IN THE SUPREME COURT OF FLORIDA

DONALD GUNSBY,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 79,616

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The symbol "R" will refer to the Record on Appeal in this cause and "SR" will refer to the Supplemental Record on Appeal.

IN THE SUPREME COURT OF FLORIDA

DONALD GUNSBY, Defendant/Appellant, vs. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 73,616

STATEMENT OF THE CASE

On May 3, 1988, the state filed an indictment returned by the grand jury charging Donald Gunsby with the premeditated first-degree murder of Hisham Mohammad Awadallah in addition to one count of possession of a firearm by a convicted felon. (R711) The trial court eventually appointed a lawyer who cited no conflict in representing Gunsby. (R730-31,736-37,739,743-44,748) Stating that he had reason to believe that Gunsby might be incompetent to stand trial or might have been insane at the time of the offense, trial counsel filed a motion for the appointment of a confidential expert. (R754-55) The trial court appointed Dr. Ira Conley for that purpose. (R756-58) Approximately five weeks later, on October 10, 1988, counsel again cited doubts about Gunsby's mental status and requested a psychiatric examination for aid in the determination of those two questions. (R774-75) Defense counsel also gave notice of his intention to rely on the defense of insanity. The trial court appointed Dr. Umesh

Mhatre and Dr. Rodney Poetter for determination of these issues. (R776-78)

On November 8, 1988, Appellant filed a motion to strike the adjectives "extreme" and "substantially" contained in Sections 921.141(6)(b)(e) and (f), Florida Statutes. (R794-95) The trial court ultimately denied this motion. (R168) Defense counsel also filed a motion in limine relating to prior bad acts of Gunsby. The trial court granted this motion. (R796-797) Appellant also filed two motions attacking the constitutionality of Sections 782.04, 775.082 and 921.141, Florida Statutes. The trial court eventually denied both of these motions.

On November 8th and 9th, 1988, the state tried Donald Gunsby for first-degree murder before the Honorable Raymond T. McNeal, Fifth Judicial Circuit in and for Marion County, Florida. (R1-541) At Gunsby's request, the trial court severed the charge that Gunsby possessed a firearm as a convicted felon. (R4) Following jury selection, the court also granted Gunsby's motion in limine. (R168-169) Trial counsel also renewed the three motions that he previously filed dealing with the constitutionality of the death penalty. (R168)

The trial court overruled several hearsay objections by defense counsel during the testimony of state witnesses. (R188-89,192,197,233,298-300) During the cross-examination of the medical examiner, the state objected to a line of questions relating to illicit drugs that the doctor found in the victim's system. The trial court ruled that this evidence was irrelevant. (R315-17)

At the conclusion of the state's case-in-chief, defense counsel moved for a judgment of acquittal which the trial court denied. (R373) Gunsby presended the testimony of eight witnesses. (R376-462) Defense counsel renewed his motion for judgment of acquittal and the trial court denied the motion. (R462-563) Appellant also renewed all previous motions. (R463) The state presented two witnesses to rebut the defense case-in-chief. (R463-75) The trial court denied the state's request to call three more witnesses. (R476-78) Defense counsel then stated that he wanted to call several state witnesses who had also been listed as defense witnesses, but was unable to do so since the state released the witnesses from their subpeonas. Defense counsel stated that he was now unable to locate those witnesses. (R476-78)

Following deliberations, the jury returned with a verdict of guilty as charged. (R536-37,857) On December 13, 1988, a penalty phase commenced. (R543) The state introduced certain documentary evidence and called four witnesses. (R543-578) Gunsby called three lay witnesses and two mental health professionals during the penalty phase. (R579-665) During the cross-examination of a defense witness, the state was allowed over defense objection to testify about an incident where police found two firearms in Gunsby's possession. (R661-662)

Appellant objected to the trial court instructing the jury concerning the aggravating circumstance that the murder was cold, calculated and premeditated without any pretense of moral or legal justification. (R696-99) Following deliberations, the

jury returned with a nine to three recommendation for the death penalty. (R699,869) The trial court followed the jury's recommendation and, on January 3, 1989, sentenced Donald Gunsby to die in the electric chair. (R703-710,901-04) The trial court found three aggravating circumstances: (1) that the murder was committed while Gunsby was under a sentence of imprisonment; (2) that Gunsby had prior convictions of aggravated assault and robbery; and (3) that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R901-02) In mitigation, the trial court found that Donald Gunsby is mildly retarded and intellectually functions on a third or fourth grade level. (R902-03) The trial court concluded that the aggravating circumstances far outweighed the mitigating circumstance and sentenced Gunsby to die. (R903) On January 19, 1989, Gunsby filed a timely notice of appeal. (R1010) A simultaneously filed motion for new trial was also denied on that date. (R1017-19) On March 3, 1989, the Office of the Public Defender, Seventh Judicial Circuit, was designated to handle this appeal. (R1022)

STATEMENT OF THE FACTS

GUILT PHASE

Jessie Anderson, a black fifty-two-year-old block mason from Ocala, was celebrating his birthday on April 20, 1988. Anderson worked part of the day but began drinking and celebrating in Apopka on his way home from work. Anderson and his boss stopped in Leesburg to get more to drink during the trip home. When Anderson's boss dropped him off at Sam's Big Apple, a convenience store in Ocala, Anderson was pretty drunk. Anderson went into the store to buy another six-pack. He was evidently too boisterous inside the store and Tony Awadallah, a member of the Middle Eastern family that owned the store, asked Anderson to leave. Anderson was attempting to comply with the request when Awadallah grabbed him from behind and pushed him down. This caused Anderson to bump his head on one of the posts just outside the store. Since Anderson was bleeding from his head, two bystanders drove him to the hospital where he stayed for approximately two hours. (R184-188)

Anderson's brother, James a/k/a Jap, was having a party that day at his Ocala home. (R187-188,191) Jessica, Jessie Anderson's daughter, heard about her father's injury. She went to James Anderson's home where the party was in progress. After a frantic report from Jessica, Jap and Donald Gunsby, a guest at the party, drove with Jessica over to Sam's Big Apple. James Colbert, another guest at the party, followed the trio in his own car. When the group got to the store, they learned that Jessie Anderson was at the hospital. All four then drove to the

hospital where they visited Jessie Anderson in the emergency room. Jessica informed a still intoxicated Jessie that he had been pistol-whipped by Tony Awadallah. (R188-189,191-197)

Bennie Brown, Jap Anderson's 43-year-old female cousin, was also at the party that night. She saw Jessica, Jap, and Donald Gunsby return to the party approximately forty minutes after they left. (R221-24) At that point, Gunsby stated that he was "tired of those damn Iranians messing with the black." (R224) Gunsby then left the party and returned a short time later wearing a camouflage ensemble. (R224) Brown concluded that she saw the outline of some type of gun underneath Gunsby's clothing. (R225)

Isaac Burgess, another guest at Jap Anderson's party, also heard about Jessie's injury. When Burgess heard about the altercation at the store, he became concerned, as this incident was only the latest in a series of problems that had occurred at Sam's Big Apple. Evidently, racial tension existed between the Middle Eastern proprieters of the store, and their predominantly black patrons. Burgess did not think it wise to go down alone, so he called the police. Wayne Sellers of the Ocala Police Department accompanied Burgess to the store where he spoke to the senior Awadallah. Awadallah apologized for the misunderstanding and the officer completed a written report. (R441-456) Burgess returned to the party where he stayed until approximately 9:30 or 10:00 that night. His wife drove him home since he had been drinking. (R209-216)

The Awadallah family began operating Sam's Big Apple convenience store in 1985. Nasser (a/k/a Tony) Awadallah, his older brother Hisham, and their parents ran the store. Tony Awadallah came to work about 6:30 a.m. on April 20, 1988. Tony's father was also working that day as well as Opal Latson, a cashier. (R234-35, 251-53) Tony's brother, Hisham, was working that day but had gone to run an errand. (R236)

Hisham returned to the store later that night to help close. The store stayed open until 10:00 p.m., but they started counting the day's receipts about 9:30. (R238-39) Hisham was in the process of counting the second and final cash register when a black male entered the store wearing a camouflage suit. (R239-40) The black male also wore a camouflage hat and was wielding a shotgun. (R240,258) The black male leveled the gun at Hisham and fired once, hitting Hisham in the right side of the chest. (R239-40,256-59,306) Hisham died almost immediately. (R266-67,290-94,302-15) Tony Awadallah grabbed his .38 revolver and fired three shots at the fleeing gunman. (R242,259) The culprit ran out the front door of the store, turned right, and fled the scene. (R244) Tony grabbed some bullets before getting into his car and unsuccessfully attempted to chase the gunman. (R244)

Both Tony Awadallah and Opal Latson later claimed to recognize the gunman as a somewhat regular customer over the last several months. (R243,256,27072,297-301) Neither knew the gunman by name. Both subsequently identified Donald Gunsby's photograph from a photographic line-up. (R243,249-50,259-60, 331-42)

Bennie Brown heard about the shooting at the party shortly after it occurred. (R226-227) Brown went to the crime scene where a large crowd had gathered. (R227) Officer Sellers also responded to the scene and helped secure the area. (R441-443) In the aftermath of the shooting, Officer Sellers observed Opal Latson and the elder Awadallah at the scene. (R443) Officer Sellers thought he heard Mr. Awadallah point to him (Sellers) while telling Opal Latson, "He knows the guy who committed the crime. He was with him earlier today." (R443-44) Opal Latson later testified that she understood Awadallah to say that the man who had accompanied Sellers to the store earlier that day (Burgess) would know who the actual culprit was. (R473-475)

After visiting the crime scene, Brown returned to the party where she allegedly overheard Gunsby tell Jap Anderson that he had "tooken care of that." (R227-28) Later that night, Burgess went by Bennie Brown's house. Although Burgess denied it, the community concensus was that Brown and Burgess were romantically involved. (R201,205-06,229-30) The police were at Brown's home and told Burgess that he was a suspect in the shooting. (R217-219) Brown had heard rumors that Burgess was a suspect in the killing. She had arranged for a policeman whom she knew to come by her house that night in an attempt to clear Burgess. (R228-29)

At approximately eleven o'clock on the night of the murder, Latisha Terry, a fourteen year-old neighbor of Gunsby's, saw Gunsby exit the passenger side of a car at his apartment.

