick was not able to help Appellant with his homework very much, because Derrick was "not too good at reading and writing" himself. (R744) Appellant's mother "took care of that aspect of it." (R744) The couple received complaints from

the school Travis and Appellant attended because of the boys being dirty when they arrived at school. (R730-731) Derrick thought his son quit school in eighth or ninth grade, but he later obtained his GED. (R743-744)

David Derrick described the home where Appellant grew up as "basically a mess" 99 per cent of the time, because his wife refused to clean it up. (R729-731) There was "junk laying around," and sand in the bed. (R731-732, 742-743) Clothes would be thrown out in the backyard by the washing machine. (R733-734) The children's mother would buy junk food. (R732) She would not clean out the refrigerator. (R732) On one occasion Derrick found maggots in the bottom of the refrigerator. (R732)

Derrick testified that he took his family with him on hunting and fishing trips. (R743) He tried to teach his boys moral values. (R745)

At one time Derrick was charged with child abuse. (R735-736) Travis had been "instigating" Appellant, and Derrick told them to go outside and fight. (R735-736) Travis would not fight, and so Derrick hit him with a belt. (R736) Apparently, someone at school saw a mark on Travis, because Derrick got into trouble with HRS and had to go to training class for parents. (R736-737)

Appellant and Travis wanted to move in with a man named Joe Martin. (R737-738) HRS did a home study on Martin and told Mr. and Mrs. Derrick that "he was perfectly all right," although David Derrick did not believe it. (R737) He did not want the

boys to go, but one evening he came home and found that his wife had taken them to Martin's house. (R738) Appellant lived with Martin for about one year. (R738)

Appellant's mother and father divorced after approximately 21 years of marriage. (R729)

Harry Joseph Martin had known Appellant for seven years. (R745-746) He first met him when he picked up Appellant and his brother, Travis, when they were hitchhiking and took them home. (R746) He gave them rides a number of times after that, and got to know the boys very well. (R746)

They lived in a small trailer that was always filthy. (R746) The bathtub was full of dirt. (R746) The sinks were full of dishes. (R746) Dirty clothes were piled up outside the back door. (R746) There were lots of dogs and cats around. (R746) There was no heat in the trailer, but Appellant's mother and father used an electric blanket. (R746-747)

At times Martin would get calls in the middle of the night from the boys saying they were hungry. (R747) He would buy them food at the store and feed them and they would go home. (R747)

One night when Martin came home, the boys were sleeping in an abandoned car in his front yard. (R747) They were afraid to go home because they said their father would beat them. (R747) Martin called Derrick, and the two met at the Boondocks Bar. (R747, 755) Martin told Derrick the boys were afraid of being beaten when they went home. (R747, 755) Derrick said he would

not beat the boys if they would come home. (R755-756) This left Martin with the impression Derrick had beaten them in the past, but would not beat them in the future. (R756) Martin had seen marks on Appellant's back which Appellant said were the result of being whipped by his father. (R755) The boys did go home that night with their mother and father. (R747)

One day while Appellant's father was working out of town, Martin got a call from Appellant. (R747) He was "all shook up" that his mother was going to "dump him at HRS," and wanted Martin to take him to Martin's house. (R747) Appellant's mother arrived at Martin's front yard with the two boys and their clothes still wet from the laundromat and "dumped them." (R748) She said, "'I can't handle the boys, they're your boys now,'" and drove off. (R748)

With their parents' permission, Martin put the boys in school. (R748) Appellant was a very good student during the approximately one year he lived with Martin. (R748) Before he had skipped school whenever he could, and had fallen a year or so behind. (R748, 756)

Martin went to prison for lewd and lascivious or indecent activity on a child under the age of 14. (R749) Appellant was one of the victims. (R749-750) Martin also molested Travis and a cousin of the Derricks. (R749-750)

After Martin got out of prison, it was months before he saw Appellant. (R752) Thereafter, Appellant came to visit Martin, either alone or with his wife, an average of once a week.

(R751-752, 754) Sometimes Appellant asked to borrow money, and Martin gave it to him if he had it. (R751-752) In May, 1987 Martin loaned Appellant $175.00 to buy a car. (R751) Martin had also helped Appellant find jobs. (R753)

Jean Davis was Appellant's mother-in-law. (R757-758) She had known Appellant for about three years. (R758) Appellant and her daughter, Sherri, got married in January, 1987. (R763) They had a son, Shawn, who was 11 months old at the time of Appellant's trial. (R758)

Appellant and Sherri lived with Davis and her husband for approximately six months prior to Appellant's arrest. (R763) Sherri was in a federally-funded "Woman Infant Care" program that paid for most things for the baby. (R765) She and Appellant did not pay any rent, but Davis did ask for monetary help, and Appellant gave "[m]ore than sufficient." (R770)

Davis knew Appellant as a very caring, loving, and gentle person, whom she loved very much. (R759, 761) He was a gentleman who helped other people. (R759) He had taken money out of his own pocket to help others who were less fortunate. (R760) He was a very good mechanic, and would help even people he did not know when their cars were broken down alongside the road. (R760)

Appellant's bedroom at his family home was basically a tool shed on the back of a small trailer. (R761) His family life as a child was far from adequate. (R761) Appellant had done without a lot of things. (R761-762) There was little love, little money, little caring in the home where he grew up. (R762)

After Appellant found someone who loved him, he began to feel better about himself, and to feel that he mattered. (R762) He had begun to come out of the shell he had been in for years. (R762) He started to think in terms of furthering his education and working for better jobs to make more for Sherri and himself. (R761-762)

Sherri Derrick, who was 19 years old at the time of Appellant's trial, met Appellant in January, 1985. (R771, 777) When Sherri was pregnant, Appellant went with her to Lamaze classes, and was there when their child was born. (R773) Appellant and Sherri had an argument on June 24 [1987] over petty things, but it was not about money. (R773-774) Sherri never saw Appellant with knives, except for a pocket knife. (R776-777) Appellant cared about people. (R772) He would always stop to help if he saw someone broken down or needing a tire changed. (R772) He did odd jobs and helped people without expecting money or anything in return. (R772) Sherri found Appellant to be a wonderful person and a loving husband and father, and she loved him very much. (R771-773)

V. Sentencing Hearing

At his sentencing hearing of July 25, 1988 Appellant addressed the following remarks to Judge Bergstrom (R847):

> **THE DEFENDANT:** I would like to ask you to please spare my life. Everything I ever wanted in life was a son and I have a son. If I can't be with him, I can at least watch him grow up. I'm married. I love my wife very much. I ask you to please spare my life.

SUMMARY OF THE ARGUMENT

I. The trial court should have conducted a full inquiry into all the surrounding circumstances when it came to his attention that the State had not immediately disclosed to the defense that Appellant had made admissions to fellow inmate Randall James. The court made no determination as to whether Appellant was harmed or prejudiced by the prosecution's belated disclosure of James as a witness, but the prejudice appears manifest in the record. The revelation that James was a potential witness altered the entire defense strategy and caused Appellant not to testify after he had already been announced as a defense witness. And the public defender's office had a severe conflict of interest due to their representation of both James and Appellant, which did not evaporate merely because the court withdrew the public defender's office from representing James.

II. The trial court should have given defense counsel additional time to prepare to meet the penalty phase testimony of surprise witness Randall James. Counsel had only from May 11, 1988, when the State disclosed James as a witness, until May 13, 1988, when the penalty phase was held, which was inadequate time under the circumstances of this case.

At any rate, James' testimony should not have come in at all, as it was irrelevant and highly inflammatory. It injected into the proceedings the improper suggestion that Appellant would kill again if he did not receive a sentence of death. James' testimony also conveyed to the jury that Appellant lacked remorse,

and played a major role in the jury's eight to four death recommendation.

III. Appellant was denied a fair trial because he was in shackles throughout the proceedings. The trial judge failed to make an adequate inquiry into the need for Appellant to be restrained, and the record fails to show that the chains were necessary. Nor did the court take certain steps that could have minimized prejudice to Appellant. Shackling Appellant both impaired his presumption of innocence at guilt phase and undermined the reliability of the jury's penalty recommendation at sentencing phase.

IV. A newspaper article appeared in the Tampa Tribune after Appellant's trial began stating that Appellant had told detectives details about the stabbing of Rama Sharma, and listing the crimes for which Appellant was convicted in the past. The trial court refused defense requests to sequester the jury, and to question the jurors as to whether they had been exposed to the potentially prejudicial news account. As a result, Appellant was denied his constitutional right to a fair trial before an impartial jury.

V. The court below unduly curtailed Appellant's cross-examination of several State witnesses, hampering Appellant in the presentation of his defense, and depriving the jury of information they needed to know in order to give this case proper consideration.

