IN THE SUPREME COURT OF FLORIDA

ULRICK OMELUS,
Defendant/Appellant,
vs.
STATE OF FLORIDA,
Plaintiff/Appellee.

CASE NO. 73,911

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

By Indictment, the State alleged that:

> "Ulrick Omelus, on or between October 15, 1986 and October 31, 1986, in The County of Brevard, and State of Florida, did then and there aid, abet, counsel, hire or otherwise procure another, JOHN HENRY JONES, to commit a criminal offense against the State of Florida, to-wit: FIRST DEGREE MURDER FROM A PREMEDITATED DESIGN, to unlawfully kill a human being, WILLIE MITCHELL, by STABBING WILLIE MITCHELL WITH A KNIFE OR OTHER SHARP INSTRUMENT, and said killing was perpetrated by said JOHN HENRY JONES, from a premeditated design or intent to effect the death of said WILLIE MITCHELL, contrary to Sections 777.011 and 782.04(1)(a)1, Florida Statutes [.]

(R1937). Private counsel (Mr. Robert G. Udell, Esq.) was appointed to represent Mr. Omelus because the Office of the Public Defender was representing an essential state witness (Gerald Crayton). (R1945-47)

The first trial, held in July, 1988, ended with a hung jury. (R2078) Thereafter, the trial judge (Honorable Lawrence V. Johnston, III) was recused because, "before the existence of aggravating or mitigating circumstances was even mentioned to Judge Lawrence V. Johnston he made the announcement in his courtroom that regardless of the jury's recommendation as to the death penalty he would not sentence the defendant to death in this cause." (R2085,2095) The case was re-assigned to the Honorable John Dean Moxley (R2098), and tried again in October, 1988. Defense counsel obtained a pre-trial ruling forbidding the state from mentioning an Indian River County murder until the relevance of that murder, in reference to the Brevard County murder for which the defendant was on trial, was shown. (R37-39) Two motions for mistrial followed, one during opening statement when the prosecutor mentioned facts concerning the Indian River County murder (R590-92), and another when the state questioned its key witness (John Henry Jones), who committed both the Brevard County and the Indian River County murders. (R840-41) Both motions for mistrial were denied. (R592,919)

At the conclusion of the state's case defense counsel moved for a judgment of acquittal, arguing that the state had failed to prove that Omelus had hired Jones to murder Willie Mitchell with a knife, as had specifically been alleged in the Indictment. (R1547-50) The motion was denied. (R1550) The defense rested without presenting any evidence and renewed the motion for judgment of acquittal. (R1557) The trial judge again denied the motion, this time explaining his reasoning. (R1557)

There were no objections to the jury instructions, either as proposed during the charge conference (R1562) or as given. (R1712) During closing argument, both sides argued to the jury that, although jury instructions would be given concerning lesser included offenses, such a verdict would be a compromise, and that the verdict should either be guilty of first-degree murder or not guilty. (R1568-69, 1712) Deliberation began at 12:46 P.M. on October 19, 1988 and a guilty verdict was returned (after overnight sequestration) at 8:57 P.M. on October 20, 1989. (R1725) The court received several communications from the jury (R2560-67); one requesting further instructions was resolved in open court in the presence of the defendant and counsel. (R1718-25) The jury foreman stated that the jury was "particularly interested" in obtaining a transcript of the testimony of John Henry Jones, but was told by the trial judge without objection that unless the request could be narrowed, it would be impossible to provide the jury with a copy of Jones' testimony. (R1722-23)

The penalty phase occurred a month later on November 17, 1988. Omelus, in writing, waived the statutory mitigating circumstance of no significant history of prior criminal activity. (R2135-36) Defense counsel moved to strike as an aggravating factor Section 921.141(5)(h) (especially heinous, atrocious or cruel murder) on the basis of Maynard v. Cartwright 486 U.S. ___, 108 S.Ct 1853 (1989). (R1753,2051) The court ruled, "I'm going to take care of Maynard. I'm going to [define] H, C and A at Dixon, 283 So.2d 1, and that will take care of the Maynard problem." (R1754) The court continued:

> I'm not going to, quote, D.V. on any aggravating circumstance. The law is if you cannot agree which do and do not apply, then the Court is authorized to instruct upon all of them. The legal sufficiency is going to be by virtue of the sentencing order of this Court, should there be one necessary. And I'm looking at Cooper so I can give an instruction which passes muster under Maynard. Because they didn't actually, they did not adequately in Oklahoma identify what that circumstance means. Okay?

(R1754-55)(emphasis added) Defense counsel moved to add separate instructions identifying as non-statutory mitigating factors being a model prisoner and having potential for rehabilitation. (R2051) These requested instructions were denied. (R1808-10) Thereafter, the state presented the testimony of a single witness, that being the medical examiner who performed the autopsy of Willie Mitchell. (R1770-1819) After testifying in sordid detail concerning the extent of Mitchell's injuries, the medical examiner admitted during cross-examination that Mitchell would not have lived for more than two or three minutes from the time the attack commenced, and that during a portion of that time Mitchell would have been unconscious. (R1818) Several additional photographs showing the injuries to the victim were introduced into evidence and published to the jury. (R1771,1790-1807,1814).

Omelus testified in his own behalf and presented the testimony of five witnesses. Deputy Sweazy testified that Omelus has always conducted himself as a model prisoner. (R1831-33) Corporal Williams from the Brevard County Sheriff's Office testified that while Omelus was in the sheriff's custody only one trivial administrative action was taken against Omelus for giving

a cigarette to a juvenile inmate. (R1823-27) Three friends described Omelus as a religious, loving father who was a good provider for his family. (R1834-44) Omelus described his impoverished childhood in Haiti (R1860) and his trip to America in an open boat with 209 other Haitians. (R1862-68)

The jury was instructed on three aggravating factors, to wit: especially heinous, atrocious or cruel murder, murder for pecuniary gain, and a cold, calculated and premeditated murder with no pretense of legal or moral justification. (R1920-22,2568-2572) The death penalty was recommended by an 8-4 margin. (R1929-31,2143) The trial judge followed the recommendation, finding two statutory aggravating factors (murder for pecuniary gain and a cold, calculated and premeditated murder with no pretense of moral or legal justification) and one non-statutory mitigating factor (the actual killer received a life-sentence). (R2196-2202; Appendix A) The court did not consider Omelus' potential for rehabilitation; conduct as a model prisoner; conduct as a good father and family provider; or his impoverished childhood in Haiti. On March 16, 1989 Omelus was adjudicated guilty of first-degree murder and sentenced to death. (2203-05,2770-71) A timely notice of appeal was filed that same day (R2184) and the Office of the Public Defender was appointed to represent Mr. Omelus for this appeal. (R2187) This brief follows.

STATEMENT OF THE FACTS

John Henry Jones is six foot three inches tall; he weighs 220 pounds. (R1003) He is a self-admitted cocaine addict (R1061), having used crack cocaine every day for three years. (R1093) Around 7:00 P.M. on October 31, 1986, (Friday), Jones reported that he had found a body approximately 210 feet east of the FEC railroad in a bushy area behind the ABC Lounge in Cocoa. (R620-22,625-29,666)

Deputy Tamillo of the Brevard County Sheriff's Office responded around 7:30 P.M. (R620-22) and found the body of a black male, five feet eight inches tall, weighing approximatley 148 pounds. (R663-64) The body was determined to be that of Willie Mitchell. (R649,674-77) Police found only coins and an old arrest form in Mitchell's pockets; there were no items of real value. (R656,674,676,814-18, State's Exhibit 36) The body was cold and stiff when the police arrived; many flies were around the head of the victim. (R672) The police photographer saw insect larvae around Mitchell's eyes. (R818) Mitchell had apparently been assaulted roughly 20 feet from where the body was lying. (R650-53) Mitchell's shoes had been placed neatly next to his body. (R769,797-98) The body could not be seen from the path where the attack occurred. (R660)