She saw another man driving and a third man get out of the back seat carrying several firearms. The trio entered Gunsby's apartment briefly before getting back into the car and driving away. (R352-63) Terry remembered that the man in the back seat with the guns was wearing fatigues. (R355,358-60,361-362)

Diane Williams, another neighbor of Gunsby's who also happened to be related by marriage to the victim, testified that Gunsby approached her the day after the murder. Gunsby told Williams that she had probably heard that he had shot Tony Awadallah. Williams informed him that he had mistakenly killed Hisham instead of Tony. Gunsby told Williams that he had already made arrangements for a alibi witness and asked Williams to also support his alibi. She flatly refused. (R363-68) Williams also saw a carload of men at the apartment complex transporting firearms on the night of the murder. (R366-71) Williams testified that she did not see Gunsby at all that night.

The state presented the testimony of Alfred Hart, a jailhouse snitch, who claimed that he overheard Gunsby make several incriminating statements to Raymond Taylor, another inmate, while all of them were in jail awaiting trial. (R343-51) Raymond Taylor agreed that Gunsby discussed his case with Taylor, but established that Gunsby did not make any incriminating statements to him. (R388-95) Taylor, a former prosecutor fallen on bad times, testified that inmates frequently approached him to discuss their cases. Gunsby told Taylor that he needed to worry about all state witnesses including Bennie Brown, even though she was lying. Gunsby explained that Brown was lying to protect her

lover, Isaac Burgess, who actually committed the murder. (R394-95) Several alibi witnesses placed Gunsby away from the scene of the crime that night. (R376-88,397-439)

PENALTY PHASE

At the penalty phase, the state introduced documentary evidence that Donald Gunsby had prior convictions for aggravated assault and robbery. (R547-49,1022) The state also presented evidence that on March 4, 1988, Gunsby pleaded guilty to a charge involving possession of a shotgun. On that same date, the trial court sentenced Gunsby to eighteen months in prison. The trial judge gave Gunsby permission to report to the Marion County Jail five days later. (R549-53) The jail records indicated that Gunsby never reported to the jail as ordered. (R553-57)

The state again presented the testimony of Bennie Brown. (R557-662) Her observations of Gunsby shortly before the murder revealed that Gunsby was drinking and socializing at James Anderson's party. Brown noticed nothing unusual about Gunsby's demeanor. He appeared to be himself.

Dr. Umesh Mhatre testified for the state, apparently in anticipatory rebuttal of the two mental health professionals presented by Gunsby at the penalty phase. Dr. Mhatre examined Gunsby on October 28, 1988, at the request of the trial judge to determine: (1) Gunsby's sanity at the time of the offense; (2) Gunsby's competence to stand trial; and (3) whether Gunsby met the criteria for involuntary hospitalization. (R562-67) After spending barely an hour with Gunsby, Dr. Mhatre concluded that he

was sane at the time of the offense and was competent to stand trial. (R567-69)

Dr. Mhatre admitted that a person's sanity at the time of the offense was a difficult issue to determine where the individual, like Gunsby, denied guilt. (R568) For the same reason, Dr. Mhatre also admitted difficulty in determining whether Gunsby was under the influence of extreme mental or emotional disturbance at the time of the offense. (R569) Dr. Mhatre applied the McNaughten standard in concluding that Gunsby's ability to appreciate the criminality of his conduct and to conform that conduct to the requirements of the law was not substantially impaired. (R569-70) Dr. Mhatre saw no evidence of mental illness or disturbance. (R570-72) Dr. Mhatre concluded that Gunsby was not so retarded that it was obvious from a brief interview. (R577-78) Dr. Mhatre believed that an I.Q. below 90 is generally considered evidence of retardation. (R577-78) He gave Gunsby no tests to determine intelligence. (R578) Dr. Mhatre conducted no tests during his interview of Gunsby. (R576) Dr. Mhatre never contacted anyone in Gunsby's family and did not visit Gunsby again. (R576-77)

Gunsby's mother suffered from schizophrenia and was institutionalized in a mental hospital most of her life. (R572) Schizophrenia is genetically transmitted. (R572,575-76) Gunsby's brother had also been institutionalized for his mental illness.

Dr. Rodney Poetter, a clinical psychologist, was appointed by the court to assess Gunsby's competence to stand trial as well as his sanity at the time of the offense. Dr.

Poetter examined Gunsby on October 29, 1988. He immediately observed Gunsby to be cognitively slow. Gunsby had a difficult time understanding some questions and took quite a while to respond. Dr. Poetter conducted a standard intelligence test, an objective memory function test, a basic academic test, and a motor skills test. (R591-96) The Wechsler Intelligence Test suggested that Gunsby has very severe intellectual limitations. Gunsby fell within the range of mild mental retardation. His I.Q. was below the first percentile. His effort was good, but his ability to solve problems was very limited. Gunsby's vocabulary was also quite limited. He could not define simple words such as repair, fabric, assemble, or enormous. Gunsby's spelling skills tested to a third grade level with his reading on a fourth grade level. (R596-97) His academic skills placed him in the bottom one percent of the general population. (R598) Dr. Poetter testified that Gunsby would easily qualify for supplemental security income administered by the social security administration. Dr. Poetter concluded that Gunsby's I.Q. was below 59. (R598)

Dr. Poetter opined that Gunsby did not suffer from a severe mental illness where his perception of reality would be very distorted. Gunsby's intellectual limitations were a chronic problem since childhood. Gunsby's intellectual limitations resulted in Gunsby failing to appreciate all of the ramifications of his actions. (R604) Dr. Poetter found that Gunsby continuously abused alcohol. He also suffered from an anti-social personality disorder. (R607-08) Gunsby appeared to be religious and talked

of church. He thought that God talked to him sometimes. Dr. Poetter concluded that this was related to his religious beliefs rather than reflective of hallucinations. (R600) Dr. Poetter spent three hours with Gunsby in an attempt to comply with the trial court's order appointing him. (R612)

Dr. Ira Conley, a psychotherapist licensed in psychiatric social work and trained in pastoral psychology, examined Gunsby on September 22, and September 27 pursuant to a court order. (R618-621) Although his reading comprehension level was equivalent to a third-grader, Gunsby insisted that he was a high school graduate. (R616-17,622) Dr. Conley found that Gunsby's main delusion involved his belief that he had been annointed as an agent of God to rid the community of drugs and drug dealers. (R623) Dr. Conley administered the Minnesota Multiphasic Personality Inventory (MMPI). Since the test requires a sixth grade reading level, Conley was forced to read the test to Gunsby. (R625) The test indicated confused, bizarre, and disorganized thinking on the party of Donald Gunsby. Conley found Gunsby to be in the psychotic range showing a tendency to be out of contact with reality. Conley opined that Gunsby suffered from a paranoid schizophrenic disorder. (R626-29)

At the beginning of the examination, Conley saw nothing unusual, but the longer he stayed, the more Gunsby's ideas began to unravel. Conley noticed memory impairment and a preoccupation with the community's drug problem. Gunsby's delusional system was not easily fragmented. He seemed legitimately concerned

about drug usage in the community and the apparent apathy about the problem. (R630-31)

Dr. Conley also found Gunsby's family to be very dysfunctional. His mother was seriously mentally ill prior to his birth and spent most of her life in institutions. She died in the Florida State Hospital. Gunsby's brother also had a long history of mental illness. Conley's clinical diagnosis of Donald Gunsby was that he suffered from borderline retardation and paranoid schizophrenia. Gunsby's condition is chronic. Conley had no doubt that Gunsby's illness was genuine. Conley concluded that Gunsby was under the influence of an extreme mental or emotional disturbance at the time of the offense. He also believed that Gunsby's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Conley thought that Gunsby was insane using even the McNaughten standard. Although Conley found Gunsby to be mentally ill, the doctor concluded that he could be treated. (R632-34)

Johnnie Mae Gunsby raised Donald since his birth. Donald's mother was Johnie Mae's half-sister. Gunsby never had a relationship with his father. There was some doubt as to who his actual father was. (R653) Donald had no memory of his biological mother. (R657-58) Johnnie Mae noticed that Donald was different from her own children. He did not act like the rest of the kids. Donald was sometimes sweet, while other times he was very reclusive. (R654) Growing up, Donald had a habit of slipping off

for a day or two at a time. He would sleep in abandoned cars. (R654-55)

Donald simply could not function in school. (R655) While the other children learned, Donald had a special desk in the back of the classroom where he played with toys. (R655-56) He only got through the third or fourth grade. (R656)

Gunsby had a job cleaning up his apartment complex. He lost his job when he became temporarily disabled. A car battery exploded in his face as he attempted to help a stranger who was having car trouble. His employers were unable to keep his job open until he was able to work again. Donald found this very frustrating and he became very unhappy. (R658-59) Donald Gunsby was also a father. (R659)

Anna Belle Raines and Earthe Harris, two of Gunsby's neighbors, testified on his behalf at the penalty phase. (R579-91) Raines had seen Gunsby chase drug dealers and other troublemakers out of the neighborhood. (R580-82) Gunsby also helped the old folks in the neighborhood and looked out for the children. He especially loved the neighborhood kids and frequently played games with them. (R580-82) Harris supported Raines' testimony about Gunsby and the neighborhood children. (R587)

SUMMARY OF ARGUMENTS

POINT I: The trial judge allowed individual jurors to excuse themselves if they would be uncomfortable hearing this particular case. This deprived Gunsby of his constitutional right to a fair cross-section of the community. Seven jurors were allowed to excuse themselves before either lawyer was able to conduct any voir dire. Although defense counsel did not object to this procedure, Gunsby contends on appeal that the trial court abused its discretion.

POINT II: During cross-examination of the medical examiner, defense counsel attempted to elicit testimony that the doctor found evidence of illicit drugs in the victim's system. The state objected and the trial court precluded this line of inquiry. Defense counsel maintained that the culprit's identity was an essential element that the state had to prove. Defense counsel pointed out that the victim was involved in drugs and stolen property which could have provided a motive for someone other than Gunsby to commit the murder.