VI. The trial court should have sustained defense objections to remarks the prosecutor made in his guilt phase and penalty phase closing arguments which incorrectly stated the law of this case. The assistant state attorney's guilt phase comment that the court would tell the jury to disregard the consequences of its verdict was erroneous in light of a ruling the court made at the jury charge conference, and improperly down-played the jury's role in the capital sentencing process. His penalty phase remarks that the law says that one who kills with the aggravating circumstances present in this case should die was similar to, but more egregious than, a comment that this Court has previously condemned.

VII. The penalty phase instructions improperly allowed Appellant's jury to consider as two separate aggravating circumstances that the homicide was committed during the course of a robbery and was committed for financial gain, where both factors related to a single aspect of the case. The court below should have given Appellant's proposed anti-doubling instruction to prevent this.

VIII. The instructions the trial court gave Appellant's jury at penalty phase did not adequately define and narrow the aggravating circumstances of especially heinous, atrocious, or cruel and cold, calculated, and premeditated.

IX. The sentencing weighing process was skewed in an unconstitutional manner toward a sentence of death because it

included improper aggravators and excluded applicable mitigating factors.

A. The evidence failed to show that the instant homicide resulted from a careful plan or prearranged design to effect Rama Sharma's death, and the cold, calculated, and premeditated aggravating circumstance does not apply. Even if the robbery was preplanned, this fact cannot be grafted onto the homicide to support this aggravator.

B. The victim here was not a law enforcement officer and the evidence was insufficient to show beyond a reasonable doubt that the dominant or only motive for the homicide was to avoid or prevent a lawful arrest.

C. Nothing about the instant homicide sets it apart from the norm so as to qualify it for the especially heinous, atrocious, or cruel aggravating circumstance. Knife killings are relatively common, and courts have not invariably found stabbing deaths to fall within this aggravator. Sharma did not suffer for more than a few minutes, and there was no evidence that Appellant meant for him to suffer at all.

D. The record fails to establish that the sentencing court considered all evidence that Appellant presented in mitigation, including that Appellant was a loving husband and father who was good with children, that Appellant was a caring person who went out of his way to help others, and that Appellant's childhood was one of abuse and neglect.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE RICHARDSON HEARING AND IN FAILING TO TAKE APPROPRIATE REMEDIAL ACTION WHEN THE STATE REVEALED RANDALL JAMES AS A SURPRISE WITNESS IN THE MIDST OF APPELLANT'S TRIAL.

Appellant filed his demand for discovery on July 17, 1987. (R865) This demand triggered the prosecutor's obligation to disclose to defense counsel, among other things, the substance of any oral statements made by Appellant, together with the name and address of each witness to the statements. Fla.R.Crim.P. 3.220(a)(1)(iii). The prosecutor's duty to disclose was a continuing one. Fla.R.Crim.P. 3.220(f); Brown v. State, 515 So.2d 211 (Fla. 1987); Cumbie v. State, 345 So.2d 1061 (Fla. 1977). "When a first degree murder trial is in progress, the rule dictates immediate disclosure." Lee v. State, 538 So.2d 63, 65 (Fla. 2d DCA 1989). See also Brown and Cooper v. State, 336 So.2d 1133 (Fla. 1976). There is no exception to the discovery rule for rebuttal or impeachment evidence. Smith v. State, 500 So.2d 125 (Fla. 1986); Kilpatrick v. State, 376 So.2d 386 (Fla. 1979); Witmer v. State, 394 So.2d 1096 (Fla. 1st DCA 1981).

When the prosecutor below announced that he had a new witness, Randall James, who could testify to admissions Appellant made, and Appellant thereupon moved for a mistrial, it became incumbent upon the trial court to conduct an inquiry into the

circumstances surrounding the prosecutor's failure to fulfill his duty immediately to inform the defense of this witness and the contents of Appellant's admissions. Since this Court's decision in Richardson v. State, 246 So.2d 771 (Fla. 1971), it has been established that the trial court must conduct an inquiry when it appears the State has violated its discovery obligations. The trial court has discretion to determine whether such a violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances. State v. Hall, 509 So.2d 1093 (Fla. 1987); Wilcox v. State, 367 So.2d 1020 (Fla. 1979). In making this inquiry, the trial court must determine, at a minimum, whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, what effect it had on the defendant's ability to prepare for trial. State v. Hall, 509 So.2d at 1096; Wilcox v. State, 367 So.2d at 1022.

The purpose of a Richardson inquiry is to ferret out procedural rather than substantive prejudice. The court must decide whether the State's discovery violation prevented the defendant from properly preparing for trial. Id., at 1023. This rule contemplates that material not disclosed to the defense shall not be admitted into evidence. Id.

In his zeal to "move ahead" with the case, the court below failed to make the requisite inquiry. From the discussion that did take place, it is impossible even to tell exactly when

the State became aware of Randall James as a potential witness. Although the prosecutor represented that he had been handed the note from one of his investigators approximately an hour before he disclosed that James was a potential witness, other State operatives had talked to James before that. James had first told his wife, Cathy, about the admissions Appellant made some two weeks before James testified at Appellant's trial. (R694-695, 705) She contacted the state attorney's office on some unspecified date. (R695-696) In James' deposition he said Cathy had talked to a "Mr. Yarby" first on May 11, 1988 before she talked to Detective Vaughn. (R1077) Vaughn then interviewed James. (R695-696) The information in question was subject to the rules of discovery not when the prosecutor acquired it, but whenever it was acquired by the sheriff's office. See State v. Coney, 294 So.2d 82 (Fla. 1973); State v. Alfonso, 478 So.2d 1119 (Fla. 4th DCA 1985); Griffis v. State, 472 So.2d 834 (Fla. 1st DCA 1983); Lee. Unfortunately, because no adequate Richardson hearing was conducted, the record does not reflect precisely when the State learned of the statements Appellant allegedly made to James.

Perhaps more importantly, the court made no determination of whether Appellant was harmed or prejudiced in the preparation of his defense. Had the court conducted a Richardson inquiry, the State would have been required to show that Appellant was not prejudiced, and the circumstances establishing non-prejudice would have to affirmatively appear in the record. Cumbie; Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980); Hill v. State, 406

So.2d 80 (Fla. 2d DCA 1981). Nonetheless, the prejudice to Appellant is apparent from the record. The entire defense strategy was altered when the prosecutor belatedly revealed Randall James as a witness. This turn of events caused Appellant to decide not to take the witness stand after all, and the defense case came to an abrupt halt following the testimony of Senthia Hardesty and Shannon Loyce. Defense counsel represented that had they been aware of James prior to putting on the defense case, they probably would not have called these two witnesses and given up the right to first and last closing argument. (R514-515, 522-523)

Furthermore, the defense had already announced in open court before the jury that Appellant was going to be the third defense witness. Obviously, the prosecutor could not have commented directly on Appellant's exercise of his right to remain silent when Appellant thereafter did not testify. Donovan v. State, 417 So.2d 674 (Fla. 1982); Bennett v. State, 316 So.2d 41 (Fla. 1975). But by waiting until Appellant was announced as a witness before springing the Randall James trap, the prosecutor called the jury's attention to Appellant's failure to take the stand as surely as if he had commented thereon in so many words.

The trial court also failed to come to grips with the conflict of interest that existed because Assistant Public Defender Stephen Dehnart was representing both Appellant and Randall James. Dehnart may have learned confidential information during the course of his representation of James that could have been useful in his representation of Appellant, but which he could not

use because of the dual representation. Although the trial court did remove the public defender's office from representing James, this did not remove Dehnart's continuing ethical obligation to preserve the confidences of a former client and not to use information to the disadvantage of a former client. See The Florida Bar Rules of Professional Conduct, Rule 4-1.6 and Comment and Rule 4-1.9. And although Randall James stated at deposition that he was willing to give up his attorney-client privilege and be cross-examined by someone from the public defender's office (R1055-1057), he was not represented by counsel at the time (R1055-1056), and the record fails to reflect that his waiver was knowing and voluntary.

The trial court's failure to conduct the hearing required by Richardson into the State's discovery violation requires reversal and remand for a new trial and cannot be found harmless on appeal. Smith. The purpose of the Richardson inquiry is to determine whether the discovery violation was prejudicial, and so the appellate court cannot find the violation harmless in the absence of an inquiry by the trial court. Id. This Court has "repeatedly held that a trial court's failure to conduct a Richardson inquiry is per se reversible." Brown, 515 So.2d at 213.

In this case the State's discovery violation and the court's failure to conduct a proper hearing into the matter implicated not only Appellant's right to a fair trial in conformity with principles of due process of law, but his right to remain silent and his right to be effectively represented by counsel as

well. Amends. V, VI, and XIV, U.S. Const.; Art. I, sections 9, 16, and 22, Fla. Const. He must receive a new trial.

ISSUE II

THE PENALTY RECOMMENDATION OF THE JURY HEREIN WAS TAINTED BY THE JURY'S RECEIPT OF IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY WHICH THE DEFENSE WAS NOT GIVEN AN OPPORTUNITY TO MEET.