The Medical Examiner arrived at the scene and noted that Mitchell's body was lying face down amid shrubs and high weeds; blood was on the body and multiple stab wounds were visible on the neck and thorax area. (R709-12) An autopsy performed the next morning revealed that Mitchell died from

multiple stab wounds, primarily in the chest and neck area, both front and back. (R714) There were at least nineteen wounds consistent with having been inflicted by a single-edged knife. (R715-18) Several wounds had been inflicted after death. (R723) Mitchell displayed defensive wounds to the hands and wrists. (R727-28) A toxicology report revealed the presence of cocaine and marijuana in Mitchell's blood. (R734)

The doctor noted several potentially fatal wounds to the lungs and chest cavity (R722), and reasoned that the attack probably lasted no longer than four minutes. (R753) The first stab wound described by the doctor was the immediate cause of death. It entered the right side of Mitchell's neck in the anterior compartment of the neck, crossed over to the midline of the neck and went through the neck into the vascular compartment on the opposite side of the neck; it was "obviously a very lethal type of wound." (R722) That wound may have been the first wound inflicted. (R732) The Medical Examiner was unable to determine the time of death to any degree of medical certainty. (R735-40) The presence of maggots during the autopsy was inconsistent with the premise that Mitchell was alive at four o'clock on the morning of October 31; it commonly takes 24 hours for maggots to appear. (R758,776)

On November 6, 1986 Deputy Leatherow met with and obtained a taped statement from an insurance salesman (Hagerman) who claimed that Omelus had recently assisted Mitchell obtain an insurance policy, and had attempted to recover benefits after finding out that Mitchell had been killed. (R680-83,780,2648-65)

Omelus had purchased a fifty thousand dollar life insurance policy on himself on July 1, 1986. (R2648-49) On July 14, Omelus purchased a health insurance policy for himself and his child. (R2650) On August 15th Omelus brought in a friend (Wilson Francois) to obtain life insurance in the sum of fifty thousand dollars; Francois' wife was the beneficiary. (R2651,2647)

Omelus next met Hagerman on October 4, 1986. (R2652) Omelus was accompanied by a Haitian male identified as Willie Mitchell, Omelus' cousin (R2653), who lived with Omelus. (R1289) Mitchell's English was very broken. Omelus interpreted as he had with Francois, and for $75.00 Mitchell obtained a fifty thousand dollar life insurance policy effective immediately. (R2653) On October 29, 1986 Omelus brought in two Haitian women (Juliette Loriston and Pauline Hipolette) so they could obtain insurance. (2654) The women had to borrow $15 from Hagerman in order to to purchase the insurance. (R2654) Hagerman stated that Omelus brought him the $15 the next day, which would have been Thursday, October 30, 1986. (R2654-55) Hagerman stated that Omelus came back around 5:00 P.M. that same day (October 30) to ask if Willie Mitchell had health insurance, because he had heard that Mitchell had been cut up pretty badly in a knife fight and that Mitchell needed the money to pay for hospital bills. (R2656) Hagerman told Omelus that Mitchell had life insurance, not health insurance. (R2657) Omelus left.

Hagerman next saw Omelus on November 5, 1986 when Omelus told Hagerman that Mitchell had died from the incident in North Gifford. (R2657-58) Hagerman became suspicious and called

the police after Omelus left. (R2659-61) Hagerman initially called the police in Vero Beach to verify that Mitchell had been killed there as represented by Omelus and was told no one by that name had been killed. (R1417) Thereafter, Brevard County deputies called Hagerman and informed him that Mitchell had died in Cocoa Beach and they were interested in talking to him. (R1417) Hagerman gave the police a taped statement and told them that, when Mitchell obtained insurance, he had to refer to a 3 x 5 card containing a social security number and date of birth (R1417-18, 2664).

In early December, Deputy Leatherow met with Gerald Crayton, who was facing charges for possession and sale of cocaine. Crayton wanted to deal and told police that Jones (the person who reported Mitchell's body) was the murderer; he agreed to meet with Jones while under electronic surveillance and try to learn who had hired Jones to kill Mitchell. (R684-87,1225-26) Two such meetings occurred, both during trips in Crayton's 1985 Cadillac as they drove from Cocoa in Brevard County to the Wabasso area in Indian River County to obtain cocaine. (R685-90) Both taped conversations, in edited form, were introduced into evidence over hearsay objection. (R2539-2548; 2549-2558) The first trip occurred December 16, 1986; the second on January 14, 1987. (R1027,1040) At the end of the second trip, Crayton's vehicle was stopped and Jones was arrested for the murder of Willie Mitchell. (R688-90)

On January 16, 1989 Omelus voluntarily came into the police department to talk with the officers when he heard that

they were looking for him. (R694-95,1241-43,1291) In a taped statement that was introduced into evidence over objection, Omelus denied any involvement in the murder and stated that he did not know John Henry Jones. (R792,2826-2832) Omelus gave the police two telephone numbers where he might be reached. (R787) The first number was to a telephone booth; the second number was to a residence rented by several Haitian residents. (R796) The phone number to the Haitian residence and the name "John" appear on a paper found in John Henry Jones' wallet. (R1329)

John Henry Jones murdered Willie Mitchell. (R831) He has been convicted and sentenced for that murder. (R831) Jones claims that a person named "John", who he identified as Omelus, hired him to commit the murder. (R831-32) Jones claims that he met with Omelus "between from one to about four times". (R835) Jones first met Omelus when Jones was remodeling Bernard Knight's house in Cocoa Beach in June-July of 1986. (R833) Jones claims that Omelus brought some cocaine to Bernard Knight, who was not home at the time, and that Jones spent approximately 45 minutes talking to Omelus. (R833-34) Jones stated that when he first met Omelus, Omelus did not bring up the subject of having Jones do something for him, but instead brought it up in the second meeting. (R835-36) The second meeting occurred approximately a week after the first meeting. (R836-37) "He [Omelus] asked me would I, do I know, do I know anybody would collect money or help him out about getting some money back from some people owe him." (R837) Jones explained that the money was owed Omelus for cocaine. (R837) Jones told Omelus that he would check around and

see. (R837) About a week and a half later, Jones saw Omelus and told him that he could not find anyone, but that he (Jones) would take the job. (R839) At trial Jones testified that he understood that the collection was to use threat or force to require the payment of funds. (R839) At the next meeting, the job description changed; [By Jones] "This conversation at that time, he didn't -- he wanted him dead, he didn't want him -- 'cause they been cheating him and he didn't want him to owe him. That's the way he wanted me to solve the murder -- solve the payment, by murder and then he went on again, someone who had took -- who had took some insurance policies out on him and they made, this is what he told me, they made -- what is the victim's name?" [By prosecutor] "Willie Mitchell" [By Jones] "All right, he made him sign some kind of insurance policy." (R840) Jones agreed to commit the murder, though he did not know who the victim was to be because that had not yet been specified. (R841)

According to Jones, on the last Friday in August Jones and Omelus went to Burnett Road in West Cocoa to see Crayton to obtain a "weapon". [2/] (R973-75) After obtaining the weapon, Jones and the defendant went to Wabasso and spent the night in apartment 9 of a motel a few thousand feet off U.S. 1. (R975-76) Jones left Wabasso the next day. (R976) Jones and Omelus maintained a relationship after the August incident and later discussed

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[2/] This testimony refers to the murder of Dessama Cherry in Indian River County by Jones, which was accomplished with a .45 caliber pistol Jones obtained from Crayton. The pistol was returned to Crayton before the murder of Mitchell. At the judge's direction, the term "weapon" was substituted for the word pistol or knife. (R947-49) There was no objection.

committing the murder of Willie Mitchell. However, prior to October 30th, Omelus never revealed the name of the person whom he wished killed. (R977) Jones claimed that Omelus "said (Mitchell) had ripped him off of some cocaine, he owed him for cocaine and he, that's the only way he probably can get his money, about killing him because -- he was telling me about they had, someone else had insurance on him and that's the way they're going to get their money out of it." (R977)