POINT III: Over defense counsel's objection, a state witness was permitted to testify that other people saw Gunsby with a gun shortly before the murder. The testimony was pure hearsay and denied Gunsby his right to confront witnesses. The evidence was prejudicial since it aided the state in proving premeditation.

POINT IV: The state charged Donald Gunsby with premeditated murder. The state's case tended to establish premeditated murder. There was absolutely no evidence of felony murder. The trial court inexplicably instructed the jury on premeditated as well as felony murder. Since the verdict could be supported on one ground but not another, the verdict must be set aside. This court cannot be certain which of the two grounds was relied upon by the jury in reaching the verdict. Mills v. Maryland, 100 L.Ed.2d 384 (1988).

POINT V: Gunsby's penalty phase was tained by the introduction of irrelevant and prejudicial Williams Rule evidence. On cross-examination of a defense witness, the state elicited testimony about an incident that implied that Gunsby made a habit of carying guns. The prosecutor also argued this prejudicial evidence during closing. Such evidence is presumed harmful error and the state cannot prove beyond a reasonable doubt that the verdict could not have been affected by the error.

POINT VI: Gunsby argues that his death sentence is disproportionate when the circumstances of the offense and Gunsby's character are examined. The valid aggravating circumstances are not particularly compelling. The trial court found mental mitigating evidence to be valid. The trial court inappropriately gave that evidence little weight. On the spectrum of capital cases that this Court has reviewed, this case simply does not qualify as one warranting imposition of the death penalty.

POINT VII: Gunsby attacks the imposition of his death sentence on a variety of bases. The trial court incorrectly found that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. It is clear that at least a pretense of justification existed. Gunsby also contends that the state failed to prove beyond a reasonable doubt that he was under sentence of imprisonment. The trial court also ignored valid mitigating evidence. The trial court also gave no weight to uncontroverted mitigating evidence.

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

POINT IX: Appellant urges reversal based upon cumulative error resulting from several incidents at trial.

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

POINT I

GUNSBY WAS DENIED A FAIR CROSS-SECTION OF THE COMMUNITY THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE THE TRIAL JUDGE ALLOWED MEMBERS OF THE VENIRE TO EXCUSE THEMSELVES WITHOUT JUST CAUSE.

At the very beginning of jury selection, the trial court explained the process of voire dire to the venire. The court also read the indictment and explained that, in the event of a verdict of guilty of first-degree murder, a penalty phase would be required where the jury would recommend either a sentence of life imprisonment or the death penalty. (R4-11) The trial court then asked the first question of the thirteen venireman in the jury box:

> Given the nature of this case do any of you feel that it would better if you did not serve on this particular case?
>
> (Prospective Jurors Michael and Durchak were excused)
>
> THE COURT: Okay. Is there anyone else? What I am really asking you to do in this process is to search your own conscience to determine whether or not you can sit as a fair and impartial juror and try the case solely on the facts and the law and the arguments of counsel.
>
> And so rather than anybody getting excused by one side or the other in this process I am asking the jurors to look inside themselves and determine whether or not they should excuse themselves. (R11)

Two venireman replaced the two excused and the trial court asked if either felt if it would be better if they did not serve on the

jury because of the nature of the case. (R12) After receiving a negative response, the trial court then asked:

> Now, I need to know whether any of you have such strong feelings for or against the death penalty that would prevent you from being fair and impartial to both the State and to the defense. Is there anyone that feels that way, either for or against?
>
> PROSPECTIVE JUROR COOPER: I do.
>
> THE COURT: Okay. You can step down, sir.
> You can step down also.
> Sir, you would like to be excused for that reason? Okay.
>
> (Prospective Jurors Cooper, Dix and Rice excused.) (R12-13)

Later, more jurors were excused in the above manner:

> THE COURT: Okay. I need to ask you three prospective jurors the same question. Do any of you three feel that just because of the nature of this case it would be better if you did not serve?
> Okay. You can step down, Ma'am.
>
> (Prospective Juror Howell excused.)
>
> * * *
>
> THE COURT: Okay. Do you feel that you can serve on this particular case, ma'm?
>
> PROSPECTIVE JUROR NELSON: No, I don't.
>
> THE COURT: You do not feel that you can. Okay. You can step down.
>
> (Prospective Juror Nelson excused.) (R13-14)

Although there was no objection from either side concerning the trial court's method of excusing the above jurors, Appellant contends on appeal that fundamental error occurred. As

a result of the trial court's unorthodox method of excusing potential jurors in this case, Appellant contends that he was denied a fair cross-section of the community resulting in a deprivation of his constitutional right to a fair trial guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Florida Constitution. The resulting death sentence violates the Eighth Amendment of the United States Constitution and Article I, Section 17 of the Florida Constitution.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. Smith v. Texas, 311 U.S. 128 (1940); Amends. VI and XIV, U.S. Const. It was a denial of Due Process for the trial judge to sua sponte excuse numerous jurors while simultaneously preventing defense counsel from ascertaining and/or making a record of that juror's ability, desire, and qualifications to serve as a juror. See Dennis v. United States, 339 U.S. 162, 168 (1950)("[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor. . . . in exercising its discretion, the trial court must be zealous to protect the rights of an accused."); see also Piccarrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976).

In the instant case, Appellant specifically complains about the manner in which the trial court allowed prospective jurors simply to excuse themselves without a sufficient inquiry into their ability to deliberate on this particular type of case.

The potential jurors that voluntarily stepped down from service did not have to answer the hard questions generally propounded on voire dire in capital cases. The trial court's action allowed potentially qualified jurors to choose the easy way out. Appellant submits that the type of juror more likely to voluntarily step down under these circumstances is the more compassionate, defense-oriented, death-scrupled juror. A state-oriented, death-qualified juror would be much less likely to choose to step down from a capital jury based only on the "nature of the case." A death-qualified juror is much more likely to be eager for the chance to "administer justice" to a "cold-blooded murderer." Such a juror would not voluntarily extricate himself from a situation where such an opportunity might present itself.

The focus of Appellant's attack on the trial court's procedure below is the insufficiency of the questioning prior to the excusal of these potential jurors. The exclusion from the jury venire denied Gunsby a fair cross-section of jurors from which to select his jury, and it provided the state with an unfair advantage by eliminating from the venire numerous potentially qualified jurors.

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence, he is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all

> conscience is the field of discretion that remains.

B. Caredozo, The Nature of the Judicial Process, 141 (1921). The foregoing was quoted by this Court in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) where the limits of judicial discretion was determined to be whether "reasonable men could differ as to the propriety of the action taken by the trial court." Canakaris, 382 So.2d at 1203.

The death-qualification of jurors in capital cases is a complex yet sensitive procedure. Rule 3.300(b), Florida Rules of Criminal Procedure, provides for counsel's right to examine jurors orally on voir dire. Donald Gunsby's attorney never had any opportunity to delve into these jurors' attitudes, their understanding of the law and their ability to apply the law.

Although not identical, an analogous case was presented to this Court in O'Connell v. State, 480 So.2d 1284 (Fla. 1985). O'Connell's trial judge excluded two jurors for cause after examination by the prosecutor wherein the jurors stated they were opposed to the death penalty. Defense counsel objected that he had no opportunity to examine these jurors or try to rehabilitate them. In concluding that reversible error occurred, this Court recognized a trial court's considerable discretion in determining the extent of counsel's examination of prospective jurors, but pointed out:

> Here, however, the trial court's refusal to allow the defense an opportunity to examine the two "death-scrupled" jurors cannot be justified as an exercise of "control of unreasonably repetitous and argumentative voir dire questioning," Jones v. State, 378 So.2d 797 (Fla. 1st

DCA 1979), cert. denied, 388 So.2d 1114 (1980), since defense counsel never got to ask either of them a single question.

O'Connell, 480 So.2d at 1286-7 (emphasis added). Neither trial counsel for the state or for Donald Gunsby was permitted any questioning of the jurors perfunctorily excused by the trial court.

The seven jurors excused by the trial court were improperly excused where neither counsel had any opportunity to rehabilitate them. While the trial court did give an abbreviated explanation of the bifurcated penalty phase procedure, the seven jurors heard only that they would recommend either life or death at the penalty phase. (R10-11) There was no explanation that, although the recommendation would be given great weight, the ultimate sentencing responsibility rests with the trial judge. The true feelings of these seven jurors as well as their actual understanding of the applicable law was never fully explored by the trial court or either attorney. The trial court's action allowed these seven jurors to simply excuse themselves from jury duty. The trial court's action denied Gunsby a jury composed of a fair cross-section of the community in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Florida Constitution. Further, the trial court's action denied defense counsel an opportunity of examining these seven jurors concerning their qualifications resulting in a denial of Gunsby's ability to make a record and, accordingly denied Gunsby due process of law under the Fifth and Fourteenth Amendments. The resulting death penalty imposed violates the Eighth Amendment to the United States Constitution.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Officer Greg Stewart, an evidence specialist with the Ocala Police Department, recovered numerous items of evidence at the scene of the crime. (R273-89) Officer Stewart recovered a marijuana cigarette from the victim's pocket. (R288) Dr. Thomas Techman performed the autopsy on the victim. (R302-315) On cross-examination, defense counsel immediately questioned the doctor about any chemicals that he may have detected during the autopsy. (R315-316)

> MR. MOORE (Prosecutor): Judge, I would object to that and ask to approach the bench.
>
> THE COURT: Objection sustained.
>
> MR. SCOTT (Defense counsel): Your Honor, could I make an offer of proof before the judge?
>
> THE COURT: You want to approach the court and make some argument?
>
> MR. SCOTT: Yes, Your Honor. (R316)

At a side-bar conference, the prosecutor admitted that the doctor found cannabis in the victim's system. The prosecutor stated that he had no opportunity to object earlier when defense counsel elicited the fact that a marijuana cigarette was found at the scene. The prosecutor contended that these facts had no relevance to the case. Defense counsel replied:

> It is relevant because this testimony tied him in with some other testimony and the defense case is that Tony Awadallah and his brother also were involved in drugs, also found was stolen property.
>
> And it is a defense position that -- you know, our position is we don't know who killed him and it could have been drug related; could have been related to stolen property.
>
> THE COURT: Could have been's aren't relevant. The objection is sustained. (R316-317)

At that point, defense counsel abandoned any further cross-examination and further abandoned the proffered theory of defense.