After the State disclosed Randall James as a witness during the latter part of the guilt phase of Appellant's trial (please see Issue I herein), defense counsel moved to strike James as a witness at penalty phase or, in the alternative, to continue the penalty phase. (R956-958)

At the hearing on the motion defense counsel explained that they had deposed James during guilt phase jury deliberations, and the deposition revealed the need for counsel to depose other people if James was going to testify. (R675-682) Appellant's attorneys needed to depose James' wife, who was the first person to whom James had confided that he had heard Appellant's alleged admission. (R676-677) They needed to depose Detective Clint Vaughn, who had spoken with James concerning Appellant's statement, but Vaughn was in Washington, D.C. (R676-677) Counsel also needed to obtain James' medical records from the jail and to depose Dr. Teaman, the jail psychiatrist who had prescribed anti-psychotic drugs for James when James was moved to the medical wing after being in a pod with Appellant. (R677-678) Defense counsel also wanted to talk to other individuals who were in jail when Appellant allegedly made his statements to James. (R678) The court denied the defense motion to strike or continue. (R684)

Ordinarily, the granting or denial of a motion for continuance is within the sound discretion of the trial court. Echols v. State, 484 So.2d 568 (Fla. 1985). Under the facts and circumstances of this case, however, the court abused his discretion in refusing to grant Appellant additional time to prepare for the penalty phase, if the court was not going to strike Randall James as a witness. In Lightsey v. State, 364 So.2d 72 (Fla. 2d DCA 1978) the court held that the defendant was entitled to a new trial where he was unable to depose certain witnesses or to complete his investigation into the facts prior to trial due to the tardiness of the State's responses to his demand for discovery. And in State v. Banks, 349 So.2d 736 (Fla. 3d DCA 1977) the court noted that a trial court "may continue a case where discovery is not completed through no fault of the defendant." 349 So.2d at 737. Here the State did not disclose Randall James as a witness until May 11, 1988 (R509-530, 945), and the penalty phase went forward on May 13. (R690-831) Through no fault of his own, Appellant was not prepared to meet Randall James' penalty phase testimony. Defense counsel specified to the court exactly what they needed to do to prepare for James' testimony. A brief delay to accommodate the defense request was fully justified in view of the fact that Appellant was facing the ultimate penalty.

The need for a continuance manifested itself as defense counsel was attempting to cross-examine James during his penalty phase testimony. Counsel attempted to ask James about an answer he had given on deposition which was inconsistent with his trial

testimony, but the deposition had not yet been transcribed, and the court sustained a State objection to the lack of a proper predicate for the attempted impeachment. (R700) When this happened, defense counsel renewed his motion to strike or continue, and moved for a mistrial when the court again denied the motion. (R700-701)

Appellant's case is to be distinguished from that of Bouie v. State, 15 F.L.W. S188 (Fla. April 5, 1990), in which this Court recently dealt with a situation somewhat similar to that presented herein. On the second day of jury selection at Bouie's trial, an inmate contacted the prosecutor's secretary and told her that Bouie had confessed to him earlier that week. The prosecutor's investigators then talked to the inmate, and the court and defense counsel were subsequently informed of the confession. This Court found no reversible error under the circumstances of Bouie in the trial court's denial of a defense motion for continuance. However, in Bouie, this Court noted that the State's good faith and diligence in the matter had been established. 15 F.L.W. at S189. The same cannot be said here, in light of the absence of an adequate Richardson hearing, as discussed in Issue I herein. Furthermore, in Bouie counsel was able to depose other inmates who had been in the holding cell at the time of the confession. 15 F.L.W. at S189. Appellant's counsel specifically told the court below they needed to depose the other inmates who were in jail when Appellant allegedly made his admissions to Randall James (R678), but they were not given the oppor-

tunity to do so. Finally, in Bouie, this Court held that any error in not granting a continuance would have been harmless, as the jailhouse confession did not contribute to Bouie's conviction. 15 F.L.W. at S189. As the discussion which follows demonstrates, Appellant's confession to Randall James certainly contributed to the jury's death recommendation.

Had the court refused to allow James to testify, as he should have, there would have been no need to continue the penalty phase. In arguing that James should be stricken as a witness, defense counsel said any testimony he could give would be irrelevant. (R684)

James then testified that when he and Appellant were in jail together, James asked Appellant what he was in for. (R693) Appellant replied, "murder." (R693) James asked him if he did it. (R693) Appellant answered, "'yeah, I killed the motherfucker, and I'll do it again.'" (R693-694)

After James testified, defense counsel again unsuccessfully moved for a mistrial. (R711-712)

James' testimony was irrelevant. It did not relate to any of the aggravating circumstances found in subsection 921.141(5) of the Florida Statutes, which are exclusive. State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledge v. State, 346 So.2d 998 (Fla. 1977).

James' testimony raised the spectre that Appellant would kill again if he did not receive the death penalty. This Court has condemned prosecutorial argument which urged the jury to rec-

ommend the death penalty because the defendant otherwise might be released from prison and kill again. Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Grant v. State, 194 So.2d 612 (Fla. 1967). The testimony in question similarly could have served only to inflame the passions of the jury, and had no place in our system of jurisprudence.

Unlike in most cases, we need not speculate here what impact James' testimony had on the jurors' penalty recommendation; there is an indication in the record that it was the primary factor that led the jury to recommend death. After Appellant's trial, juror Nancy Marple was interviewed by a reporter for the St. Petersburg Times. She told the reporter that it was "primarily James' testimony that led the panel to recommend the electric chair for Derrick." (R993) Marple added, "'It just didn't appear that he [Appellant] had any remorse.'" (R993)

Lack of remorse is an improper consideration in the penalty phase of a capital trial. Robinson v. State, 520 So.2d 1 (Fla. 1988); Patterson v. State, 513 So.2d 1257 (Fla. 1987); Pope v. State, 441 So.2d 1073 (Fla. 1983). James' testimony thus injected into the proceedings an element which the jury could not legitimately consider, and the penalty verdict was based largely upon this improper factor.

Randall James' penalty phase testimony, which Appellant was given inadequate time to prepare to meet, tainted the jury's eight to four death recommendation. To subject Appellant to a death sentence based in part upon such an unreliable penalty ver-

dict would constitute cruel and unusual punishment and a violation of due process of law, contrary to the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, 17, and 22 of the Constitution of the State of Florida.

ISSUE III

APPELLANT WAS DENIED A FAIR TRIAL BECAUSE HE WAS IN SHACKLES THROUGHOUT THE PROCEEDINGS.

At a hearing on the morning Appellant's trial began, there was a discussion among the court and counsel regarding the fact that Appellant was going to be shackled during his trial, as follows (R1130-1131):

> MR. MCCLURE [assistant public defender]: Judge, Mr. Derrick is presently attired with leg shackles, and it would be our desire not to have the jury see him shackled.
>
> THE COURT: Well, if you can get him in there --
>
> MR. DEHNART [assistant public defender]: Won't they do that in the hall, Judge, take his cuffs and shackles off in the hall?
>
> MR. HALKITIS [assistant state attorney]: I think that's up to the sheriff's office.
>
> THE BAILIFF: There is a request by the sheriff's office to keep leg irons on them.
>
> MR. HALKITIS: He has a charge of introducing contraband. There is case law that says that this Court should really not interfere with the protective measures used by the sheriff.
>
> THE COURT: Halpin?
>
> MR. HALKITIS: He had a razor blade in his shoe, if you recall. And when you're looking at the death penalty, there is more of an inclination to maybe try to make a break for it. We don't have the security mesh that many of the

> courts in the bigger cities have, and I would suggest that you should leave it up to the sheriff as to what he thinks is necessary to maintain adequate security of a person who's charged with first degree murder.
>
> THE COURT: Well, somehow they're going to have to figure out how to get him in with the leg irons without the jury seeing him.
>
> MR. DEHNART: As long as that's done.

A couple of later references in the record to Appellant's "manacles" or "shackles" demonstrate that he was indeed in chains throughout the proceedings. (R109, 509)

Both the Supreme Court of the United States and this Court have recognized that shackling an accused is an inherently prejudicial practice. Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); Stewart v. State, 549 So.2d 171 (Fla. 1989); Bello v. State, 547 So.2d 914 (Fla. 1989).

Requiring a defendant in a criminal case to stand trial before a jury dressed in identifiable prison or jail clothing is forbidden, as the presumption of innocence to which the accused is entitled may be impaired or even denied. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972); Schultz v. State, 131 Fla. 757, 179 So. 764 (Fla. 1938); Topley v. State, 416 So.2d 1158 (Fla. 4th DCA 1982). Requiring an accused to appear in chains may have a similar, but even more devastating effect. Not only may the presumption of innocence evaporate, but the jury may see the restrained

defendant as a violent creature, perhaps akin to an animal who would be dangerous if set free. This perception obviously could have a tremendous impact on the sentencing recommendation as well as the guilt phase verdict.