Jones testified that he did other favors for Omelus. Jones was paid between two and five hundred dollars to keep Omelus' automobile. (R978) Jones claimed that Omelus wished to have people believe the car had been seized by police. (R978-86) Jones stated that he and Omelus drove to a service station a little way from Palm Bay and made a phone call. "He told him the police was after him and he was halfway to, on U.S. 1, halfway to Wabasso and for somebody to come and pick him up because the police was after him. And I think the scam was he was taking the cocaine from the people he was delivering for because then he wouldn't have to pay if he said the police had his car, I think that's what it was about." (R981)

Jones stated that Omelus gave him forty dollars and said that he'd come back and would pay him for keeping the car. (R981) Jones claimed that Omelus came to see him twice while Jones had possession of Omelus' car (R982), once when Omelus brought a copper box full of change to be used to put gas in the car, and a second time when Omelus was brought by Jones' nephew to an auto repair shop to meet Jones. (R982)

According to Jones, on October 30, 1986 Omelus returned to Cocoa to get his car. (R986-87) Jones was at the body shop when Omelus arrived. (R987-88) The body shop was about three blocks from Jones' nephew's house. (R988) Jones and the defendant walked an eighth mile to Omelus' car, which Jones had parked in a downtown Cocoa Village parking lot. (R988-89) They returned to Jones' nephew's house and got out of the car. (R989) Omelus gave Jones some checks that he wanted disposed to Jones, who tore them up and threw them in a dumpster. (R989-90) Jones observed that the phone number on the checks matched the one that had previously been given him by Omelus, but Jones did not recall the name (Omelus) that was on the checks; he could only tell the police that the person who hired him was named "John". (R990-91)

According to Jones, after Jones threw the checks in the dumpster, he and Omelus drove to Gifford in Indian River County. (R992) On the way they stopped at an abandoned building/wash house that had people standing out front. Jones knew none of them. Omelus called to one person who came and got in the back seat of the car. They drove off. (R993) Jones described the man as small and dark skinned. (R994) The group travelled on U.S. 1 toward Cocoa, but stopped at a 7-11 convenience store; Jones was given twenty dollars by Omelus to buy beer. (R994) When Omelus went inside the 7-11 to make a telephone call, he indicated to Jones that the person in the back of the car was the one he wished to have the job done on. "He told me that's the fellow he was talking about and that's the one he wanted me to do the job on. I was handing the money and he told me to keep it." (R995)

According to Jones, after leaving the 7-11, the group went to Cocoa and stopped at Bernard Knight's house. (R996) Jones and Mitchell stayed in the car while the defendant went into Knight's house, stayed for three or four minutes and came out. (R996) "He came out, he hand me a big bag of cocaine and told me this is some- thing for us we can get high off and sell. He wanted the man we picked up in the back seat, he wanted him to help me sell it because I was a good salesman and after I already know he was, what was going to, supposed to take place." (R996-97) The group then drove to Jones' nephew's house and Jones and Mitchell got out of the car. (R997) Jones and Mitchell then went inside and started smoking cocaine. (R997) Omelus left, then came back, blew the horn and told Jones' nephew that he wished to speak to either Mitchell or Jones. (R997-98) Omelus talked to Mitchell first, and Jones last. (R997-98) Jones claimed the following occurred:

> (Jones) He told me he told Mitchell he was coming back to pick him up at one o'clock so he had him fooled. He told him he was going to get a motel and he would be back cause he had a girl and cause he was going to be with her and he'd be back at one o'clock to pick him up and we could go and sell some cocaine and he told him to stay to the house with me until he come back. (R998)

Omelus left; Jones returned to the house and smoked more cocaine with Mitchell and his nephew and perhaps a few more people; Jones was uncertain. (R999) Jones stayed for about an hour and smoked cocaine. Jones and Mitchell then caught a ride to west Cocoa on Burnett Road and sold and smoked more cocaine. (R999)

Jones saw Gerald Crayton on Burnett Road and asked him for a weapon; however Crayton did not have a weapon. (R999-1000) Jones saw Edgar Dugger on Burnett Road and asked him for a gun, but Dugger only had a knife, which Jones accepted. (R1000-01) Mitchell and Jones then caught a ride back to town with a girl, and Jones gave her some cocaine because she was a cocaine user and she knew that Jones had cocaine and he did not want her following him around. (R1001-02)

Jones and Mitchell returned to his nephew's house and smoked more cocaine. (R1004) They consumed all of the cocaine that had not been sold. (R1004) Around 2 or 3 o'clock in the morning, Jones took the money obtained from selling cocaine and went to buy more cocaine; he came back to the house and he and Mitchell smoked that. (R1005) Mitchell did not accompany Jones to obtain that cocaine, but stayed at Jones' nephew's house. (R1006) Jones travelled approximately 500 yards to obtain the additional supply of cocaine. (R1006) Mitchell evidently became worried about Omelus' absence and wanted to go home, so Jones told Mitchell they would try to find him a ride. (R1006-07) At this point Jones was high and only thinking about letting Mitchell go home and not of killing him. (R1007) When they could find no ride for Mitchell, they returned to his nephew's house and smoked more cocaine. (R1007) By this time it was getting real late and, knowing they had smoked up all the cocaine and spent all the money, Jones told Mitchell that perhaps he could catch a bus to get a ride home. (R1008)

They went to the bus station, but it was closed; they went by another fellow's house but he was not yet home. (R1008) As Jones and Mitchell walked by the railroad tracks Jones began thinking that Omelus had told him to not ever cross him, "cause we can be friends a long time until I cross him, you know. And I thought about me smoking up all of the cocaine and didn't have the money. The same thing probably would have happened to me. It could be a hit being put on me because -- if I didn't do the job what I decided I would do." (R1008) Jones, who at the time weighed 164 pounds due to his cocaine addiction (R1003), then killed Mitchell by stabbing him. (R1009-12) While being killed, Mitchell screamed, "I'm going to pay you." (R1078) Jones left and went to his nephew's house to wash up. Jones took the clothes and threw them in a dumpster, then smoked more cocaine with friends that were at his nephew's house. (R1013)

Later that morning Jones returned to the scene because he had dropped the knife and wanted to get it; Jones discovered that Mitchell had crawled into the bushes. (R1013-14) Jones saw that Mitchell was dead. (R1015) He obtained his knife, cleaned it, and then disposed of it by throwing it down a sewer drain. (R1015) After disposing of the knife, Jones returned once more to check on the body; he reported it later that evening. (R1018) Sometime during that day Jones went to Bernard Knight's house and saw the 280Z that Omelus had been driving and went across the street to wait for Omelus to come out. (R1022-23) According to Jones, when Omelus emerged, Jones told him what had happened the preceding night and was given cocaine:

> "I told him everything was, had been taken care of and he told me, good, he said -- after I walked away from the girls, 'cause we didn't let the girls know what we was saying 'cause he met me, he asked me did I have any money on me I said no, I did not. He said, 'all the cocaine gone?' I said yes. He said, 'okay.' He said, 'I'll be back.' He said 'wait a minute,' he said 'let me go inside, I'll be back.' He went inside and he came out and gave me a handful, a big bag of cocaine and told me he'd be back to see me. -- I gave the girls some cocaine before they started smoking 'cause I told them I had to go. They was trying to get me to stay 'cause I know when I start it's hard to stop, you just can't stop 'til everything's gone. (R1023)

Jones gave the girls some cocaine (R1024), and then went to a friend's house and gave them some cocaine. (R1024) Jones has only met Omelus twice after that. Jones called and told Omelus that he wanted some money and Omelus stated that the police had been down to talk to him about the murder and had asked him questions. (R1024-25) Jones stated that Omelus agreed to pay him $3,000 and a car and a motorcycle, and that the $3,000 could have been comprised of both money and cocaine. (R1025)