The right to cross-examination is a fundamental right encompassed within the Sixth Amendment's right to confrontation, which is applied to the states through the Fourteenth Amendment. Davis v. Alaska, 415 U.S. 308 (1974); Barber v. Page, 390 U.S. 719 (1968); Coxwell v. State, 361 So.2d 148 (Fla. 1978); Coco v. State 62 So.2d 892 (Fla. 1953). See also Art. I, §16, Fla.Const.

> [A] fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called. . .

Coco, 62 So.2d at 894-895. In Coco this Court also pointed out that defensive matters can be presented on cross-examination. Id at 895.

In Coxwell v. State, 361 So.2d 148 (Fla. 1978), also a capital case, this Court articulated a standard by which appellate courts review trial court rulings restricting cross-examination.

> [W]here a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecutor witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error.

Coxwell 361 So.2d at 152 (emphasis added).

As a result of the trial court's undue restriction of cross-examination of the medical examiner, Donald Gunsby's case was curtailed before it even began. The medical examiner testified as to his determination as to the cause of death. (R312-313,317) The fact that the doctor also found the presence of illicit drugs in the victim's system was certainly within the scope of permissible cross-examination. The trial court's ruling precluded defense counsel from ever developing the defense theory dealing with evidence that the victim and his brother were involved in drugs and stolen property. (R316-317) The identification of the gunman was certainly an issue at trial. The gunman's identity was an essential element of the crime which the state had a duty to prove beyond a reasonable doubt. Defense counsel contended that the killing could have been drug-related or connected to the victim's involvement in stolen property. (R316-317) Defense counsel attempted to make a case that Issac Burgess was the actual culprit. Due to the trial court's ruling, the jury never heard a possible motive. The only motive the jury heard related to Donald Gunsby.

The trial court's perfunctory ruling that "could-have-beens" are not relevant effectively haulted this defense theory before it began. The trial court's ruling denied Donald Gunsby his constitutional rights to effective assistance of counsel, due process of law, and his right to a fair trial. Amend. V, VI, and XIV, U.S. Const. Art. I, §§ 2, 16, and 22, Fla.Const. Gunsby's death sentence which is predicated on his conviction is therefore also constitutionally infirm. Amend. VIII, U.S. Const.; Art. I, §17, Fla.Const.

POINT III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY HEARSAY OBJECTION THEREBY ALLOWING THE STATE TO IMPROPERLY INTRODUCE TESTIMONY WHICH RESULTED IN A DENIAL OF GUNSBY'S CONSTITUTIONAL RIGHTS RELATING TO CONFRONTATION OF WITNESSES AND TO DUE PROCESS OF LAW.

Bennie Brown, a female guest at James Anderson's party, testified for the state. (R220-233) Brown told the jury that, after Gunsby, Anderson and another male investigated Jessie Anderson's injury at the store, the trio returned to the party approximately forty minutes after they had left. (R222-224) Brown then told the jury that Gunsby made a statement that he was "tired of those damn Iranians messing with the black." (R224) Brown testified that Gunsby left the party only to return a short time later wearing a camouflage suit. (R224) Brown thought she saw some type of gun under Gunsby's clothing. She opined that it was either a shotgun, a .357 magnum, or a long .38. (R225) On cross-examination, Brown admitted that although she did not actually see any part of the gun, she saw the "print" of the gun. (R231-33) Presumably, Brown meant that she could see the outline or shape of the gun underneath Gunsby's clothing. On redirect, the prosecutor asked:

> MR. MOORE: Ms. Brown, what do you mean by the "print of the gun?" Can you explain to us what you mean?
>
> BROWN: The handle of the gun was on his right side. It was more than me seen it. It was at least --
>
> MR. SCOTT (Defense Counsel): Objection, Your Honor; hearsay.

THE COURT: Objection overruled.

MR. MOORE: Go ahead.

BROWN: It was at least 50 people there and I'm quite sure at least ten people seen it. (R233)

This testimony constitutes pure hearsay. §§90.801, 90.802, Fla. Stat. (1985). The testimony should have been excluded because of its extremely prejudicial effect. Pursuant to Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983); Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); and Kennedy v. State, 305 So.2d 1020 (Fla. 5th DCA 1980), reversible error has occurred.

The only way that Bennie Brown could have known that ten other people at the party also saw the gun (or rather what she perceived as the outline of a gun) would be for those people to communicate that fact to Brown. As such, the testimony is clearly inadmissible hearsay. The prejudice of the objectionable testimony is obvious. The state charged Donald Gunsby with premeditated murder. (R711) The trial court instructed the jury and also found the aggravating circumstance that the murder was cold, calculated, and premeditated. Testimony that Gunsby made a threatening statement, left the party, and returned after fetching a weapon clearly support the state's theory regarding premeditation and tended to support the finding of the related aggravating factor. As such, the error cannot be considered harmless and a new trial is required. Amends. VI and XIV U.S. Const.; Art. I, §16, Fla. Const.

POINT IV

FUNDAMENTAL ERROR OCCURRED WHERE THE TRIAL COURT INACCURATELY INSTRUCTED THE JURY THEREBY RESULTING IN A DEPRIVATION OF GUNSBY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

Rule 3.390(a), Florida Rules of Criminal Procedure states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel . . .

The grand jury indicted Donald Gunsby for premeditated murder. (R711) An additional charge of possession of a firearm by a convicted felon was severed prior to trial and was never considered by the jury. (R4-5) The trial court instructed the jury on first-degree murder, second-degree murder, third-degree murder, manslaughter as well as excusable and justifiable homicide. (R519-21,523-524) Additionally, the trial court inexplicably instructed the jury as to felony murder as follows:

> Before you can find the Defendant guilty of first degree felony murder the State must prove the following three elements beyond a reasonable doubt:
>
> One, Hisham Awadallah is dead.
>
> Two, the death occurred as a consequence of and while Donald Gunsby was engaged in the perpetration of or attempt to perpetrate any arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aircraft piracy, or unlawful throwing or placing or discharging of a destructive device or bomb.
>
> Three, Donald Gunsby was the person who actually killed the victim or the victim was killed by a person other than Donald Gunsby

> who was involved in the commission of one of the above felonies but Donald Gunsby was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of one of the above felonies.
> In order to convict of first degree murder it is not necessary for the State to prove that the Defendant had a premeditated design or intent to kill. (R521-522,839)

No objection to this instruction appears on the record. The undersigned counsel is baffled by the trial court's instruction as to felony murder where the state produced absolutely no evidence supporting this theory of murder. Absolutely no evidence exists that Donald Gunsby was engaged in the commission of a felony during the commission of the murder. The state's case establishes premeditated murder or no murder at all. The Attorney General cannot dispute this fact.

Following deliberations, the jury returned with a verdict of guilty of murder in the first degree, as charged in the indictment. (R536-37,857) On the verdict form, the jury was not given a choice between a premeditated versus a felony murder theory. (R530-531,857) It is therefore impossible to determine which theory the jury accepted since they were instructed on both.

In Mills v. Maryland, 100 L.Ed.2d 384, 395 (1988), the United States Supreme Court stated:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the

> verdict. See, e.g., Yates v. United States, 354 U.S. 298 . . . (1957); Stromberg v. California, 283 U.S. 359 . . . (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 . . . .

This reviewing court cannot be certain which of the two theories (premeditated versus felony murder) the jury relied upon in reaching the verdict. The verdict must therefore be set aside and Donald Gunsby retried with proper jury instructions. Amends. V, VI, VIII, and XIV, U.S. Const.

POINT V

DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ALLOWING IMPROPER WILLIAMS RULE EVIDENCE RESULTING IN A DENIAL OF GUNSBY'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL RESULTING IN CRUEL AND UNUSUAL PUNISHMENT CONTRARY TO GUNSBY'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

At the penalty phase, the state presented evidence tending to prove previous convictions for aggravated assault and robbery. (R547-549) The state also attempted to prove that Gunsby was under sentence at the time of the murder. (R547-557) The state also presented the testimony of Bennie Brown who testified about Gunsby's demeanor at the party he attended shortly before the murder. (R557-562) Additionally the state presented Dr. Mhatre whose testimony was an attempt to refute subsequent evidence presented by the defense relating to Gunsby's mental condition. (R562-578)

In addition to the testimony of two mental health professionals, the defense presented the testimony of two of Donald Gunsby's neighbors as well as the testimony of Johnnie Mae Gunsby, the woman who raised Donald. (R579-591,650-665) The two neighbors testified regarding specific incidents when Gunsby drove several drug dealers out of the neighborhood. The neighbors also told the jury about Gunsby's rapport with the children of the neighborhood. (R579-591) Defense counsel's last witness was Johnnie Mae Gunsby who provided some factual background regarding Donald Gunsby's upbringing. (R650-665) She told the jury that

she raised Donald when his mother remained institutionalized most of her life as a result of mental problems. (R650-653)

On cross-examination, Johnnie Mae Gunsby admitted that Donald had a problem abiding by rules and laws. (R659-660) The prosecutor elicited testimony about an incident involving a teacher's stolen watch at an elementary school that Donald attended at the time. (R660-661) Donald ultimately returned the watch after initially denying any knowledge of the theft. The following exchange then occurred on cross-examination:

> Q. Did he also have problems with the law, with the police during the time that you raised him?
>
> A. Not much, not that I can recall.
>
> Q. He didn't have any problems with the law as far as you know?
>
> A. Yeah.
>
> Q. Like --
>
> A. He had some problems with the law but I don't -- I can't recall just what and when and where.
>
> Q. Okay. Did he have, also, a habit of carrying guns around with him?
>
> MR. SCOTT (defense counsel): I'm going to object --
>
> THE WITNESS: No.
>
> MR. SCOTT: -- to that.
>
> MR. MOORE (Prosecutor): He didn't?
>
> MR. SCOTT: I'm going to make an objection that that, Your Honor. He's calling for speculation.
>
> MR. MOORE: No, sir. I think that it will be clear when I ask her --

THE COURT: Overruled.