In Bello, the defendant was shackled during penalty phase only. This Court reversed for a new sentencing proceeding before a jury because the trial judge made no inquiry into the necessity for shackling, but deferred to the sheriff's department's apparent judgment that such restraint was necessary. The Court indicated in Bello that a greater showing of necessity would be required in order to justify shackling an accused during the guilt phase than at penalty phase, as the defendant is still entitled to the presumption of innocence at the former stage of the trial. In the instant case there was virtually no inquiry. The bailiff mentioned that the sheriff's office requested that the leg irons be kept on Appellant. (R1130) The prosecutor said Appellant had a charge of introducing contraband. (R1130) Although the prosecutor mentioned that "[h]e had a razor blade in his shoe," it is not clear that he was referring to Appellant. (R1130) The only reference in the record to a charge of possessing contraband against Appellant referred to a charge that Appellant was arrested for possessing a commercial screwdriver. (R886) The record does not show that he was ever convicted for this, nor does the record show any other support for the decision to shackle Appellant. The court made no factual findings, and did not even specifically find that it was necessary to keep Appellant in

chains. Perhaps the court was wrongly persuaded by the prosecutor's comment that case law said the court "should really not interfere with the protective measures used by the sheriff." (R1130) Bello requires just the opposite: the court must make its own determination as to whether restraint is needed.

The prosecutor's argument that one who is "looking at the death penalty" might be more inclined "to maybe try to make a break for it" (R1130) ignored the fact that Appellant had not yet been convicted of murder. Until he was, he was not facing the death penalty.

Here, as in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), the State did not make a showing that shackling was necessary to further an essential state interest. Nor did the court attempt to minimize potential prejudice to Appellant by polling the jurors to cull out those who would be prejudiced by the fact that Appellant was under restraints, and the court gave no specific cautionary instruction. Elledge.

Appellant's case is to be distinguished from Stewart, in which this Court determined that the trial court properly exercised his discretion in favor of shackling the defendant to ensure the safety and security of the proceeding. In Stewart the trial judge had dealt with the defendant before and had "had problems with" him in the past. 549 So.2d at 173. He knew that Stewart had on a previous occasion slipped off his manacles, and was facing charges of escape and attempted escape. The trial judge in Stewart thus had considerable information, including personal

knowledge, that Stewart presented a high security risk. In the instant case the trial judge had only vague, unsubstantiated allegations that Appellant had possessed contraband. This was hardly sufficient to justify chaining Appellant at the risk of prejudicing him before the jury both at guilt phase and penalty phase.

Appellant was denied the fair trial consistent with due process of law to which he was entitled pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, and 22 of the Constitution of the State of Florida.

ISSUE IV

APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED DEFENSE REQUESTS TO INQUIRE OF THE JURORS WHETHER THEY HAD SEEN OR READ A PREJUDICIAL NEWSPAPER ARTICLE CONCERNING APPELLANT'S CASE THAT APPEARED IN THE LOCAL PRESS AND DENIED APPELLANT'S MOTION TO SEQUESTER THE JURY DURING TRIAL.

On May 10, 1988 counsel for Appellant asked the trial court to inquire of the jurors, who had been selected but not yet sworn, if they had "read anything or heard anything or seen anything." (R194) The court denied the request. (R195) Counsel filed a newspaper article concerning Appellant's case that appeared in that day's Tampa Tribune, Pasco County edition. (R195, 940)

Defense counsel then filed a motion to have the jury panel sequestered during trial due to extensive media coverage and the possibility that the jury could be tainted thereby. (R941-942) In arguing the motion to the court after the luncheon recess on May 10, counsel noted that there had been a number of reporters in and around the courtroom from the Clearwater Sun, Pasco County Times, and Tampa Tribune, and referred to the fact that an article had appeared detailing Appellant's prior record, which was inadmissible at trial. (R286-287) The court denied the motion, and denied a renewed request to have the court inquire of the jurors, who had since been sworn (R214), whether they had been exposed to any media reports. (R289)

The record contains four newspaper articles about Appellant's case. In addition to the article that appeared in the May 10, 1988 Pasco County edition of the Tampa Tribune, there is an article that appeared in the May 12, 1988 Tribune (R952-953), an article from the May 13, 1988 Pasco County edition of the St. Petersburg Times (R954), and an article that appeared in the Pasco Times edition of the St. Petersburg Times some time after the jury returned its death recommendation. (R993)[9] Other articles may have been published which did not find their way into the court file.

Although it may have been discretionary with the court whether to grant or deny Appellant's motion to sequester the jury, Oats v. State, 446 So.2d 90 (Fla. 1984), Ford v. State, 374 So.2d 496 (Fla. 1979), once the court decided not to sequester, it was incumbent upon him to accede to defense counsel's request to inquire of the jurors whether they had been exposed to any media publicity concerning the case, to insure that Appellant was tried by an impartial jury free of outside influences.[10]

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[9] The date of the last article is not readable in Appellant's copy of the record on appeal.

[10] Later during Appellant's trial, on May 12, the court initially refused a defense request to inquire of the jurors whether they had been exposed to the article that appeared in that day's Tribune after defense counsel had overheard one juror refer to a newspaper article. (R568-569) However, with great reluctance, and only after prodding from the prosecutor, who suggested that failure to inquire might be reversible error, the court ultimately did ask the jurors whether they had read anything in the newspaper about the case, to which they responded in the negative. (R571-575)

In Robinson v. State, 438 So.2d 8 (Fla. 5th DCA 1983) the court reversed Robinson's conviction for second-degree murder and set forth the procedure to be followed when a claim of potentially prejudicial publicity arises after the jury has been selected, as it did in this case. The trial court must first determine whether the published material has the potential for prejudice. As in Robinson, the trial court here failed to make even this threshold inquiry. Had he examined the article that appeared in the May 10 Tribune, the court could not have concluded otherwise than that it was at least potentially prejudicial. The article not only mentioned that Appellant had told detectives details about the stabbing of Rama Sharma, which the jury had not yet heard in court, but, more importantly, referred to Appellant as "an unemployed man with a prison record for burglary, larceny and grand theft." (R940) Appellant's prior record clearly was inadmissible, and the jury never learned of it from the evidence they received in court. Extrajudicial exposure to this type of material could not help but prejudice the jurors against Appellant. In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) the Supreme Court noted that the principle underlying its earlier decision in Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), in which the Court reversed a conviction because the jury was exposed to certain news accounts during trial, was that "persons who have learned from news sources of a defendant's prior record are presumed to be prejudiced." 44 L.Ed.2d at 593. Although the Murphy Court concluded that Marshall

has no application beyond the federal courts, these opinions do demonstrate that the Supreme Court has recognized the high potential for prejudice that exists with this type of publicity. See also United States v. Manzella, 782 F.2d 533, 541 (5th Cir. 1986) (information in newspaper article regarding a prior conviction would be "unduly prejudicial and inadmissible as trial evidence") and United States v. Williams, 568 F.2d 464, 469 (5th Cir. 1978) ("news stories published during the trial that reveal to jurors a defendant's prior criminal record are 'inherently prejudicial' [citing Murphy]"). Cf. cases standing for the proposition that evidence of collateral crimes is prejudicial and inadmissible where it tends to prove nothing more than bad character or propensity, such as Jackson v. State, 451 So.2d 458 (Fla. 1984); Drake v. State, 400 So.2d 1217 (Fla. 1981); Williams v. State, 110 So.2d 654 (Fla. 1959); Green v. State, 190 So.2d 42 (Fla. 2d DCA 1966).[11]

Pursuant to Robinson, once the trial court determines that the published material is potentially prejudicial, he must then follow a two-step process. He must first inquire of the jurors whether any of them have read the material in question. If not, then its publication could not have prejudiced the defendant, and the trial may continue. If any of the jurors have read the

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[11] In Robinson the articles in question referred to a separate charge against the defendant which arose out of a well-publicized jail break attempt at the county jail. The district court of appeal concluded that this material clearly had the potential for prejudicing the defendant in his trial for an unrelated murder charge.

material, the court must question them to ascertain whether they can disregard what they read and render an impartial verdict based solely on the evidence adduced at trial. This procedure must be adhered to even where the jury has been repeatedly admonished regarding the reading of newspapers during trial. Robinson.

The Robinson court is not the only Florida court to hold that a jury inquiry is required in a situation such as that presented in the instant case. In Duque v. State, 498 So.2d 1334 (Fla. 2d DCA 1986) an article appeared in the Tampa Tribune during trial stating that the defendant had been convicted at her first trial. The appellate court reversed, noting that the article was at least potentially prejudicial, and it was therefore error for the lower court to deny a defense request to inquire of the jurors whether they had heard of or read the article. Similarly, in Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986) the court found reversible error in the trial court's refusal to poll the jury to determine their exposure to two prejudicial and inaccurate media reports published mid-trial, which referred to other charges pending against the defendant.