About a month and a half after the murder, Gerald Crayton and Jones travelled together to Wabasso. (R1027) Jones believed that they were trying to obtain some cocaine and was unaware that the police were monitoring their conversation. (R1035) While in Wabasso, Crayton and Jones went to the house where Omelus was staying with other Haitians in an effort to get cocaine, but Omelus was working. (R1036-37,2265-89) While on this trip, they met Mr. Cartwright, who was driving a blue car

with tinted windows (2260-61) and told him that they were looking for John to buy some cocaine. (R1038-39) After speaking to Cartwright and finding out that Omelus was at work they then went back to Cocoa. (R1039)

Jones' surreptiously recorded conversations with Crayton on that first trip indicate that they (Crayton and Jones) were going to see "John" (later identified by Jones to be Omelus) to obtain cocaine. (R2232) Jones told Crayton that he still had the chrome .45 pistol that he had previously pawned to Crayton. (R2237-40) Crayton told Jones that he heard that Jones had used a knife on Mitchell at the railroad tracks after Jones was unable to get a "throw-away" from Crayton or Edgar Dugger. (R2241)

Jones told Crayton that he and Mitchell had fifty pieces of rock cocaine that night. (R2241-42) Each log sold for thirty dollars. (R2272) Jones explained that he had to report Mitchell's death so the insurance people would pay off. (R2243-44) Jones bragged that he left while Mitchell was alive and that before leaving Jones took a brick and hit Mitchell in the head. (R2249) Jones stated to Crayton, "He (Mitchell) had money, I made sure of that much."(R2271)

Jones' second trip to Wabasso with Crayton occurred on January 14, 1987; that was the day Jones was arrested. (R1040) The trip was again to obtain cocaine. (R1040-41) They drove to the same two locations in Wabasso but again did not find Omelus. (R1041) A recording of Crayton's conversation with Jones was obtained by the police. (R2274-2292) In this conversation, Crayton asked Jones whether he could handle a killing in the same

manner as before whereby Crayton could receive insurance benefits. Jones stated that "Clyde" could forge a signature on a policy, and that all that would be needed was a birthdate and a signature. (R2277-78)

Jones was arrested at the conclusion of the trip on January 14, 1989. After being advised of his rights, Jones stated he knew nothing about Mitchell's murder. (R1043) Jones has three felony convictions, including the first-degree murder of Mitchell. (R1043) Jones testified that Bernard Knight was a drug dealer, who once had him test the quality of cocaine brought by Omelus (R1051,55); Knight testified that he was not a drug dealer and that he never asked Jones to test cocaine brought to him by Omelus. (R1189) Jones vacillated about how many times he had seen Omelus at Knight's house before meeting him (R1053-54), and was inconsistent about when the subject concerning having someone do collections for Omelus arose. (R1054) Jones' once said that in the very first conversation with Omelus, Omelus asked him if he knew someone to collect some money. (R1056) Later Jones said it was the second meeting when Omelus brought up the subject because people had ripped him off and he was losing money and stuff. (R1064) Jones told Omelus that he could find no one to do the job, so he would do it himself. (R1064)

Jones claimed that Omelus never discussed collection work in front of anyone else, so everything concerning their agreement was based on Jones' word alone. (R1058-59,62) Jones allegedly asked two people to do the collection work for Omelus, (Edgar Dugger and a fellow named Leroy). (R1061) The "job"

became murder very quickly: (Jones) "Like I say, about two, three days after and he came again and he asked me after, he said, he told me don't want no money, he say 'cause they done ripped him off again about $8,000. Somebody broke into his house and took some more dope or some- thing and he's tired of it and he wanted him dead." (R1065) At that meeting no money changed hands, but Omelus gave Jones some cocaine. (R1067) Although Jones saw Omelus after those meetings, he did not talk to him but just saw him driving his car through town. (R1068)

Jones testified that Omelus picked him up on the night of October 30th. (R1072) The time was estimated to be between seven and five-thirty. (R1072) When Omelus picked Jones up there was no discussion between the two as to what type of weapon would be used for the murder. (R1073) When picked up, Jones did not know who the victim was going to be. (R1073)

> Q. (defense attorney): That you not sure. Now, when he picked you up on October 30th, there had been no discussion between you and him as to what type of weapon you'd use, right?
>
> A. (Jones): No.
>
> Q. You didn't know -- in fact, you didn't even know who the victim was going to be, right?
>
> A. No, I did not.
>
> Q. So there was no discussion with him prior to October 30th, according to you, that "we're going to kill Willie Mitchell and the weapon is going to be a knife," or whatever, right?
>
> A. No, right.
>
> Q. He didn't know that?

A. Right.

(R1073) According to Jones, when he was picked up by Omelus they did not discuss the murder; Omelus simply told Jones to go with him. (R1075)

Jones said that Omelus told him that someone else had an insurance policy on Mitchell. (R1076) However, Jones admitted being aware that Omelus had policies on people:

> Q. (By defense attorney): In fact, prior to August 23, I think it is, you had gone down to a bank with him and he opened up the glove compartment and there are all types of insurance policies, right?
>
> A. (Jones): No, he went in the bank and he showed me he had insurance policies.
>
> Q. You knew what they were?
>
> A. By looking at them I knew that they was insurance policies.
>
> Q. Is it fair to say at that time to say you knew he had been helping people out getting these insurance policies?
>
> (Prosecutor) Objection --
>
> A. (Jones) I can't say what he do, I don't know.
>
> Q. Well, he takes these insurance policies out and he shows them to you. Was there no discussion --
>
> A. I didn't say he showed them to me, I said he went in the bank and put them in the glove compartment, I said.

(R1076-77) Jones stated that on October 30th, when Omelus picked him up around 5 o'clock in the evening, there was no discussion about why Omelus wanted Mitchell killed: (Jones) "He [Omelus] didn't discuss it that day. He had talked about it before then,

he didn't discuss it then. He just told me he want to show me the fellow, he want me to go with him, he'll bring me back." (R1077-78) Jones stated that the motive for the murder was because Mitchell owed Omelus for cocaine. (R1078)

When Mitchell, Jones and Omelus stopped at the 7-11, which was after 5 P.M., there had been no discussion as to how the murder would be done. (R1097-98) From the 7-11, Mitchell, Jones and Omelus went to Bernard Knight's house and obtained cocaine. (R1098) On the way, Jones on his own volition made sure that Mitchell had identification: "[Omelus] was talking to Mitchell about what he wanted to do about us going to Cocoa to go to sell the drugs and we was talking. All of a sudden, I asked him did he have i.d. in case the police stop us, they either going to run him in if he don't have no i.d." (R1099) Jones said that the reason that he asked about Mitchell's identification was to assist the police in identifying Mitchell's body, "'cause I wanted to make sure I get my money for him paying me the money. I wanted him to get paid so I could get paid." (R1100)

Jones only decided to kill Mitchell after he ran out of cocaine. (R1115- 16) Jones claims that Mitchell was alive when he left, (R1121) and that Mitchell was murdered in an open area; the body was found in bushes approximately twenty feet away; his shoes laid neatly by his side. (R650-53) When asked why he left the man alive if he had to be dead for insurance purposes, Jones responded, "I figured by the time somebody would find him he would probably bled to death." (R1122)

SUMMARY OF ARGUMENTS

POINT I: The State charged Omelus with hiring Jones to murder Mitchell by "stabbing him with a knife." The gravamen of this offense is not the commission of a murder but that one person hired another to commit the murder. Unless the charging document is specific as to the details of how one person "hired, aided, abetted or procured" another to commit the crime, a defendant is subject to multiple prosecutions. In any event, the State elected to charge specifically what Omelus hired Jones to do. The State did not present a prima facie case that Omelus hired Jones to murder Mitchell by stabbing him with a knife, as alleged. In fact, the evidence affirmatively established that Omelus did not hire Jones to kill Mitchell by stabbing him with a knife. Accordingly, the trial judge erred in failing to grant the timely and specific motion for judgment of acquittal made on those precise grounds. The conviction must be reversed.