MR. MOORE: -- the next question.

MR.MOORE: Do you remember an incident that you told us about where he was out working as a groundskeeper over here and was carrying two pistols in his -- on his person?
Do you remember that?

A. Yes.

Q. Could you tell us about that?

A. When I -- when I -- somebody come to the door and told me, said: Look, said: Don outside cleaning the yard and said police got him, said, they got him down on the ground. So I went and looked and they did have Don down on the ground. He was cleaning yards. He had a gun in each pocket.
And I went out and I -- Detective Gray, I asked him, I said: What's happening? What's happening? He said Donald have -- had two guns. We -- we got two guns off of him. We had to go and -- we had to throw him down on the ground to take the two guns.
So I asked Don. They was fixing to carry him to the car. I said: What happened, Don? He said: Momma, say, Jerry Tucker give me two guns and told me to hold them for him until he come back.

Q. Did you see the guns, Ms. Gunsby?

A. Yes, I did.

(R661-663)

Appellant asserts on appeal that the trial court erred in overruling his timely objection and allowing the admission of the above testimony which was irrelevant and prejudicial. This evidence violates the dictates of Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959). In State v. Lee, 531 So.2d 133, 135 (Fla. 1988), this Court considered

Williams and said that:

> [e]vidence of collateral crimes or acts committed by the defendant is inadmissible if its sole relevancy is to establish bad character or propensity of the accused. Williams v. State, ... evidence of other crimes or acts is admissible, however, "if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried." Id. at 662. See §90.404(2)(a), Fla. Stat. (1983). The test for admissibility for evidence of collateral crimes is its relevancy. Heiney v. State, 447 So.2d 210, 213 (Fla.) cert. denied, 469 U.S. 920 . . . (1984).

In other words, similar fact evidence which tends to reveal the commission of collateral crimes is admissible if it is relevant to a material fact in issue, except where the sole relevance is the character or propensity of the accused. Castro v. State, 14 FLW 359 (Fla. July 13, 1989).

The rationale underlying the Williams rule is that such evidence:

> would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit a crime charged, it must be excluded.

Jackson v. State, 451 So.2d 458, 461 (Fla. 1984)[quoting Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977)]. For this reason, this Court has held

that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981). Accord Peek v. State, 488 So.2d 52, 56 (Fla. 1986).

Appellant can see no relevance to the testimony elicited on cross-examination of Johnnie Mae Gunsby over defense counsel's timely objection. (R661-663) The testimony left the jury with the impression that Donald Gunsby had a habit of carrying firearms. In addition to that testimony, the jury also received documentary evidence indicating that Gunsby had prior convictions for possession of a firearm by a convicted felon and another for carrying a concealed firearm, to wit; a shotgun. (R547-549) The victim of the murder in the case at bar was gunned down by a single blast from a shotgun. The jury undoubtedly concluded that Donald Gunsby was a dangerous killer who usually carried several firearms. This appears to be particularly irrelevant in light of the state's evidence indicating that Gunsby left the party in order to obtain the weapon before the commission of the murder. The state's evidence did not reveal that Gunsby was already armed when he initially indicated that he intended to go down to the convenience store. In fact, the evidence indicated the contrary.

It is therefore clear that the objectionable evidence lacked relevance to any material fact in issue. Error clearly occurred. This Court must now consider whether the state has met its burden of showing that the error can be deemed harmless

beyond a reasonable doubt. State v. Diguilio, 491 So.2d 1129, 1135 (Fla. 1986). The improper admission of irrelevant collateral-crimes evidence is presumptively harmful. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908. It is not enough to show that the evidence against a defendant was overwhelming. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988) (emphasis supplied). Appellant submits that the state cannot meet this stringent test.

The prejudice of the trial court's ruling is not lessened by the fact that it occurred at the penalty phase.

> Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908.
>
> While the guilt phase asks the jury to determine whether the defendant committed the crime charged, the penalty phase asks the jury to recommend whether that defendant should be put to death or spend life in prison. This recommendation must be based upon a weighing of aggravating and mitigating factors that may properly be inferred from any of the evidence, including that which has been introduced during the guilt phase. . . .
>
> Once the jury has received penalty phase evidence and made a life recommendation, for the trial court to then reject that recommendation and impose a sentence of death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v.

> State, 322 So.2d 90, 910 (Fla. 1975). Under those circumstances, unless the state can prove that "there is no reasonable possibility that the error [complained of] contributed to the convictions," Diguilio, 491 So.2d at 1138 (citation omitted), the error cannot be deemed harmless. This is especially true when the error is presumptively harmful, such as a Williams - rule violation. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908.

Castro v. State, 14 FLW 359, 361 (Fla. July 13, 1989).

In Castro, this Court considered the error of the trial court admitting testimony that several days after the murder, a steak knife was found outside Castro's apartment building. Castro's trial court also admitted testimony of Robert McKnight (an accessory after the fact) that Castro had tied up McKnight and threatened to stab him several days prior to committing the capital murder. While this Court found the error to be harmless as to Castro's conviction, this Court could not conclude that the state had proven beyond a reasonable doubt that the improper testimony could not have affected the penalty phase determination. The irrelevant and improper testimony tended to negate the case for mitigation presented by Castro and thus may have influenced the jury in its penalty-phase deliberations.

Donald Gunsby's case for mitigation consisted of evidence that he was a man of severe intellectual limitations. (R591-649) Gunsby comes from an extremely deprived background. His mother was perpetually institutionalized as a result of her mental problems. (R651-653) Donald never had any relationship with his father whose identity was in doubt. (R653) Donald's

brother also suffered from mental problems. (R656) Donald only made it through the third grade. (R656) Nevertheless, Donald Gunsby had good intentions. He attempted to protect his neighborhood, especially the children, from the influence of local drug dealers. (R579-591) Donald Gunsby's case for mitigation tended to prove that he was simply a victim who, nevertheless, was usually able to maintain his good intentions. The case for mitigation contrasts dramatically from the image presented by the irrelevant and improper testimony that portrayed Gunsby as having an inherent criminal propensity and bad character. The prosecutor used the inflammatory evidence in his quest for death. In his closing argument, the prosecutor argued:

> . . . This is a guy who has been out there using pistols, committing felonies who has been sentenced to prison on at least two occasions here and he was sentenced to prison for having a filed off shotgun in his possession a third time when this murder occurred.
>
> Coincidentally, you heard the lady that raised him say that he carried pistols around on him when he's out there doing yard work. Obviously a man that likes to use firearms, shown absolutely, beyond every reasonable doubt for your consideration in recommending a sentence in this case. (R671)

The Williams rule error improperly tended to negate the case for mitigation against Gunsby and no doubt influenced the jury in recommending a death sentence. This Court cannot say beyond any reasonable doubt that had the jury not heard the irrelevant, prejudicial comment, it might not have determined that a life sentence was appropriate under the circumstances. The trial court's error denied Donald Gunsby his right to due

process of law and his right to a fair trial. Amend. V, VI, and XIV, U.S. Const. Gunsby's death sentence is therefore constitutionally infirm. Amend. VIII and XIV, U.S. Const.

POINT VI

GUNSBY'S DEATH SENTENCE IS DISPROPORTIONATE THUS VIOLATING HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court considered Donald Gunsby's mental and emotional condition as a single mitigating circumstance. (R902-903) The trial court found that the evidence established that Donald Gunsby is mildly retarded and intellectually functions on a third or fourth grade level. (R902) The trial court incorrectly found that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. See Point VII, A, infra. Appellant candidly concedes that the evidence may support the trial court's finding that the murder was committed while Gunsby was under a sentence of imprisonment and a second aggravating circumstance that Gunsby had prior convictions of aggravated assault and for robbery. (R901-902) Neither of these aggravating circumstances are particularly compelling. The gravity of one factor is somewhat diminished by the fact that Gunsby did not break out of prison, but merely failed to report to jail for the execution of a sentence previously imposed. Songer v. State, 14 FLW 262 (Fla. May 25, 1989). The trial court did find Gunsby's mental and emotional condition as a mitigating circumstance but concluded that the circumstance was entitled to little weight. (R902-903) In considering the other evidence relating to Gunsby's mental condition, the trial court clearly applied an incorrect standard. See Point VII, C, infra. On the spectrum of capital cases that

this Court has reviewed, this case simply does not qualify as one warranting imposition of the death penalty.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972)(Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973). See also Coker v. Georgia, 433 U.S 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of eighth amendment jurisprudence). This Court reviews "each sentence of death issued in this state," Fitzptrick v. State, 427 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Donald Gunsby's case is neither "most aggravated" nor "unmitigated."

Three mental health professionals examined Donald Gunsby. (SR1-20) Dr. Mhatre was the only one of the three who failed to perform any tests whatsoever. Dr. Mhatre never contacted anyone in Gunsby's family. Mhatre spent less than one hour with Gunsby on one occasion. He never conducted any follow-up visits. (R567,576-77) Only Dr. Mhatre found Donald Gunsby to be "normal." He saw no evidence of retardation or mental illness.