Pursuant to these authorities, if the court below was not going to grant Appellant's motion to sequester the jury, then he should have honored Appellant's request to ascertain whether the jurors had been exposed to and prejudiced by the Tribune article. His failure to do so deprived Appellant of a fair trial before an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I,

Sections 9, 16, and 22 of the Constitution of the State of Florida. Appellant must be granted a new trial.

ISSUE V

THE TRIAL COURT ERRED IN UNDULY RESTRICTING APPELLANT'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES.

The defendant in a criminal case has an absolute right to full and fair cross-examination of the witnesses against him. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Coco v. State, 62 So.2d 892 (Fla. 1953). In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, 927 (1965), the Supreme Court of the United States declared the right of confrontation and cross-examination to be "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Deprivation of this right is a denial of due process. Pointer.

A criminal defendant "is normally accorded a wide range in the cross-examination of prosecution witnesses," Lutherman v. State, 348 So.2d 624, 625 (Fla. 3d DCA 1977), see also Bryan v. State, 533 So.2d 744 (Fla. 1988), and the courts will be particularly zealous in guarding the defendant's cross-examination rights in a capital case. Williams v. State, 386 So.2d 25 (Fla. 2d DCA 1980).

The court below made a number of rulings which improperly stifled Appellant's exercise of his right to confront and cross-examine the witnesses against him beginning with the very first prosecution witness, Harry Lee. Defense counsel asked Lee on cross whether he was personally aware that Rama Sharma, the victim herein, had had problems with some of his customers at the

Moon Lake General Store. (R235) The court sustained a State objection on hearsay grounds. (R235-237) Clearly, defense counsel was not attempting to elicit hearsay; he was asking what Lee knew from his personal knowledge. The question was relevant because it went toward the defense Appellant was attempting to establish, that someone other than himself may have committed the crime in question, which was a legitimate defense that Appellant had a basic right to present. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982).

The chilling effect upon Appellant's efforts to present a defense continued when Rama Sharma's landlord, Raymond Poehl, testified. After all examination of Poehl was concluded, the prosecutor objected to questions asked on cross-examination regarding whether the witness had ever seen a fellow with a knife with a skull's head on it in the Moon Lake General Store. (R283, 285-286) The State suggested that perhaps the questions were not asked in good faith. (R285-286) Defense counsel represented that they were asked in good faith, which would be borne out by later testimony. (R286) Nevertheless, the court sustained the objection (which was made at the bench), and cautioned the defense lawyers. (R286) (David Lowry later testified that he was in the Moon Lake General Store a week before the instant homicide with a man named Mike or "Craze," who always carried a knife with a skull handle, when threats were made, thus verifying defense counsel's

statement that their cross-examination of Poehl was conducted in good faith. (R315-316, 345-346))

A particularly glaring example of the improper restriction of the cross-examination of State witnesses occurred during David Lowry's testimony. Lowry was a key prosecution witness. Without him, it is possible no one would have been arrested in the homicide of Rama Sharma. Until Lowry spoke with Detective Clinton Vaughn on June 29, 1987, the Pasco County Sheriff's Office had absolutely no evidence that Appellant was involved in the homicide. (R370, 388) The first question defense counsel asked of Lowry on cross was how many felony convictions he had. (R311) Lowry answered, "Two." (R311) Counsel asked if he was sure, and Lowry said he was. (R311-312) When counsel began to question Lowry further, the prosecutor objected, unless counsel had "certified convictions." (R312) Defense counsel explained that Lowry had given a different answer on deposition than he gave in court, and counsel wanted to impeach him using the inconsistent prior statement, but the court would not allow it. (R312-313)

The subject of Lowry's prior felony convictions was appropriate for impeachment. Section 90.610(1), Fla. Stat. (1987). On deposition Lowry had said he had "[f]our, five, six, something like that" total felony convictions. (R1010) Defense counsel should have been permitted to expose Lowry's perjury to the jury using the procedure set forth in section 90.614(2) of the Florida Statutes for impeachment by inconsistent statements. Unfortunately, he was not able to do so because he was cut short

by the trial court's ruling. See Fleming v. State, 457 So.2d 499 (Fla. 2d DCA 1984) (manslaughter conviction reversed in part because trial court excluded evidence of a prior inconsistent statement made by one of the State's witnesses) and Tobey v. State, 486 So.2d 54 (Fla. 2d DCA 1986) (indicating that trial attorneys have not merely a right, but a duty to introduce impeaching evidence after laying the groundwork for introduction of prior inconsistent statements).

Rulings which limit defense cross-examination of necessary State witnesses such as David Lowry are subject to close appellate scrutiny, Slater v. State, 382 So.2d 892 (Fla. 4th DCA 1980). Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important information bearing on the credibility of a key prosecution witness constitutes error. Williams. An abuse of discretion by the trial judge in curtailing cross-examination of a key prosecution witness regarding matters germane to the witness's testimony may "easily constitute error," especially in a capital case. Coxwell, 361 So.2d at 152. Accord: Pait v. State, 112 So.2d 380 (Fla. 1959) (error in capital case must be carefully scrutinized before being written off as harmless). The matter upon which Appellant sought to cross-examine Lowry was most germane to the credibility of this vital State witness, and Appellant should have been permitted to bring it to light.

On cross-examination of Detective Clint Vaughn, defense counsel asked why he did not get a tape recording of his interview

with Appellant. (R392) Vaughn responded that he had "found that the tape recorders sometimes inhibit the flow of conversation between the detective and a suspect." (R392) Counsel then asked, "Isn't it true you didn't use it because you get those thrown out." (R392) The court sustained a general State objection to this question. (R392) Defense counsel then asked, "Do you remember telling me that in the hallway, you don't use the tape recorders because they're too easy to get the confessions thrown out?" (R392-393) Another general State objection was sustained. (R393) This line of questioning was relevant not only to cast doubt upon Vaughn's previous statement that he did not use a tape recorder because it might inhibit the flow of conversation, but also to call into question the circumstances surrounding the making of Appellant's confession and hence the voluntariness thereof. It was also pertinent to the question of why the jury had to rely upon the officers' memories of what Appellant said, rather than being able to hear a recording that might more accurately reflect the contents of the interview and would not be subject to the vagaries of the passage of time and the fading of memories.

During cross-examination of the associate medical examiner, Dr. Corcoran, defense counsel asked if he was familiar with the term "frenzy." (R462) Corcoran said that he was, and went on to define the term as meaning "uncontrolled, pretty much, violent activity." (R462-463) When counsel asked the doctor to "go into a little more" and say exactly what he meant by "uncontrolled violent activity," the State objected, "unless that's some kind of

a medical term." (R463) The court sustained the objection, noting that the witness was an expert in pathology, but not in frenzy. (R463) When defense counsel then asked whether the evidence showed the instant killing to be consistent with a frenzy killing, another State objection was sustained. (R463) Dr. Corcoran should have been permitted to say whether he felt it was within his expertise to offer an opinion as to whether the killing of Rama Sharma qualified as a frenzy killing, particularly as the witness had already expressed familiarity with the term. The nature of the killing was relevant to the question of premeditation, and also related to the applicability of the aggravating circumstances of cold, calculated, and premeditated, and committed to avoid or prevent a lawful arrest, as will be discussed further in Issue IX. A. and B. herein.

Finally, as has already been discussed in Issue II herein defense counsel was prevented from impeaching Randall James at penalty phase by asking him about an inconsistent statement he made on deposition.

The cumulative effect of these rulings was to prevent the jury from receiving information that was important in their consideration of this case. Appellant's right to confront and to fully cross-examine the witnesses against him was hampered in an unconstitutional manner. Amends. VI and XIV, U.S. Const.; Art. I, sections 9, 16, and 22, Fla. Const. As a result, Appellant must receive a new trial.

ISSUE VI

THE COURT BELOW ERRED IN FAILING TO SUSTAIN DEFENSE OBJECTIONS WHEN THE PROSECUTOR MISSTATED THE LAW IN HIS CLOSING ARGUMENTS DURING BOTH THE GUILT PHASE AND THE PENALTY PHASE.

A. Guilt Phase

During the final portion of his bifurcated guilt phase closing argument, the prosecutor made the following remarks to the jury (R650):

> And Counsel says, well, the Judge is gong to instruct you on the minimum and maximum. And under the law he has to tell you what the minimum punishment and what the maximum punishment is. And in the same breath, he's going to tell you to disregard the consequences of your verdict at this point in time.

Defense counsel immediately objected that this was not the law. (R650-651) The court overruled the objection and said (R651):

> I told the jury at the beginning this morning that the instructions on the law would come from me and not from the lawyers.