POINT II: Omelus was denied a fair trial by deliberate prosecutorial misconduct. The prosecutor intentionally violated a court ruling and tainted the jury by revealing information that concerned another murder that was legally irrelevant to the one for which Omelus was on trial. Such error is presumptively harmful, and in any event the error was not harmless because the State cannot show beyond a reasonable doubt that the error did not affect the verdict. Accordingly, the conviction must be reversed and the matter remanded for retrial.

POINT III: The trial court ruled that it would instruct the jury on all aggravating factors if the parties could not agree as to which factors were applicable. That ruling was error. Omelus was prejudiced by the ruling, in that the court instructed the jury on the statutory aggravating factor of an especially heinous, atrocious or cruel ("HAC") murder. This factor was inapplicable as a matter of law. The erroneous presence of that instruction tainted the death recommendation because the weighing process by the jury was distorted in favor of the death penalty. The death sentence is thus unreliable under the Eighth and Fourteenth amendments. The recommendation is further flawed because the modified jury instruction was unconstitutionally vague under the dictates of Maynard, infra.

POINT IV: Omelus timely requested that the jury be instructed that certain factors are non-statutory mitigating considerations. Evidence had been presented to support those factors. The trial judge, however, refused to identify these factors as separate considerations, ruling that the "catch-all" instruction was adequate. The catch-all instruction does not fairly apprise the jury what factors may properly be considered as mitigation. The refusal of the trial judge, upon timely request, to specifically identify these factors as bona fide mitigation resulted in a denial of due process and rendered the death penalty recommendation unreliable under the Eighth and Fourteenth Amendments. The death penalty must be reversed and the matter remanded for a new penalty phase before a new jury.

POINT V: The standard jury instructions are defective, in that they instruct the jury that, for a sentence of life imprisonment to be recommended or imposed, it is necessary that the mitigation outweigh the aggravation. The state bears the burden of persuasion only until one valid statutory aggravating factor is proved; thereafter death is presumed to be the appropriate penalty unless the defendant can persuade the jury or judge that the mitigation outweighs the aggravation. Under the standard jury instructions, a death penalty must be imposed even if the defendant convinces the jury and judge that the aggravation and mitigation weighs the same. Because the standard instructions fail to adequately apprise the jury or trial judge that, for imposition of the death penalty the aggravation must outweigh the mitigation, the instructions violate the Fifth, Sixth, Eighth and Fourteenth Amendments and the death sentence which has been imposed in reliance on those instructions must be reversed.

POINT VI: The statutory aggravating factor of a cold, calculated and premeditated murder with no pretense of moral or legal justification is arbitrarily and capriciously applied in violation the Eighth and Fourteenth Amendments. This Court's interpretations of that factor under substantially the same material facts have been inconsistent. This Court has discarded as a "pretense" of moral or legal justification evidence that, at other times, has readily accepted as valid. Inconsistent application of this factor renders the death penalty arbitrary and capricious under the Eighth and Fourteenth Amendments.

POINT VII: The two key state witnesses were Jones, the killer who claimed that Omelus hired him to murder Mitchell, and Hagerman, who was an insurance salesman who had, through Omelus' help, sold several insurance policies to several Haitian residents, one of whom was the victim, Mitchell. Both state witnesses had been severely impeached in the prior trial, but now were experienced in being cross-examined. Defense counsel sought to cross-examine these witnesses in critical areas that had yielded inconsistent and/or absurd statements in the initial trial, but the cross-examination was unduly restricted by the court when the state objected. The restriction of cross-examination violated state and federal rights to due process and confrontation of witnesses.

POINT VIII: The trial court's order affirmatively states that certain evidence did not fit within the trial court's definition of mitigation. Such evidence has been recognized by this Court as valid mitigation which should be weighed in opposition of the death penalty. The refusal of the sentencer to consider valid mitigation renders the sentence unreliable under the Eighth Amendment, and the rejection in one case of what is valid mitigation in another case results in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. When the uncontroverted mitigation is compared to the two statutory aggravating circumstances found by the trial court, assuming that they are valid, imposition of the death penalty is disproportionate under the Eighth Amendment. The sentence must be reversed and a life sentence imposed.

POINT IX: The appellate review provided by this Court is arbitrary and capricious because it is based on conjecture and speculation as to why the jury reached a particular recommendaton, and what affect error had on the jury's deliberations. The inability of this Court to ensure that the same facts will yield the same results renders imposition of the death penalty arbitrary and capricious under the Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution.

POINT X: The record inexplicably contains items that were not introduced into evidence in open court. Omelus has been denied a meaningful opportunity to establish whether the jury was exposed to that material during deliberations, which violates the rights to Due Process and a fair trial under the Fifth and Fourteenth Amendments. The unexplained presence of those items amid the exhibits that were viewed by the jury violates the Fifth, Sixth and Fourteenth Amendments, and the possible exposure of the jury to that material renders imposition of the death penalty unreliable under the Eighth and Fourteenth Amendments.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO GRANT A JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PRESENT A PRIMA FACIE CASE OF THE OFFENSE CHARGED IN THE INDICTMENT.

At the conclusion of the state's case defense counsel moved for a judgment of acquittal, arguing that the state had failed to prove that Omelus hired Jones to kill Mitchell from a premeditated design by stabbing him with a knife, as had been expressly alleged in the indictment. (R1548-50) In that regard, the indictment specifically charges that:

> ULRICK NMN OMELUS, on or between October 15, 1986 and October 31, 1986, the County of Brevard, and State of Florida, did then and there aid, abet, counsel, hire or otherwise procure another, JOHN HENRY JONES, to commit a criminal offense against the State of Florida, to-wit: FIRST DEGREE MURDER FROM A PREMEDITATED DESIGN, to unlawfully kill a human being, WILLIE MITCHELL, by STABBING WILLIE MITCHELL WITH A KNIFE OR OTHER SHARP INSTRUMENT, and said killing was perpetrated by said JOHN HENRY JONES, from a premeditated design or intent to effect the death of said WILLIE MITCHELL, contrary to Sections 777.011 and 782.04(1)(a)1, Florida Statutes[.]

(R1937)

The motion for a judgment of acquittal was twice denied, once without discussion (R1550) and again as follows when the motion was renewed:

> The Court: And I'll deny it on the basis that I think it's reasonably foreseeable -- it's not the manner of the killing, the homicide, the aiding and abetting principle. It's reasonably foreseeable that when you ask someone to kill that there will be a killing, regardless of the manner in which it was done.

> I think that it's certainly within the province that the killing be done in some manner, it doesn't matter how. I think it's required for the State to prove how. I don't think it necessarily has to be within the purview of the procurer or the principal that the killing be done in a specific manner. Denied on that basis. If the appellate court thinks otherwise, they can tell me.

(R1557)

It is respectfully submitted that the trial judge was wrong in ruling that, when someone is charged with hiring another to commit a murder, it is legally irrelevant what the details of the agreement were. The offense is not the commission of the murder, but instead that one person hired, aided, abetted, or procured another to commit an offense. The statute (Section 777.011) [1/] must be read in conjunction with another statute (in this case Section 782.04) to constitute the distinct offense of being a principal in the first degree without being actually or constructively present when the offense is committed.

In order to prevent a defendant from being embarrassed in trying to defend against such a charge, it is essential that the State specify how the defendant aided, hired, procured, or

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1/ Section 777.011, Fla. Sta. (1987) provides:

> PRINCIPAL IN THE FIRST DEGREE. - Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

abetted another in committing the crime. Further, because the defendant is being charged with hiring someone to commit an act rather than being charged with the substantive offense that was actually committed, he may otherwise be subject to reprosecution for each instance of hiring, aiding, abetting, or procuring another to commit an offense, which is why the details of the agreement must be alleged and proved. The State elected to charge precisely what Omelus hired Jones to do, and by doing so the State obligated itself to prove that Omelus hired Jones to kill Mitchell with a knife or other sharp cutting instrument.