(R562-78; SR12-16) However, even Dr. Mhatre admitted that Gunsby's family had a history of mental illness. (R572,575-77)

In contrast to Dr. Mhatre's perfunctory findings, Dr. Poetter and Dr. Conley found that Donald Gunsby had severe intellectual limitations. (R596-98,625,631-32; SR1-4,18-20) Unlike Dr. Mhatre, the other two doctors spent considerable time with Gunsby and conducted several psychological tests rather than relying solely on the interview. (R594-98,621-625) Dr. Conley's examination led him to the conclusion that Gunsby suffered from borderline retardation and paranoid schizophrenia. Conley concluded that Gunsby was under the influence of an extreme mental or emotional disburbance at the time of the offense. He also believed that Gunsby's capacity to appreciate the criminality of his conduct and to conform that conduct and to conform that conduct to the requirements of the law wa substantially impaired. Conley believed that Gunsby was insane at the time of the offense under the McNaughten standard. Dr. Poetter found less evidence of Gunsby's mental illness. However, Poetter did find Gunsby to be very intellectually limited. Poetter concluded that Gunsby's I.Q. was below 59. Poetter believed that Gunsby, as a result of his mental condition, would easily qualify for supplemental security income administered by the social security administration. (R596-98)

Viewing the crime against the background of Gunsby's intellectual and social deficiencies, this Court cannot escape the conclusion that the death sentence is disproportionate in this case. Donald Gunsby saw himself as a protector of the black

community. He suffered from a grandiose delusion in this regard. His delusion had previously focused on ridding his community of drugs and drug dealers. The evidence revealed that racial tensions obviously existed between the Middle Eastern proprietors of Sam's Big Apple convenience store and the predominantly black patrons of the store. Jessie Anderson, an older black man popular in the community, was involved in an altercation with Tony Awadallah that day. Rumors spread throughout the black community that Tony had pistol-whipped Jessie when he became drunk and boisterous inside the store. Donald Gunsby had been drinking at a party hosted by a relative of Jessie Anderson, when they heard about Jessie's plight. He responded in an admittedly inappropriate manner. However, given the specific nature of Gunsby's grandiose delusions coupled with his other mental and emotional baggage, his actions are not surprising.

This Court must examine the details of the actual murder against the background of Gunsby's mental problems and the sequence of events that night. Hisham Awadallah did not suffer. He was killed by a single shotgun blast to his chest. Death occurred almost immediately and Hisham no doubt went into shock instantly. Gunsby's reflection was not of a lengthy duration. He acted for a reason. Even though the reason was clearly not justified, it was in Donald's uncomprehending mind. Gunsby was avenging Jessie Anderson. The killing was a culmination of a long history of racial problems at the store. Gunsby killed only one person, the person that he thought pistol-whipped Jessie Anderson a few hours before. Compared to the norm of capital

murders that this Court reviews, Donald Gunsby's crime does not stand out.

In Wilson v. State, 493 So.2d 1019 (Fla. 1986), the defendant killed his father and five-year old cousin while also attempting to murder his stepmother. This Court noted that there were two aggravating circumstances (prior conviction of violent felony and heinous, atrocious or cruel) which were not balanced by any mitigating factors. This Court concluded that murders caused by a heated domestic confrontation do not warrant a sentence of death. Donald Gunsby's crime certainly has a quasi-domestic aspect especially in light of Gunsby's grandiose delusion.

It is also interesting to compare Wilson with Gunsby's case in light of the complete lack of mitigation in Wilson's case and the substantial amount of mitigating evidence in Gunsby's case. While Gunsby's trial judge considered his mental problems as a single non-statutory mitigating circumstance, the evidence of Gunsby's mental problems and deprived upbringing is substantially supported by the record.

An even better case for comparison is Livingston v. State, 13 FLW 187 (Fla. March 10, 1988). Two valid aggravating factors existed in Livingston's case. Livingston shot a convenience store clerk during the course of a robbery. Unlike Gunsby, Livingston also fired a shot at another woman who was in the store. Previously that day, Livingston had burglarized a residence. Livingston and Gunsby share deprived childhoods and marginal intelligence as mitigating factors. While Livingston's youth and immaturity were certainly strong factors in this

Court's decision to vacate the death sentence, Gunsby's mental and emotional deficiencies are at least of equal mitigating effect. An important distinction between Livingston's crime and Gunsby's crime is the motivation. Livingston appeared to be on a crime spree with greed as a motivating factor. Gunsby was a misguided avenging angel attempting to retaliate for a perceived racial injustice. His action was the product of a distorted thought process rather than criminal intent. The tragedy that unfolded was predictable, but Gunsby's moral culpability simply is not great enough to deserve a death sentence.

Another case to compare is Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). The jury recommended that Fitzpatrick should die and the trial court found five valid aggravating circumstances. In mitigation, the trial court found Fitzpatrick's age and the two statutory mental mitigating factors. This Court found that the mitigating factors (all related to Fitzpatrick's mental and emotional problems) outweighed the five valid aggravating circumstances and the jury's death recommendation. This Court found the death sentence to be disproportionate in Fitzpatrick's case. Gunsby's mental and emotional problems may not be as well documented as Fitzpatrick's, but the evidence certainly suggests that Gunsby was far from "normal." The evidence showed that Gunsby was mentally retarded with severe intellectual limitations. The fact that Gunsby's family had a history or mental illness is valid mitigation. Thompson v. State, 456 So.2d 444 (Fla. 1984). Even the trial court found in mitigation that Gunsby is mildly retarded and functions intellec-

tually on a third or fourth grade level. (R902) Given the scenario of Gunsby's social background, his retardation, his grandiose delusion, and the commonplace facts of the murder, Donald Gunsby does not deserve to die. Amends. VIII and XIV, U.S. Const.; Art. I, §17, Fla. Const.

POINT VII

IN CONTRAVENTION OF APPELLANT'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH WHICH IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

INTRODUCTION

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation indicating that a majority of nine concluded that death was the appropriate sanction. (R869) In sentencing Donald Gunsby to death, the trial court found three aggravating circumstances: (1) the murder was committed while Gunsby was under a sentence of imprisonment; (2) Gunsby had previously been convicted of aggravated assault and robbery, felonies involving the use or threat of violence against another; and (3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R901-904) The trial court found Gunsby's mental and emotional condition (Gunsby is mildly retarded and intellectually functions on a third or fourth grade level) as a mitigating circumstance. However, the trial court concluded that, in light of Gunsby's past history of violence and the circumstances of the case, this mitigating circumstance was entitled to little weight. The trial court concluded that the aggravating circumstances outweighed the lone mitigating circumstance. The court

further concluded that the only appropriate sentence was death. (R902-3)

Donald Gunsby's death sentence must be vacated. The trial court relied upon aggravating circumstances that were not established beyond a reasonable doubt. The trial court also failed to give appropriate weight to highly relevant mitigating circumstances. The trial court also applied an incorrect standard in assessing the evidence in mitigation. Additionally, the trial court accorded too much weight to the jury's recommendation and ignored the dictates of Proffitt v. Florida, 428 U.S. 242 (1976).

A. The Trial Court Erred in Finding That the Murder was Committed in a Cold, Calculated, and Premeditated Manner Without any Pretense of Moral or Legal Justification.

In finding that the capital crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court wrote:

> The evidence established beyond any reasonable doubt that the defendant acquired a loaded shotgun and went to the Big Apple Supermarket for the sole purpose of killing Tony Awadallah. Before going to the store defendant told witnesses he was going to "teach those Irans not to mess with the Blacks." When defendant arrived at the store, he stepped inside and shot the clerk behind the counter at point-blank range, with no warning, killing Hesham Mohammad Awadallah instead of his brother, Tony. When defendant returned from the store, he said that "everything was taken care of." The murder was planned and carried out like an execution.

(R902) The trial court cited Swafford v. State, 533 So.2d 270 (Fla. 1988) and Eutzy v. State, 458 So.2d 755 (Fla. 1984).

Section 921.141(5)(i), Florida Statutes (1987) sets forth this aggravating circumstance:

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

Appellant concedes that the current caselaw probably supports the heightened level of premeditation required to establish this circumstance. See e.g. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982). It is the latter portion of the language setting forth this aggravating circumstance that precludes its application to Gunsby's crime. The aggravating circumstance requires not only a heightened degree of premeditation, it also requires that the murder be committed without any pretense of moral or legal justification. It is clear from the trial court's written findings that Donald Gunsby acted under a pretense (albeit misguided) of moral justification. "Before going to the store defendant told witnesses he was going to 'teach those Irans not to mess with the Blacks.'" (R902) The aggravating factor in question does not require a legitimate moral or legal justification. The statutory language is clear that the murder must be committed without any pretense of moral or legal justification. Appellant does not believe that the language could be more clear.

The state's case clearly shows that Jessie Anderson was injured at Sam's Big Apple convenience store after an altercation with Tony Awadallah, one of the store's proprietors. Anderson

was a middle-aged black man, well known in the black community. While there was conflicting testimony as to whether Anderson fell or was pushed by Awadallah, it is undisputed that the altercation resulted in an injury to Anderson's head. (R184-88,236-37,253) After the altercation, rumors spread in the black community that Awadallah had pistol whipped Anderson. (R188-89,191-97) Donald Gunsby heard these rumors and responded in a misguided, inappropriate manner.

Evidently, racial tension existed between the Middle Eastern proprietors of the store and their predominantly black patrons. Anderson's injury was the latest in a series of racial problems at the store. (R209-16) Gunsby's misunderstanding of the actual chain of events coupled with the history of racial problems at the store certainly gives rise to the pretense on which Gunsby acted. This is especially evident in light of Gunsby's actions in attempting to "clean up" his own neighborhood of drug dealers and loiterers. (R579-591) Dr. Conley's testimony indicated that Gunsby suffered from a delusion that he had been anointed as an agent of God to rid the community of drugs and drug pushers. (R623) This was Gunsby's main delusion and Dr. Conley was unable to shake it even though the doctor spent almost seven hours with him. Dr. Conley characterized Gunsby's drug focus as a grandiose delusion. (R641)

Donald Gunsby's delusion helped form a pretense of justification which renders this particular aggravating circumstance inapplicable. This aggravating circumstance clearly requires not only a heightened premeditation but also the absence

of any pretense of justification. All aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Without a consistently narrow interpretation and application of this factor and all aggravating circumstances, the constitutionality of Florida's death penalty scheme is called into question. The trial court's reliance on this aggravating factor denied Gunsby his constitutional rights to due process of law and to a fair trial. Amends. V, VI, and XIV, U.S. Const. Gunsby's death sentence is therefore constitutionally infirm. Amend. VIII, U.S. Const.