It is improper for counsel to misstate the law or the jury instructions in arguing to the jury. Cave v. State, 476 So.2d 180 (Fla. 1985); see also Tuff v. State, 509 So.2d 953 (Fla. 4th DCA 1987).

Here the prosecutor's argument was improper because the court had ruled during the jury charge conference which preceded closing arguments that he would delete from the instructions language which told the jury they were not responsible for the penal-

ty in any way because of their verdict. (R556-564)[12] Thus the prosecutor below misstated the law of this case, as it had been established by the trial court, to the jury.

Furthermore, the prosecutor's argument improperly diminished the jury's role in the capital sentencing process in violation of the principles expressed in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).[13]

B. Penalty Phase

Obviously, the prohibition against misstating the law extends to the penalty phase of a capital trial as well as the guilt phase. See Rhodes v. State, 547 So.2d 1201 (Fla. 1989).

During his penalty phase closing argument, the prosecutor first discussed the aggravating circumstances. (R792-799) He then said (R799-800):

> Ladies and gentlemen, the law says that if you kill under such circumstances with these aggravating factors, then you should die.

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[12] The only instruction the court actually gave on penalties, apart from informing the jury of the minimum and maximum for first degree murder, was (R664, 984):

> Your duty is to determine if the defendant is guilty or not guilty in accord with the law. It is the Judge's job to determine what a proper sentence would be if the defendant is found guilty.

[13] In successfully arguing against the offending language at the charge conference, defense counsel said he "would object to anything which minimizes the jury's impression that their role is anything less than paramount." (R556)

Defense counsel immediately objected that this was not an accurate statement of the law. (R800) The court merely said, "I'll tell the jury what the law is." (R800)

The prosecutor's remark here was very similar to an improper remark by the prosecutor in Garron v. State, 528 So.2d 353 (Fla. 1988). In Garron this Court held the prosecutor's penalty phase closing argument to be so egregiously improper that Garron was entitled to a new penalty phase proceeding, even though the trial court had sustained a number of defense objections to the prosecutor's argument, and given curative instructions. One of the comments condemned in Garron was:

> The law is such that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty.

528 So.2d at 359. The prosecutor's remark in the instant case was an even worse misstatement of the law than what occurred in Garron; here the prosecutor urged that the aggravating circumstances alone justified putting Appellant to death, with no mention of the need to consider mitigation. And, of course, here the court did not sustain Appellant's objection or give a curative instruction.

C. Conclusion

Florida courts recognize that among attorneys the prosecuting authorities must be especially circumspect in the comments they make within the hearing of the jury, because of the quasi judicial position of authority which prosecutors enjoy. Adams v. State, 192 So.2d 762 (Fla. 1966); Gluck v. State, 62 So.2d 71

(Fla. 1952); Stewart v. State, 51 So.2d 494 (Fla. 1951); Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975). See also Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973).

> Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason, misconduct by the prosecutor ... must be scrutinized carefully.

Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985).

Part of the prosecutor's duty to seek justice is to refrain from improper remarks which would or might tend to affect the fairness and impartiality to which a defendant is entitled. Cochran. The prosecutor below breached this duty in misstating the law to the jury, resulting in a denial of Appellant's right to a fair trial consistent with principles of due process of law. Amends. VI, XIV, U.S. Const.; Art. I, Sections 9, 16, 22, Fla. Const. As it impossible for this Court to tell from the record that the prosecutor's improper remarks did not prejudice Appellant, he must receive a new trial or, at very least, a new sentencing proceeding. Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

ISSUE VII

APPELLANT WAS DENIED HIS RIGHT TO A FAIR PENALTY RECOMMENDATION BY THE TRIAL COURT'S REFUSAL TO GIVE HIS PROPOSED INSTRUCTION WHICH WOULD HAVE PREVENTED THE JURY FROM GIVING IMPROPER DOUBLE CONSIDERATION TO THE AGGRAVATING CIRCUMSTANCES OF PECUNIARY GAIN AND COMMITTED DURING A ROBBERY.

During the penalty phase jury charge conference, defense counsel requested that the following instruction be given (R787-790, 948):

> Where the same aspect of the offense at issue gives rise to two or more aggravating circumstances, that aspect can only be considered as one aggravating circumstance.

The court denied the requested instruction. (R790, 948)

Subsequently, the court instructed the jury that the first aggravating circumstance they could consider was that the crime was committed while Appellant was engaged in the commission of a robbery (R822), and that the third aggravating circumstance they could consider was that the crime was committed for financial gain. (R823)

This Court has recognized in a number of cases that, where they are based upon the same evidence, as here, the aggravators of robbery and pecuniary gain should not be considered as separate aggravating factors because they relate to but a single aspect of the case. E.g., Provence v. State, 337 So.2d 783 (Fla. 1976); Gibson v. State, 351 So.2d 948 (Fla. 1977); Gafford v. State, 387 So.2d 332 (Fla. 1980); Perry v. State, 395 So.2d 170

(Fla. 1980); Palmes v. State, 397 So.2d 648 (Fla. 1981); Oats v. State, 446 So.2d 90 (Fla. 1984). The instruction proposed by Appellant would have prevented the jury from giving improper double consideration to facts that should constitute but one aggravator, and the court should have granted the instruction.

Appellant is aware that in Suarez v. State, 481 So.2d 1201 (Fla. 1985) this Court held that the trial court did not commit reversible error in instructing the jury on both robbery and pecuniary gain. The Court noted that prior cases "regarded improper doubling in the trial judge's sentencing order, and did not relate to the instructions to the penalty phase jury." 481 So.2d at 1209. The Court further explained as follows:

> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.

481 So.2d at 1209.

This contradictory policy of allowing the jury but not the court to improperly double aggravating circumstances fails to take cognizance of the vital role the jury plays in Florida's capital sentencing scheme. Although a jury's sentence recommendation is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v.

State, 303 So.2d 17, 20 (Fla. 1974). The jury acts as the conscience of the community, and its penalty recommendation must be accorded great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975).

The Suarez Court found significance in the fact that the judge, but not the jury, makes written findings which are subject to appellate review. However, the fact that the jury does not make written findings which are subject to correction on appeal makes it all the more essential for them to receive proper jury instructions which channel and direct their discretion so that the advisory verdict they return will be valid. The importance of suitable jury instructions was emphasized by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

> The idea that a jury should be given guidance in its decision-making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L.Ed.2d at 885-886. The anti-doubling instruction Appellant requested was needed to carefully and adequately guide Appellant's jury in its penalty phase deliberations.

Allowing the jury to count a single aspect of this case as two aggravating circumstances rendered the eight to four death recommendation unreliable. Appellant's death sentence, predicated in part on the unreliable recommendation, cannot stand, as it was imposed in violation of the requirements of due process of law, and subjects Appellant to cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, Sections 9, 17, Fla. Const.

ISSUE VIII

THE TRIAL COURT'S INSTRUCTIONS ON THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCES WERE UNCONSTITUTIONALLY VAGUE BECAUSE THEY DID NOT INFORM APPELLANT'S JURY OF THE LIMITING CONSTRUCTION GIVEN TO THESE AGGRAVATING CIRCUMSTANCES.

The court below instructed Appellant's penalty phase jury on the especially heinous, atrocious, or cruel aggravating factor, which is set forth in section 921.141(5)(h) of the Florida Statutes, as follows (R823):[14]

> Fourth, the crime for which the defendant is to be sentenced was essentially [sic] wicked, evil, atrocious, or cruel.

Obviously, the court's use of the word "essentially" instead of "especially" misled the jury. This instruction suggested that the State needed to prove much less in the way of the depravity of the offense than is actually required to establish this aggravator.

Furthermore, the jury was not informed of the limiting constructions this Court has given to this aggravating factor in cases such as State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), in which the Court stated:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile;

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[14] One of Appellant's pretrial motions to dismiss alleged that the aggravating circumstances enumerated in section 921.141 of the Florida Statutes are vague and overbroad. (R908)

> and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Appellant's jury was simply given a vague instruction which could be thought applicable to any murder. It was not an adequate definition of the section 921.141(5)(h) aggravating circumstance.

The court's instruction on the cold, calculated, and premeditated aggravating circumstance set forth in section 921.141(5)(i), Florida Statutes, was similarly brief and uninformative (R823):

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

The court did not tell the jury that this aggravator does not apply to all premeditated killings, but requires a heightened degree of premeditation beyond that required for the ordinary first degree murder, such as a careful plan or prearranged design. Schafer v. State, 537 So.2d 988 (Fla. 1989); Card v. State, 453 So.2d 17 (Fla. 1984). He did not tell the jury that this factor is reserved primarily for executions or contract murders or witness elimination murders, such as underworld or organized crime killings. Garron v. State, 528 So.2d 353 (Fla. 1988);

Bates v. State, 465 So.2d 490 (Fla. 1985); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). Nor was the jury told that premeditation accompanying a felony during which a murder occurs cannot be transferred to the homicide for purposes of this aggravating circumstance. Perry v. State, 522 So.2d 817 (Fla. 1988); Hardwick v. State, 461 So.2d 79 (Fla. 1984); Gorham v. State, 454 So.2d 556 (Fla. 1984). The instruction the jury received on cold, calculated, and premeditated did not adequately define the section 921.141(5)(i) aggravating circumstance. The jury could well have believed this aggravator applicable in all cases of premeditated murder.

In Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (Fla. 1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious, or cruel" was unconstitutionally vague under the Eighth Amendment, United States Constitution because this language gave the sentencing jury no guidance as to which first degree murders met these criteria. Consequently, the sentencer's discretion was not channeled to avoid the risk of arbitrary imposition of the death penalty.

The jury instructions given by the court below provided no more guidance to Appellant's jury than the Oklahoma statute in Cartwright. A reasonable juror might well have concluded from the instructions that the heinous, atrocious, or cruel aggravator applied to all murders and that the cold, calculated, and premeditated aggravator applied to all premeditated murders.

The Cartwright decision cannot, however, be cavalierly applied to the Florida capital sentencing scheme. In Oklahoma, capital juries are the sentencers and they must make written findings of which aggravating factors they found. In Florida, on the other hand, the jury's recommendation is advisory and no findings with regard to the aggravating factors weighed by the jury are made. We simply do not know in the case at bar whether all of the jurors found Appellant's crime especially heinous, atrocious, or cruel and/or cold, calculated, and premeditated, whether none of them did, or whether the jury split on the applicability of one or both of these aggravators. What can be said is that there is a reasonable probability that some of the jurors found one or both of these circumstances proved and joined in the recommendation of death. Had the jury been properly instructed concerning the limiting constructions given to these aggravating factors, there is a reasonable possibility that fewer jurors wold have found one or both of them applicable, and a life recommendation might have been the result.

For this reason, Appellant's death sentence is unreliable under the Eighth Amendment, United States Constitution. Although a Florida jury's sentence recommendation is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d 17 at 20 (Fla. 1974). In Valle v. State, 502 So.2d 1225 (Fla. 1987), this Court held that a defendant must be allowed to present all relevant mitigating evidence to the jury in his effort to secure a

life recommendation because of the great weight the sentence recommendation would be given. The corollary to this proposition is that the jury must not be misled into thinking that an aggravating circumstance applies because that circumstance was not properly defined to them. In either case, there is a likelihood of an erroneous death recommendation.

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court of the United States noted:

> If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. [Citations omitted.]

82 L.Ed.2d at 352. In the Florida scheme of attaching great importance to the jury's penalty recommendation, it is critical that the jury be given adequate guidance so that its recommendation is rational and can appropriately be given the great weight to which it is entitled. If, as here, the jury is not given adequate instructions to define and narrow the aggravating circumstances, its penalty verdict may be based on caprice or emotion at worst, or an incomplete understanding of applicable law at best. The resulting sentence which leans heavily upon the jury's recommendation for support will then lack the rational basis mandated by the United States Constitution. See Amends. VIII and XIV.

Appellant is aware that this Court recently rejected arguments similar to those set forth herein in Smalley v. State,

546 So.2d 720 (Fla. 1989) and Brown v. State, 15 F.L.W. S165 (Fla. March 22, 1990), but asks the Court to reconsider the important constitutional issues presented herein.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING SAMUEL JASON DERRICK TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court improperly applied section 921.141 of the Florida Statutes in sentencing Samuel Jason Derrick to death. This misapplication of Florida's death penalty sentencing procedures renders Appellant's death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed in the remainder of this argument.

> A. The trial court erred in instructing the jury on, and in finding the existence of, the aggravating circumstance that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In finding this aggravating circumstance, the court below recited the following facts in support thereof (R996):

> The evidence shows that at about 10:30 p.m., the defendant armed himself with a knife and hid in the bushes along the path from the victim's place of business to his residence. After the initial assault the victim recognized the

> defendant and ran. The defendant chased him and caught him after a run of about 20 feet. The medical examiner determined that the victim received 20 knife thrusts to his back and the balance to the front of his body.

Appellant would first note that the court's statements regarding a chase were speculative. There was no direct evidence that Rama Sharma ran from Appellant and was caught after 20 feet. The court apparently was extrapolating from the fact that there was a pool of blood about 20 feet from the body, and a trail of blood down the path to where the body was found. (R255, 260, 428, 450, 459-460)

At any rate, neither the facts recited by the court nor any other facts of record show that this homicide qualified for the cold, calculated, and premeditated aggravating circumstance. Florida's legislature did not intend this aggravator to apply to all premeditated killings. Harris v. State, 438 So.2d 787 (Fla. 1983). Rather, it requires proof beyond a reasonable doubt of a careful plan or prearranged design, a heightened premeditation beyond that required to establish premeditated murder. Schafer v. State, 537 So.2d 988 (Fla. 1989); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Nibert v. State, 508 So.2d 1 (Fla. 1987); Mills v. State, 462 So.2d 1075 (Fla. 1985); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Card v. State, 453 So.2d 17 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). Appellant's statement to the sheriff's deputies indicated that his intention was only to rob

Sharma and that he only stabbed Sharma to quiet him when he started screaming. (R374, 417)

Furthermore, the prosecutor emphasized felony murder, rather than premeditation, in his statements to the jury. In his opening statement to the jury, the assistant state attorney said he was going to prove a felony murder during a robbery. (R219) In his closing argument, the prosecutor mentioned premeditation, but the thrust of his argument was that Sharma was killed during a robbery. (R576-610, 641-653)

During the guilt phase jury charge conference, the trial judge initially was not going to instruct the jury on premeditated murder. He said, "I didn't think this was a premeditation." (R536) The prosecutor prevailed upon the court to instruct on premeditated murder, as it was charged in the charging document. (R536) The court then agreed to so instruct the jury, saying that he "overlooked the premeditation in the charging document." (R536) Although this portion of the record is subject to interpretation, it suggests that the court may not have viewed the instant homicide as involving premeditation.

It is not apparent from the court's sentencing order, but he may have felt that application of the cold, calculated, and premeditated aggravator was justified because the robbery of Rama Sharma was pre-planned. But no matter what degree of calculation went into the robbery itself, this factor cannot be supported unless there was also a prearranged design to effect Sharma's death. The premeditation involved in the robbery cannot be trans-

ferred to the homicide. Perry v. State, 522 So.2d 817 (Fla. 1988); Hardwick v. State, 461 So.2d 79 (Fla. 1984); Gorham v. State, 454 So.2d 556 (Fla. 1984).

The cold, calculated, and premeditated aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, such as underworld or organized crime killings, which the instant homicide clearly was not. Garron v. State, 528 So.2d 353 (Fla. 1988); Herzog v. State, 439 So.2d 1372 (Fla. 1983). These descriptions are not all-inclusive, Herzog, but this aggravator has been held not to apply to cases such as Appellant's. For example, in Mitchell v. State, 527 So.2d 179 (Fla. 1988) this Court held the aggravator in question inapplicable where the medical examiner testified that the number of stab wounds (110) and the force with which they were delivered were consistent with a killing consummated by one in a rage. This Court noted that "rage is inconsistent with the premeditated intent to kill someone." 527 So.2d at 182. Similarly, in Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) this Court held the defendant's frenzied stabbing of the victim more than 30 times to be indicative of a robbery that got out of hand rather than a demonstration of cold and calculated premeditation. Appellant sought the opinion of the associate medical examiner who testified at his trial as to whether Rama Sharma's homicide was consistent with a frenzy killing, but the court below refused to allow the witness to testify in this regard. (R462-463) (Please see Issue V herein.) Nevertheless, the

medical examiner's testimony showed that Sharma had been stabbed over 30 times (R455), and the homicide here was very similar to those in Mitchell and Hansbrough which did not qualify for the cold, calculated, or premeditated aggravating factor. Finally, in Peavy v. State, 442 So.2d 200 (Fla. 1983) this Court held that where a stabbing death occurred during commission of a burglary and robbery, cold, calculated, and premeditated was not proven beyond a reasonable doubt, as the murder was susceptible to other conclusions than that this aggravator applied. Here the evidence was most susceptible to the conclusion that Appellant stabbed Sharma as a spontaneous reaction to his screaming. This case involved a robbery that went bad, rather than a pre-planned killing.

> B. The trial court erred in instructing the jury on, and finding the existence of, the aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

The trial court recited the following facts in support of his finding of this aggravating circumstance (R995):

> In describing the event to David Lowry, Lowry testified that defendant told him he had to kill the victim after the victim recognized him.