Omelus geared his defense to show that he never hired Jones to kill Mitchell with a knife, and in that regard it remains uncontroverted that Omelus never hired Jones to kill Mitchell with a knife. Not only did Jones affirmatively testify that the murder weapon to be used was never discussed between him and Omelus (R1097), it is uncontroverted that Jones did not even contemplate using a knife until after his attempts to procure a firearm proved unsuccessful (R999-1000); this occurred after Omelus lef t. (R1106) The variance between the allegata in the indictment and the probata entitle Omelus to a judgment of acquittal as to the charge of hiring Jones to murder Mitchell with a knife, when the timely and specific motion for judgment of acquittal was made. See Booker v. State, 93 Fla. 211, 111 So. 476 (1927); Barker v. State, 78 Fla. 477, 83 So. 287 (1919); Ankiel v. State, 479 So.2d 263 (Fla. 5th DCA 1985); Jones v. State, 325 So.2d 436 (Fla. 1st DCA 1975), cert. denied 339 So.2d 1172 (Fla.1976); Jiminez v. State, 231 So.2d 26 (Fla. 3d DCA 1970).

"[I]n general an indictment or information framed substantially in the language of the statute is sufficient." State v. Waters, 436 So.2d 66,69 (Fla.1983). The State chose not to simply track the language of the statute, and instead chose to bind itself to prove that Omelus hired Jones to kill Mitchell with a knife. The State is obligated to prove what it voluntarily alleges in its charging document. See, Krathy v. State, 406 So.2d 53, 54 (Fla. 1st DCA 1981)("Due process requires that the State prove what it alleges.") The State elected to prosecute Omelus on a narrow charge of hiring Jones to murder Mitchell "by STABBING WILLIE MITCHELL WITH A KNIFE OR OTHER SHARP INSTRUMENT" (R1937)(emphasis in Indictment), and by being so specific the state preserved the right to retry Omelus for hiring Jones to murder Mitchell in a way other than by stabbing him with a knife or other sharp instrument. Accordingly, Omelus was entitled to a judgment of acquittal on that charge when the state failed to present a prima facie case that Omelus intended that Jones use a knife or other sharp instrument to stab Mitchell to death. The conviction should be reversed.

POINT II

THE CONVICTION FOR FIRST-DEGREE MURDER MUST BE REVERSED DUE TO DELIBERATE PROSECUTORIAL MISCONDUCT THAT DENIED OMELUS A FAIR TRIAL.

"By eliminating evidentiary weight as grounds for appellate reversal, we do not mean to imply that an appellate court cannot reverse a judgment or conviction 'in the interest of justice.' The latter has long been, and still remains, a viable and independent ground for appellate reversal." Tibbs v. State, 397 So.2d 1120, 1126 (Fla.1981).

> In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

Rule 9.140(f), Fla.R.App.P. (1977). It is respectfully submitted that the interest of justice requires a new trial in this case.

This is the second time the prosecutor tried this case. The first trial resulted in a hung jury, and thereafter the prosecutor had Judge Johnston recused because, "During the course of the trial of the case, but before the existence of aggravating or mitigating circumstances was even mentioned to Judge Lawrence V. Johnston, he made the announcement in his courtroom that regardless of the jury's recommendation as to the death penalty he would not sentence the defendant in this cause to death." (R2085) In having Judge Johnston recused, the prosecutor was adamant that he would never seek to interfere with the adverse evidentiary rulings that had been made by Judge Johnston:

> (MR. WHITE): I understand Mr. Udell's concerns regarding your ruling on Williams Rule, but I certainly don't take kindly to the allegations that I hoped to obtain a new forum for that. I don't know if Mr. Udell's aware of it, there was a principle of law called the law of the case and I can tell you right now I'm not even going to ask for a rehearing on the Williams Rule issue before we go to trial because that principle is applicable and the new judge has no right to review that ruling.

(R40-41) Prior to trial, Omelus filed a Motion in Limine seeking to preclude evidence or comments concerning the murder of Dessama Cherry, another murder committed by John Henry Jones in Indian River County, allegedly at the request of Omelus. (R2829-30) Judge Johnston ruled during the first trial that this evidence was inadmissible, yet, when faced with the motion in limine, the state sought to overturn Judge Johnston's prior ruling and present evidence and argument concerning the murder of Dessama Cherry. (R3237) Judge Moxley, prior to the instant trial, ruled as follows:

> THE COURT: I'm going to grant a permissive motion in limine. Prior to that testimony being heard by a jury or mentioned to the jury, I want the court to have an opportunity to know specifically under Williams what relevant principles are established for this testimony. And then we'll determine whether or not under 90.403 it should be coming in or whether it's relevant.

(R37) The court repeated its ruling to make sure it was clear to all parties and that the prosecutor clearly understood that it was not to even mention to the jury anything concerning the murder of Dessama Cherry:

> THE COURT: All I'm saying is I don't want the state to refer to it, mention it. And I also request the state instruct their witnesses not to refer, mention or otherwise allude to it until the court has an opportunity to determine whether or not under Williams or else under the criminal rules of procedure whether or not this is relevant or probative to their charge; and if determined relevant or probative, whether or not it's so prejudicial that it should not come in under Section 90.403, Florida Statutes.

(R39). The state ignored this ruling during opening statements:

> MR. WHITE: Now, during the time that intervened, [John Henry Jones] and the defendant became a little closer friends and at one point, for instance, they spent some time together trying to find a murder weapon. They went to see a fellow named Gerald Crayton. That name sounds familiar, I am sure. And they managed, the two of them together, to obtain a gun from Mr. Crayton. They purchased a gun from Mr. Crayton. Mr. Jones will tell you that that gun, unfortunately, due to his situation as a drug addict himself, he eventually sold it off to someone else for some money and by the time they got around to doing this murder he could no longer get that gun. On another occasion, he and the defendant went down to Wabasso together, he took him down there. And the defendant put him up in a motel for the night. In fact -- I'm sorry, it's not another occasion, it's an extension of the day when they got the gun, that same day; after they bought the gun the defendant took him down to Wabasso to show him a man he wanted killed. And while they were down there --
>
> DEFENSE COUNSEL: Judge --
>
> MR. WHITE: -- at that point --
>
> DEFENSE COUNSEL: -- move for a mistrial. Can we approach the bench?
>
> THE COURT: Yes, over here.

(R588-89) Defense counsel moved for a mistrial, arguing that the state was violating the ruling on the motion in limine by talking about the Indian River County murder. (R590) The judge ruled, "I'm going to find it's neutral at this point, I'll deny it." (R592) The statements were anything but neutral. This trial judge was unfamiliar with the evidence, and did not appreciate that the state was talking about the murder of Dessama Cherry, where Jones obtained a .45 caliber pistol from Gerald Crayton, allegedly was taken by Omelus to a motel in Indian River County where Omelus stayed while Jones shot and killed Cherry. Jones' initial contact with Crayton and the alleged first trip to Indian River County with Omelus was wholly irrelevant; the murder of Mitchell occurred in Brevard County with a knife, obtained from someone <u>other</u> than Crayton! At this early juncture, however, the trial judge simply did not appreciate the damaging nature of the prosecutor's misleading revelations.

The prosecutor refused to leave the Indian River topic alone, and intermingled events concerning both murders. The jury certainly could not appreciate the distinction between trips to Indian River County in August when Dessama Cherry was killed by Jones, and the trip October 30 when Omelus allegedly took Jones to pick up Mitchell in Wabasso. The evidence was presented in such a fashion that the jury would reasonably conclude that Omelus was planning the murder of Mitchell as early as August, which is absolutely untrue. It is more probable, however, that the jury early on caught on to the states thinly-veiled references to another murder committed by Jones, presumably at the request

of Omelus, and that the information was being kept from them. It bears pointing out that several of the jurors had been sent to Omelus' venire from another trial that had resulted in a mistrial. (R464-65) The state's opening statement contaminated the rest of the trial, in that the jurors had been given enough information to realize that two murders were involved, one with a .45 caliber pistol and another with a knife. The motion for mistrial should have been granted at that point, but the trial judge simply did not comprehend what the prosecutor was accomplishing with these opening statements.