B. The Trial Court Erred in Finding that Appellant Committed the Murder While Under Sentence of Imprisonment.

In finding that the capital crime was committed while Gunsby was under sentence of imprisonment (§921.141(5)(a), Fla. Stat.), the trial court stated:

> On March 4, 1988 defendant was sentenced in Case No. 87-2846-CC-A-X to serve 18 months in prison followed by two years Community Control on charges of Possession of a Firearm by a Convicted Felon and Carrying a Concealed Firearm. He was allowed five days to report to jail. When he failed to report on March 9, 1988, a warrant was issued for his arrest. The warrant was outstanding at the time of the murder on April 20, 1988. (R901)

The trial court cited Bundy v. State, 471 So.2d 9 (Fla. 1985); Brown v. State, 473 So.2d 1260 (Fla. 1985) and Martin v. State, 420 So.2d 583 (Fla. 1982) in support of the applicability of this aggravating circumstance.

Appellant candidly concedes that a finding of this particular aggravating circumstance is justified where the defendant was on parole at the time of the offense. See Straight v. State, 397 So.2d 903 (Fla. 1981). However, this Court has disapproved the finding of this aggravating factor where the defendant was on probation at the time of the offense. Ferguson v. State, 417 So.2d 639 (Fla. 1982). In Peek v. State, 395 So.2d 492, 499 (Fla. 1981), this Court held that:

> Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in Section 921.141(5)(a).

Ferguson was serving a two-year period of probation which followed an eighteen-month period of incarceration. This Court relied heavily on the above quote from Peek and concluded that, since Ferguson was not confined in prison at the time nor was he supposed to be, he was not within the parameters of this particular aggravating circumstance.

The cases relied upon by the trial court involve defendants who were either on parole or had actually escaped from custody. In the case at bar, Donald Gunsby had been sentenced but was not yet in custody. Appellant concedes that he did not report to the county jail for execution of his sentence as ordered by the trial court. Most of the cases dealing with particular aggravating circumstance concern defendants on parole, on probation, or defendants who have escaped from custody. See e.g. Mills v. State, 476 So.2d 172 (Fla. 1985); Ferguson v.

State, 417 So.2d 639 (Fla. 1982); and Bundy v. State, 471 So.2d 9 (Fla. 1985). This Court has held that status as a parolee or as an escapee is sufficient for the application of this factor, while probationary status is insufficient. Mills; Bundy; and Ferguson. Appellant submits that he was not on parole nor had he escaped since he had not commenced the serving of his sentence. Appellant submits that his status at the time of the crime was more akin to that of a probationer than that of a parolee or escapee. But see Stone v. State, 378 So.2d 765 (Fla. 1979). The application of this aggravating circumstance to Donald Gunsby violates his constitutional rights. Amends. V, VI, VIII, and XIV, U.S. Const.

C. The Trial Court Erred in its Consideration of the Mitigating Evidence.

The pertinent Florida Standard Jury Instruction provides:

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

This Court pointed out in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), that any consideration of mitigation must fall within certain established guidelines. Given the fact that the imposition of death by public authority is so profoundly different from all other penalties, an individualized decision is essential in capital cases. Lockett v. Ohio, 438 U.S 586, 604-605 (1978). Moreover;

> [j]ust as the State may not by statute preclude the sentencer from considering

> any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982)(emphasis in original, footnote omitted). See also Skipper v. South Carolina, 476 U.S. 1 (1986).

With these admonitions in mind, this Court set forth the guidelines that trial courts should use in the consideration of evidence offered in mitigation by a capital defendant. Rogers v. State, 511 So.2d 526, 634 (Fla. 1987). The trial court must first consider whether the facts alleged in mitigation are supported by the evidence. The court must then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. If such factors exist, the sentencer must then determine whether they are of sufficient weight to counterbalance the aggravating factors. Rogers, 511 So.2d at 534.

The trial court found Gunsby's mental and emotional condition as a single mitigating circumstance but concluded that it carried little weight. It is unclear whether the trial court found Gunsby's mental condition as a statutory or non-statutory mitigating circumstance, although it appears that the court considered it as a non-statutory factor. The trial court wrote:

> The court also considered the defendant's mental and emotional condition as a mitigating circumstance in imposing sentence. Defendant is mildly

> retarded and intellectually functions on a third or fourth grade level. Dr. Ira Conley diagnosed defendant as paranoid schizophrenic and determined that the defendant was under the influence of extreme mental or emotional disturbance at the time of the killing. Dr. Conley also opined that the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of society was substantially impaired. Dr. Umesh Mhatre and Dr. Rodney Poetter contradicted these findings. Their opinions are supported by the testimony of witnesses that the defendant did not exhibit any unusual conduct or behavior immediately prior to the shooting. Further, defendant's actions suggest that his capacity to appreciate the criminality of his conduct was not impaired. A short time after the murder the defendant attempted to establish an alibi for the time of the shooting. The jury considered the evidence of defendant's mental condition in making their recommendation and the court carefully considered, compared and weighed this information in the light of all the evidence in the case. Although defendant's mental condition was considered as a mitigating circumstance, the court finds that the defendant was not legally insane at the time of the murder nor at sentencing. Viewed in the light of defendant's past history of violence and the circumstances of this case, defendant's mental condition carries little weight. Martin v. State, 420 So.2d 583 (Fla. 1982).
>
> Upon consideration, the court finds that the aggravating circumstances far outweigh the mitigating circumstance the the only appropriate sentence is death, . . . (R902-903)

Appellant contends that the trial court ignored substantial evidence that established valid mitigating circumstances. The trial court also used an improper standard in reviewing the evidence presented in mitigation and also construed

that evidence. The trial court appears to state that only Dr. Conley found evidence of Gunsby's significant mental problems. (R902-903) While it is true that Dr. Mhatre found no evidence of Gunsby's mental problems, the same cannot be said of Dr. Poetter. It is true that Dr. Poetter concluded that Gunsby did not suffer from a severe mental illness such that his perception of reality would be extremely distorted. Poetter did find Gunsby's intellectual limitations to be a chronic problem resulting in Gunsby failing to appreciate all the ramifications of his actions. (R604) Dr. Poetter concluded that Gunsby was mildly retarded with an intelligence quotient below the first percentile of the general population. (R591-98) It should be noted that Drs. Poetter and Conley, who did observe some evidence of Gunsby's mental problems, spent much more time examining Gunsby than did Dr. Mhatre who found nothing amiss. Also, unlike Dr. Mhatre, Drs. Poetter and Conley conducted a battery of tests during the examination rather than placing complete reliance on a short interview.

The trial court states that there is no evidence that Gunsby's mental problems contributed to the crime, as evidenced by the fact that Gunsby did not exhibit any unusual conduct or behavior immediately prior to the shooting. (R903) This statement is a contradiction. The evidence established that Gunsby suffered from a grandiose delusion that he had been anointed by God as a general protector of the community, particularly from drug dealers. As such, his reaction to Jessie Anderson's hospitalization was not an exhibition of unusual conduct or behavior.

Rather, the murder could be predicted given the circumstances and Gunsby's mental state. It is therefore clear that the trial court was incorrect in giving Gunsby's mental condition little weight, in light of Gunsby's past history of violence and the circumstances of the case. (R903) Given these factors, the tragedy was probably inevitable.

The trial court further stated that Gunsby's action in attempting to establish an alibi after the murder was evidence of Gunsby's capacity to appreciate the criminality of his conduct. (R903) Contradicting this finding, Dr. Poetter, whose opinion the trial court respected, was not surprised that Gunsby attempted to arrange such an alibi. (R604-605) That same doctor also diagnosed Gunsby as suffering from a personality disorder which resulted in Gunsby encountering great difficulty conforming his behavior to the expectations of society. (R607-08)

Furthermore, there is evidence that the trial court employed an inappropriate standard in reviewing the evidence of Gunsby's mental condition. The trial court wrote that Gunsby was "not legally insane at the time of the murder nor at sentencing." (R903) In Ferguson v. State, 417 So.2d 631 (Fla. 1982), this Court remanded for resentencing because the trial court applied th wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge here, just as in Mines, misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the M'Naughten Rule which is

> the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under section 921.141(6), Florida Statutes.

Id. at 638. It is also enlightening to note that the mental health professionals examined Gunsby pursuant to orders from the trial court to focus on Gunsby's competence to stand trial as well as his insanity at the time of the offense. (SR1-20) The witnesses also seemed to focus on these issues when testifying at the penalty phase. (R567,569-70,603,633-34) Since there is certainly some doubt that the trial court employed the correct standard in considering this evidence of valid mitigating circumstances, this Court should, at the very least, remand for resentencing. Ferguson.

The trial court completely ignored other competent and unrebutted evidence of other non-statutory mitigating circumstances. It was not disputed that Gunsby's family had a history of mental illness. This Court has approved this finding as a valid mitigating circumstance. Thompson v. State, 456 So.2d 444 (Fla. 1984). Also, as previously mentioned, Gunsby attempted to keep his neighborhood free from drug dealers and other trouble makers. (R580-82) He helped old folks in the neighborhood and looked out for the children. He especially loved the neighborhood kids and frequently played games with them. (R580-82,587) Donald never had a relationship with his father, and there was some doubt as to who his father actually was. (R653) He had no memory of his biological mother who died in a mental institution

where she had spent most of her life. (R632-34) The woman who raised Donald noticed very early in his life that he was different from the other children. (R654-55) Donald could not function in school where he was relegated to the back of the classroom to play with toys while the other children learned. (R655-56) As a result of an accident that occurred while helping a stranger, Donald lost his janitorial job of which he was proud. This frustrated and depressed Donald. (R658-59)

The trial court failed to address whether the above evidence was proven by the defense. The trial court failed to state whether it considered the above evidence to be mitigating and, if so, how much weight the evidence was entitled. This resulted in a violation of the spirit of Lockett v. Ohio, 438 U.S. 586 (1978) and villifies the "individualized decision" essential in every capital case. The problem of a trial court's refusal to find uncontroverted mitigating evidence is discussed in Waters, Uncontroverted Mitigated Evidence in Florida's Capital Sentencing, Fla.B.J. January 1989, at 11. The trial court's treatment of the mitigating evidence has resulted in an unconstitutional death sentence. Amends. V, VI, VIII, and XIV, U.S. Const.