Actually, Lowry's testimony was that Appellant told Lowry he stabbed Sharma 13 times because Sharma kept screaming, not because Sharma recognized Appellant. (R307)

As for Appellant's own explanation of why he killed Sharma, Detective Clint Vaughn stated that Appellant said Sharma turned around and saw who Appellant was and started screaming, at which point Appellant stabbed Sharma to shut him up. (R374) Deputy Harold Johnson testified that Appellant said, "I was just going to rob him, but he turned around and saw me and I had to kill him." (R417) Sergeant Gary Fairbanks testified that Appellant said, "I don't know why I did it." (R430, 435-436)

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So.2d 496 (Fla. 1985); Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278 (Fla. 1979). In fact, there must be proof beyond a reasonable doubt that the dominant or only motive for the killing was the elimination of a witness. Perry v. State, 522 So.2d 817 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Doyle v. State, 460 So.2d 353 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). And the mere fact that the victim knew and could have identified the attacker will not support application of this aggravator. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Perry.

The evidence adduced at Appellant's trial did not rise to the level required by the above-cited cases to establish that Appellant killed Sharma to avoid or prevent a lawful arrest. The

evidence suggested that, rather than being accomplished pursuant to a considered motive to avoid or prevent arrest, the stabbing of Sharma was a panicked response when he turned around and began screaming; the robbery simply got out of hand. Hansbrough is most instructive. In Hansbrough this Court held the section 921.141(5)(e) aggravating circumstance inapplicable, and stated:

> Instead of an intended witness elimination murder, it is more likely that this robbery simply got out of hand, as indicated by Hansbrough's stabbing the victim more than thirty times while in an apparent frenzy.

509 So.2d at 1086. Like the victim in Hansbrough, Rama Sharma was stabbed over 30 times. Appellant sought the opinion of the associate medical examiner who testified at his trial as to whether Sharma's homicide was consistent with a frenzy killing, but the trial court refused to allow the witness to testify in this regard. (Please see Issue V herein.) Nevertheless, Sharma's homicide is sufficiently similar to that in Hansbrough to apply the Court's holding in that case to Appellant's case. See also Schafer v. State, 537 So.2d 988 (Fla. 1989) (record failed to support finding that murder was committed to avoid arrest where defendant told law enforcement authorities he panicked when victim caught him burglarizing her home).

> C. The trial court erred in instructing the jury on, and in finding the existence of, the aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel.

In support of his finding of this aggravating circumstance, the court below recited the following facts (R995-996):

> ... the medical examiner testified that the victim's body bore 33 knife wounds and that the victim lived for at least ten minutes after the last thrust.

The court's finding ignored the medical examiner's testimony that, although Sharma may have lived for 10 minutes or so after the last wound was inflicted, he was not conscious that whole time. Consciousness probably would have been lost several minutes prior to death. (R459, 464) The interval between loss of consciousness and death is irrelevant for purposes of this aggravating circumstance. See Jackson v. State, 451 So.2d 458 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Not all deaths by stabbing with a knife are especially heinous, atrocious, or cruel. This Court has repeatedly emphasized that this aggravating circumstance applies only to killings "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), Accord: Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Simmons v. State, 419 So.2d 316 (Fla. 1982); Lewis v. State, 377 So.2d 640 (Fla. 1979). Committing a homicide with a knife does not deviate from the norm of capital felonies because a large percentage of murders is committed with a knife.[15]

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[15] For example, in 1983 there were 1203 murders committed in Florida. 220 of these utilized a knife. 1984 Florida Statistical Abstract, University Presses of Florida, Gainesville 1984, p. 542.

In Demps v. State, 395 So.2d 501, 506 (Fla. 1981) this Court found a killing not to be "so 'conscienceless or pitiless' and thus set 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel' [citations omitted]" where the victim was held down on his prison bed and knifed. See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So.2d 200 (Fla. 1983) (simple stabbing death without more not especially cruel, atrocious, and heinous.)

In other cases involving stabbings the trial court judge did not find the heinous, atrocious, or cruel factor. See, for example, Williamson v. State, 511 So.2d 289 (Fla. 1988) (victim stabbed repeatedly); Kelley v. State, 486 So.2d 578 (Fla. 1986) (victim stabbed several times and shot); Provence v. State, 337 So.2d 783 (Fla. 1976) (eight stab wounds). Doubtless there are many other cases involving multiple stabbings which were not found to be especially heinous, atrocious, or cruel by the trial court in which the defendant was sentenced to life.

Recently, the Utah Supreme Court considered the applicability of the Utah equivalent to Florida's section 921.141(5)(h) aggravating circumstance where the facts showed seven stab wounds along with scratches, scrapes and bruises. State v. Tuttle, 780 P.2d 1203 (Utah 1989). The court wrote:

> The record contains no evidence that Tuttle intended to do or in fact did anything but kill his victim by stabbing her. Even though this method is gory and distasteful [footnote omitted], there

> is absolutely no evidence that Tuttle had a quicker or less painful method available to him or that he was expert at such matters and intentionally refrained from administering one wound that would have caused instantaneous death in favor of a number of wounds that would prolong the victim's life and suffering. On the facts, there is nothing that could support a finding that this killing falls into the narrow Godfrey[16] - Wood[17] category and is sufficiently distinguishable from other intentional killings to make its perpetrator eligible for the death penalty. For these reasons, we find the application of section 76-5-202(1)(g) to the facts of this case contrary to the intention of the statute, as we construe it in light of Godfrey and Wood [footnote omitted].

780 P.2d at 1218-1219. Similarly, the perpetrator here did nothing other than kill Sharma by stabbing him.

Furthermore, nothing in the evidence indicated that Appellant desired that Sharma suffer at all. It appears that he stabbed him in panic and fright when Sharma turned around and started screaming. In Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) this Court noted that "[t]he fact that the victim lived for a couple of hours in undoubted pain and knew that he wasfacing [sic] imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies." See also Demps, in which the stabbing victim

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[16] Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

[17] State v. Wood, 648 F.2d 71 (Utah 1981).

was taken to two hospitals before he finally expired. Similarly, here the fact that Sharma may have lingered for a few brief moments before losing consciousness did not render his killing especially heinous, atrocious, or cruel, particularly where there was no evidence Appellant intended that Sharma suffer, and no evidence that he was subjected to any type of protracted ordeal.

The number of wounds (33) tends, if anything, to negate rather than support this aggravating circumstance. In the first place, the number of thrusts is indicative of a frenzied lashing out rather than an intention to inflict pain. And that many wounds would tend to hasten death, thus shortening the duration of any period of suffering.

D. The trial court failed to give proper consideration to all evidence Appellant offered in mitigation.

In his sentencing order the court below did find one statutory mitigating circumstance to apply: Appellant's "youthful age of 20 at the time of the commission of the offense." (R996) The court swept away all other potential mitigating circumstances in a single sentence: "No other statutory or non-statutory mitigating circumstances apply." (R996) The court offered no additional insights concerning his view of the mitigating evidence at the sentencing hearing of July 25, 1988; he merely read his already-prepared sentencing order into the record. (R853-856)

In Magill v. State, 386 So.2d 1188 (Fla. 1980) this Court noted that the sentencing judge in a capital case is charged with the responsibility of articulating the mitigating circum-

stances he considered "so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." 386 So.2d at 1191. In Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court further described the duties of the trial judge when considering evidence in mitigation:

> ...[W]e find the trial court's first task in reaching its conclusion is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534. The judge may not refuse to consider any relevant mitigating evidence presented. Stevens v. State, 552 So.2d 1082 (Fla. 1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Appellant presented substantial evidence below of the type that could constitute legitimate non-statutory mitigation, but the record does not reflect that the court below even considered it. For example, there was testimony that Appellant was a loving husband and father to his young son, and that he was good with children. (R715-717, 771-773) See Lamb v. State, 532 So.2d

1054 (Fla. 1988); Thompson v. State, 456 So.2d 444 (Fla. 1984); Jacobs v. State, 396 So.2d 713 (Fla. 1981). There was evidence that Appellant was a caring person who gave freely of his time, money and abilities (particularly as a skilled auto mechanic) to others, even strangers. (R717, 759, 760-761, 772) See Stevens; Lamb; Washington v. State, 432 So.2d 44 (Fla. 1983). There was also testimony that Appellant came from a deprived background of neglect, sexual abuse by his guardian or foster father, and, possibly, beatings by his natural father. (R729-737, 742-743, 747, 749-750, 755-756, 761-762) See Eddings; Stevens; Brown v. State, 526 So.2d 903 (Fla. 1988); McCampbell v. State, 421 So.2d 1076 (Fla. 1982). None of this important mitigation was mentioned by the court anywhere. The court thus failed to fulfill even his initial duty under Rogers to find all potentially mitigating elements supported by the evidence.

CONCLUSION

Appellant, Samuel Jason Derrick, respectfully prays this Honorable Court to grant him a new trial. If this relief is not forthcoming, he asks the Court to reduce his sentence of death to a sentence of life imprisonment or, in the alternative, to grant him a new penalty trial before a new jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 19th day of April, 1990.

Respectfully submitted,

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