Before the prosecutor put John Henry Jones on the stand, defense counsel reminded the prosecutor not to refer to anything concerning another murder, and had the court reinforce the prior ruling on the motion in limine. The court ruled: "Not only is your motion still in effect, my order's still in effect." (R829-30) After preliminary questioning, Mr. White's direct examination of John Henry Jones went as follows:

> Q. (By White): Let me ask you this, at the time that he was talking about this, about the insurance, did he tell you what the victim's name was then?
>
> A. (By Jones): No, they didn't know, he did not mention his name.
>
> Q. Okay, but at any rate, at this point now the conversations have turned to you committing a murder?
>
> A. Yes.
>
> Q. Did you agree to do that?
>
> A. Yes I did.
>
> Q. And at this time he did not specify who the victim was going to be?

A. No.

Q. Did he give you any indication whether he intended for you to do one murder or whether he was thinking about others?

A. He mentioned --

DEFENSE COUNSEL: Judge, I'll Object.

THE COURT: Sustained.

DEFENSE COUNSEL: May we approach the bench.

THE COURT. Yes.

DEFENSE COUNSEL: Judge, I object and move for a mistrial. That's why I wanted the state attorney to be prevented from asking was there anything which would show the defendant hired this man to commit more than one murder.

(R840-41) The jury was sent back to the jury room and the attorneys made preliminary arguments; the court stated, "The way I view it now, unless this can be admitted under Williams rule, we're in a mistrial posture because there is no way I can tell this jury now there wasn't another homicide involved or planned. So unless there is admissible [evidence] under the Williams rule of similar fact evidence, we are in a mistrial posture." (R843-44)

The jury was sent to lunch, and there followed an extensive proffer of testimony and argument of counsel that took up the remainder of the day. (R844-964) The content of the proffer was reported by the press, although the juror's all responded the next day that they had read nothing about what had occurred in their absence. (R966-67) The court then gave an instruction that the prosecutor's last question should be disregarded, because

what lawyers speak is not evidence and the case must be decided by them based upon the evidence only. (R969-70) All jurors agreed they could follow the law and disregard the prosecutor's last question. (R970) In light of the prosecutor's prior opening statement, however, and the trial court's initial impression [2] that there was no way that the intentional [3] violation of the order could be corrected by curative instruction, it is doubtful that the reassurances of the jurors, however sincere, could be carried out.

The erroneous presentation of Williams rule evidence is presumptively harmful. Castro v. State 14 FLW 359, 360 (Fla. July 13, 1989)("erroneous admission of irrelevant collateral crimes

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2/ When the incident occurred, the trial court was convinced the damage could not be cured by instruction:

> THE COURT: It's not going to take a moment. If this is not admissible under the Williams Rule, we are in a mistrial because I specifically asked not for any mention to be made of any other murder and the question was so ask[ed] that, obviously, unless we're Williams Rule there's no way to cure the error. (R844)

3/ There can be NO DOUBT that Mr. White's violation of the court's order was intentional:

> THE COURT: No, but I would point out the question was so specifically framed that the jury may properly conclude that there was a discussion of committing more than one murder.
>
> MR. WHITE: Yes, sir, that is correct. And to that I would plead guilty that I intended to bring that evidence forward. It's my position that I have not brought forth any evidence that a murder was actually committed. (R847)

The Court initially forbade the state "from even mentioning the Indian River County murder without prior approval. (R37-39) The state had ample opportunity to check this line of questioning when the trial judge warned that his ruling was still in effect.

evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to commit crime thus demonstrated as evidence of guilt of the crime charged.") See also Straight v. State, 397 So.2d 903, 908 (Fla. 1983); Peek v. State, 488 So.2d 52, 56 (Fla. 1986). The burden is on the state to prove beyond a reasonable doubt that the intentional injection of this irrelevant and presumptively prejudicial information did not affect the jury's verdict. Chapman v. California, 386 U.S. 18 (1967). "[W]e recognize that 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.)" Castro, 14 FLW 359,360 (Fla. July 13, 1989)

In light of defense counsel's timely reminder to the prosecutor that he must not delve into this area and the trial court's warning that the questioning must be so limited, the prosecutor's intentional conduct is especially egregious. State v. Murray, 443 So.2d 955 (Fla. 1984) Though prosecutorial misconduct alone will not require a reversal, it should when the impression left with the trial court immediately after the intentional prosecutorial error is that "we are in a mistrial posture." In light of the contradictory nature of the evidence and the difficulty the jury had in returning a verdict, it cannot reasonably be claimed by the State that the refusal of the trial court to grant the timely motions for mistrial was harmless error. State v. Diguilio, 491 So.2d 1129 (Fla. 1986); Ciccarelli, supra.

The evidence here is not overwhelming, even if that was the test. The only evidence linking the defendant to the murder of Willie Mitchell comes from a murderer and an insurance salesman. Assuming that their testimony is sufficient to establish a prima facie case against Omelus, it is not sufficient by much. The patent contradictions in the testimony of Jones severely undermines reliability of the testimony. Hagerman's testimony is wholly at odds with Jones', in that Jones claimed that he met Omelus between five and seven o'clock on October 30, 1986 and that they then went to Wabasso to pick up Mitchell. (R986-87, 1072) The meeting was not pre-arranged; neither the murder nor the murder weapon was discussed:

> Q (By defense counsel): That you're not sure. Now, when he picks you up on October 30th, there had been no discussion between you and him as to what type of weapon you'd use, right?
>
> A. (Jones): No.
>
> Q. You didn't know -- in fact, you didn't even know who the victim was going to be, right?
>
> A. No, I did not.
>
> Q. So there was no discussion with him prior to October 30th, according to you, that "we're going to kill Willie Mitchell and the weapon is going to be a knife," or whatever, right?
>
> A. No, right.
>
> Q. He didn't know that.
>
> A. Right.

(R1073)

Q. (By defense counsel): Did he ever say to you on October 30th when he comes to see you, "did the murder go down"?

A. No, he did not.

Q. Did he say, "we're going to do the murder now"?

A. No, he did not, he didn't tell me like that.

Q. He discussed, "we're going to pick the victim up?"

A. He didn't discuss it with me, he told me to go with him.

Q. To find a victim to murder later?

A. Yes.

Q. Not a victim had already been murdered.

A. Yes.

Q. And when he sees you at that time you didn't know what the weapon was going to be, right?

A. No.

Q. There was no discussion whether it was going to be a knife or poison or whatever, right?

A. No.

(R1075-76). Jones testified that his trip to pick up Mitchell in Wabasso with Omelus occurred on October 30, <u>after 5:00 o'clock P.M.</u>! (R1072-73)

<u>After</u> being dropped off by Omelus, Jones went in search of a suitable murder weapon (supposedly while in the presence of Mitchell), first asking Crayton for a firearm (R999-1000), and ultimately receiving a knife from Edgar Dugger. (R1000) The critical importance of this testimony is that Omelus had no way

of knowing, when talking to Hagerman at five o'clock on October 30, 1986, that a knife would be used to murder Mitchell, yet Hagerman claims that Omelus told him prior to 5 o'clock on October 30th that Mitchell had been involved in a knife fight in Gifford! (R1410) Assuming for the sake of argument that Omelus was in Hagerman's office before five o'clock and asked if Mitchell had health insurance because Mitchell had been in a knife fight, as represented by Hagerman (R1410), the only way that Omelus could have known that was if Mitchell had already been killed. It necessarily follows that either Jones or Hagerman is lying: indeed, they both may be lying. Jones to save himself from the electric chair and Hagerman to avoid paying off the insurance claim and to otherwise avoid the consequences of not following proper procedures to identify insurance applicants which could result in revocation of his insurance license. (R1467-68)