POINT VIII

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

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

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

Caldwell, 472 U.S. at 333.

Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) modified on denial of rehearing, 816 F.2d 1493 (1987), held that Caldwell mandates the reversal of a conviction where an advisory jury is misled as to the importance of its role. The trial court in Adams incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself. The trial judge instructed the jury that he could disregard the jury's recommendation, even if the jury recommended life imprisonment. The Eleventh Circuit pointed out that this constituted a misstatement of the law. In fact, Florida law

allows for an override of the jury's recommendation of life imprisonment only upon a clear and convincing showing that it was erroneous. McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Tedder v. State, 322 So.2d 908 (Fla. 1975).

The decision of the Eleventh Circuit was reversed in Dugger v. Adams, 109 S.Ct. 121 (1989). The United States Supreme Court concluded that Adams was procedurally barred from raising the issue in a federal habeas corpus proceeding where Adams did not object to the remarks at trial or challenge them on direct appeal. The Court pointed out that in the vast majority of cases, this Court has faithfully applied its rules that claims not raised on direct appeal cannot be raised on post-conviction review. See e.g. Bertolotti v. State, 534 So.2d 386, 387 (Fla. 1988); Clark v. State, 533 So.2d 1144, 1145 (Fla. 1988). Gunsby is now raising this point before this Court for the first time on direct appeal in an effort to avoid subsequent procedural bar. Appellant candidly admits that defense counsel failed to object to this error at trial.

It now appears that, in order to establish a Caldwell violation, a defendant must show that the remarks to the jury improperly described the role assigned to the jury by local law. Dugger v. Adams, 109 S.Ct. 121, 103 L.Ed.2d 435, 443 (1989). The Eleventh Circuit has stated simply that jurors and prospective jurors are not to be misled as to the applicable law on this issue. Stewart v. Dugger, 847 F.2d 1486, 1492 (11th Cir. 1988). On the other hand, the function of the jury and of the individual jurors must not be belittled by misstatement of the law. Id. A

defendant is entitled to have the jury made fully aware that the results of the sentencing deliberations will play an important part in the sentencing process. Id.

Throughout Donald Gunsby's trial the jury was repeatedly told that their sentence recommendation was advisory only. They were repeatedly told that the final decision as to the proper sentence was solely the responsibility of the trial judge. (R38,71,83,96,126,131,529-30,546-47,667,670,676-77,692, 694-6) In contrast to the numerous instances where the jury was told that their verdict was only an advisory recommendation, the jury heard only five times a suggestion that their recommendation would be given great weight by the trial court. (R39,71,83,126, 667) The last time that this was suggested to the jury was during the prosecutor's closing argument at the penalty phase.

> The Judge is going to tell you that, at this part of the trial, the law requires that you as members of this community and as members of this jury, to weigh all of the evidence in this case and weigh all of the items that you (sic) have presented to you today and render to Judge McNeal an advisory sentence that you feel is justified by the law and by the evidence as to what sentence Judge McNeal will impose.
>
> The Judge is going to tell you that here in the State of Florida, the jury that tries the case is generally the jury that renders this recommendation and that's what we're doing here today and he's also going to tell you that, in rendering this advisory sentence, it is simply that.
>
> It is an advisory sentence that you feel as the 12 members of the jury that heard this case, feel that is justified by what the law is in the State of Florida and you are telling Judge McNeal that's the sentence that you think he should impose.

> And I think the Judge will candidly tell you that -- that he will give that recommendation great weight, he will place great weight on that recommendation.
>
> But he is the ultimate decider in this case of what sentence to impose and he will do that when this procedure is over. (R666-67)

In spite of the prosecutor's assertions, the trial court inexplicably failed to instruct the jury that their recommendation would be given great weight in deciding the ultimate sentence. (R692-96)

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the prosecutor's statements in closing arguments which were not corrected by the trial court could have misled the jury into believing that its role was unimportant, thereby violating Mann's Eighth Amendment rights under Caldwell. Appellant submits that the totality of the remarks by the prosecutor and the trial court certainly could have misled the jury into believing that its role was unimportant. This is especially true in light of the prosecutor's closing argument regarding this issue coupled with the failure of the trial court to instruct the jury that their recommendation would be given great weight. Since the jury's role was denigrated by the totality of comments, argument, and lack of instructions, Donald Gunsby's death sentence is constitutionally infirm. Amends. V, VIII, and XIV, U.S. Const.; Caldwell v. Mississippi, 472 U.S. 320 (1985).

POINT IX

NUMEROUS ERRORS THROUGHOUT THE PROCEEDINGS HAD THE CUMULATIVE EFFECT OF DENYING GUNSBY HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Due to space and time constraints, Appellant includes this point is a type of catch-all point containing issues which either considered alone, in combination with each other, or in combination with other points presented in this brief had the cumulative effect of denying Donald Gunsby his constitutional right to a fair trial.

After both sides had exhausted all peremptory challenges, the prosecutor requested one additional challenge for each side. The trial court denied the request. (R141-42) A defendant charged with a capital crime must select twelve jurors and is limited to only ten peremptory challenges, the same number as a defendant charged with a felony punishable by life imprisonment. §§913.08(1)(a) and 913.10, Fla. Stat. (1987); Fla.R.Crim.P. 3.270 and 3.350(a). There is no compelling interest nor rational basis for limiting the peremptory challenges available in a capital case and not necessarily limiting the number of peremptory challenges in a felony case with multiple counts. See Fla.R.Crim.P. 3.350(e). This limitation denied Donald Gunsby effective assistance of counsel, his right to a fair trial and his right to due process of law. Amends. V, VI, VIII, and XIV, U.S. Const.

At several points during the trial, the state objected to certain testimony that defense counsel sought to elicit on

cross-examination. The trial court sustained the objections and limited cross-examination. (R272,288-89,298-300) Coxwell v. State, 361 So.2d 148 (Fla. 1978). The trial court also sustained several state objections to certain testimony that defense counsel sought to elicit. (R417,431) Limiting any type of defense evidence in a capital trial can be an extremely delicate matter. Hitchcock v. Dugger, 481 U.S. 393 (1987), and Washington v. Texas, 388 U.S. 14 (1967). Additionally, defense counsel evidently had additional state witnesses subpoenaed. The state released those witnesses from their state subpoenas and as a result, defense counsel was unable to locate the witnesses in order to present their testimony at trial. This was apparently through no fault of defense counsel. (R476-478)

During the presentation of the state's rebuttal witnesses, defense counsel requested permission to approach the bench, evidently to place an objection on the record. (R476) The trial court denied defense counsel's request. This resulted in a denial of Gunsby's constitutional right to effective assistance of counsel. Amends. VI and XIV U.S. Const.; United States v. Cronic, 466 U.S. 648, 668 n. 25 (1984). Cf. Strickland v. Washington, 466 U.S. 668, 692 (1984).

POINT X

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

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

The death penalty is imposed in Florida in an arbitrary and capricious manner on the basis of factors which should play no part in the consideration of sentence. These factors include the following: race of the victim, race of the defendant, geography, occupation and economic status of the victim as well as the defendant, and gender of the defendant. (R800-825)

Section 921.141, Florida Statutes (1987) is unconstitutional on its face and as applied based upon the arbitrary and capricious manner in which various prosecutors decide to seek the ultimate sanction in any given case. An individual indicted for first-degree murder does not face the death penalty unless the prosecuting attorney makes a conscious decision to seek the ultimate sanction. Because of the lack of adequate guidelines, the decision to seek a death sentence will, to a great degree,

depend upon the whim of the individual prosecutor. Florida's death penalty statutory scheme contains no directions or guidelines to minimize this risk. The United States District Court, Central District of Illinois, recently vacated a death sentence and declared the Illinois death statute to be unconstitutional based upon this contention. United States of America, ex. rel. Charles Silagy v. Howard Peters, III, et. al., Case No. 88-2390 (April 29, 1989). In so ruling, the federal district judge pointed out that four justices of the Illinois Supreme Court have joined in writing that the statute violates the provisions of the Eighth Amendment of the Federal Constitution. In his order, the federal district judge adopts the rationale of Justice Ryan in People v. Cousins, 77 Ill. 2d 5531, 558-69 (1979)(Ryan, J. dissenting) cert. denied 445 U.S. 953 (1980).

The Florida statute is unconstitutional on its face, because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the reception and finding of such evidence by the jury in court. It thereby violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Specifically, the language of three statutory mitigators require "extreme mental or emotional disturbance," "substantial" impairment of one's ability to appreciate the criminality of of his conduct or to conform his conduct to the requirements of the law, and "extreme" to describe the level of duress. §§921.141(6)(b)(e)(f), Fla. Stat. (1987). Two of these mitigating circumstances were arguably applicable to Donald

Gunsby's case. Trial counsel also raised this issue below in a pretrial motion. (R794-795)

Appellant also contends that the jury instructions at the penalty phase impermissibly and unconstitutionally shift the burden of proof to the defendant once the state establishes sufficient aggravating circumstances. (R692-694,858-859) The prosecutor's closing argument at the penalty phase also unconstitutionally shifted this burden. (R677,682)

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

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio,

438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

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

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

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

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

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

Eighth and Fourteenth Amendments to the United States Constitution.

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

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

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and

mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In at least two decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital

defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. 279 (1987)(dissenting opinion of Brennan, Marshall, Blackman and Stevens, JJ.)

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing reasons and authorities Appellant respectfully requests this Honorable Court to grant the following relief:

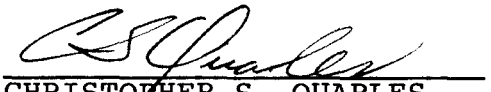
As to Points I, II, III, IV, and IX, vacate the conviction and sentence of death and remand for a new trial;

As to Points V, VI, VII and VIII to vacate the sentence of death and remand the cause for imposition of a life sentence, or alternatively remand for a new sentencing proceeding;

As to Point X, to declare Florida's death penalty statute unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 and to Mr. Donald Gunsby, #020985, P.O. Box 747, Starke, Fla. 32091 on this 28th day of July 1989.

CHRISTOPHER S. QUARLES
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