The time that Willie Mitchell died is critical, but it cannot be established to any degree of medical certainty. Dr. Reeves, the expert forensic pathologist (R708), stated on direct examination, "I'm honest enough to say I don't know when this person died." (R740) On cross-examination, defense counsel attempted to establish that the doctor had previously made statements that Mitchell died before October 31st. The doctor conceded making those statements, but noted that they had been "based upon the observations of rigor mortis, levidity and I think that was about it at that time." (R850) He continued:

> DR. REEVES: Based on those findings, the rigor was beginning to disappear, as it was at the autopsy the next morning, and as I recall it was about a 1 plus, 2 plus, somewhere in that area, going down. This opinion was based upon reviewing that at this time. They gave me a copy of the autopsy report. It showed that. And based on that it suggests a longer period of time, which certainly, hey, I still say that makes sense. But, as you didn't hear what I said before, there is a problem with it if you don't value the other mitigating circumstances. This guy could have been killed an hour before and if there were proper environmental conditions and other things to go on, the fever and the other things I've referred to or an infectious process, he may be showing the same characteristic findings.
>
> Q. The bottom line, your opinion on this date based upon whatever factors you use were that Willie Mitchell was obviously not killed on the 31st?
>
> A. I think I said in totality of this deposition, I really didn't know.

(R750-51) A factor inconsistent with death having occurred in the preceding 24 hours was the presence of maggots; it ordinarily takes 24 hours for maggots to appear. (R752,758) Maggots were observed on Mitchell at the time of the autopsy (R776), and when the body was viewed by police at the scene after 7:00 P.M. on October 31, 1988. (R818)

The testimony of John Henry Jones simply will not stand critical scrutiny. For instance, independent testimony from the police officers establishes that when Mitchell was discovered his shoes had been placed neatly beside the body. (R769,797) Jones made absolutely no mention of having removed Mitchell's shoes. In fact, Jones represents that he left Mitchell <u>alive</u> but dying

in the middle of the trail so that he would be discovered and Omelus could quickly recover the insurance proceeds. (R1011-12)

> Q. (By Mr. Udell): Now, you told him at some point, here you're on your way towards the murder scene and you decide that you got to do it again -- well, let me ask you on the way to the scene where the murder occurred you ran out of cocaine, right?
>
> A. (Jones): Yes.
>
> Q. You were coming down again, right?
>
> A. Yes.
>
> Q. And as you approaching it, you are thinking to yourself, "Now I'm going to kill him," you decided again you would do it?
>
> A. Right.
>
> Q. And what was the reason you decided again you would do it?
>
> A. I said John told me don't never cross him and I'm starting to think about it -- people smoking cocaine get paranoid, they hear things. I'm going to tell you they think they're always peeping out the window, or looking on the floor, they think they see the police, they see things not there, what they call hallucinations.
>
> Q. You see things that aren't really there, you hear things that aren't really happening, right?
>
> A. Yes.
>
> Q. Your time frame gets warped, right?
>
> A. I could say yes, probably so.

(R116).

> Q. Let me ask you at that time was it the fear that you were going to be hurt that led you to kill Mitchell or was it your desire for the money so that you could get cocaine?

A. Probably a little of both of them.

Q. It's what you're telling us now, right?

A. Yeah, like I said, both of them.

Q. As you were approaching the scene where the ABC Liquor Store is and carpet store, it's your intent you are going to commit a murder. You are not going to rob Mitchell, you are going to kill him, right?

A. That's what I was hired to do.

Q. That's your intention, right.

A. That's what I was hired to do.

Q. And the theory is, at least according to you, you are going to kill Mitchell and leave the body where it can be found cause they got to discover the body so they can collect -- find out his name and they can collect the insurance proceeds right?

A. Right.

Q. That's, in fact, why you picked an open area when you started to stab him, right?

A. Yes.

Q. You saw this diagram, right, where the bloody spot was that's marked "C" here well out in the open, you can see it, anybody walking along this footpath, right?

A. Yes.

Q. That's pretty much why you picked that spot right, or a spot similar to that?

A. Yes.

Q. Okay, is there any discussion between you and Mitchell prior to you stabbing him the first time?

A. Yeah, he said "I'm going to pay you," that was his last words, "I'm going to pay."

Q. He didn't tell you that before you started stabbing him, he told you that after?

A. Huh?

Q. He didn't tell you anything about that before you started to stab him, it was after you started to stab him?

A. No, when I grabbed him and we was tousling and I told him before I stabbed or did anything to him, I told him I was hired to do a job and I got to do my job.

Q. Are you telling us now that you said those words prior to Mitchell?

A. Nobody never asked me.

Q. Was he facing you at the time?

A. We was struggling face to face, we was tousling.

Q. Did you say anything to him about the reason you were going to kill him and before you started stabbing him?

A. No, that's the only thing he said, "I'm going to pay you," what he said, "I'm going to pay ya'll."

(R1117-19).

Q. How long did it take?

A. I don't really know.

Q. You don't know that either?

A. No, it could have took a few minutes.

Q. When you left the scene he was alive?

A. Yes, he was moaning, yes, I could say he was saying something.

Q. Now, one second now. You were sent there to kill the man, according to you, because a live body does us no good, we can't collect proceeds on an insurance policy." Why did you leave him alive if you were there to kill him for insurance proceeds?

A. I figured by the time somebody find him he would probably bleed to death.

Q. You were willing to take that chance?

A. That's what happened.

Q. Weren't you worried somebody might come along and find him? Here he was in this foot path --

A. At that time of morning I wasn't. I figured it wouldn't matter. He didn't know me, anyway.

Q. It would have if somebody came along and doctored him up and --

A. I wasn't worried about that.

Q. Isn't it true the reason you left him alive is you weren't sent there to kill him, you robbed him, right?

A. No, I was sent there to kill him.

Q. But you left the scene with the man alive?

A. I knew in my mind he wasn't going to live.

Q. You didn't think it was important enough to finish him off? That's what you were there for?

A. No answer.

Q. In fact, you then went home, right? As far as you were concerned, the body was in an open area where anybody could walk along there and see it, right?

A. Yes.

(R1122-23) Jones' testimony is highly illogical, and wholly fails to account for the placement of the shoes next to the body. If, as he claims, he was hired to murder someone for insurance proceeds, it is unreasonable that he would leave him alive to identify him and to perhaps survive.

> From the earliest time, it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery, and sometimes permits the more guilty to escape, it tends to prevent and break up combinations, by making criminals suspicious of each other, and it often leads to the punishment of guilty persons who otherwise would escape. Therefore, on the ground of public policy, it has been uniformly held that a state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not.

Ingram v. Prescott, 111 Fla. 320, 149 So. 369 (1933). See Henderson v. State, 135 Fla. 548, 185 So. 625, 628 (1938) ("It is well-settled that while the testimony of an accomplice is admissible, such testimony is not regarded with favor and should be closely scrutinized and received with caution"). For a witness' testimony to be incredible as a matter of law, "It must be unbelievable on its face, i.e. testimony as to facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature." United States v. Stitzer, 785 F.2d 1506, 1515 (11th Cir. 1986). Jones' testimony falls into this category.

Based on the foregoing conflicting testimony, it is easy to see why the jury had such a difficult time returning a verdict of guilty. The jury was faced with two choices following the argument of counsel, guilty of first-degree murder or not guilty. There was no in-between ground under the peculiar facts of this case. Without doubt, the jury was troubled with the credibility of the state's witnesses. It must be emphasized that Omelus is not stating that this testimony is insufficient to convict him as a matter of law, but instead that the evidence is so tenuous that the state cannot meet its burden of showing that the intentional improper use of Williams rule evidence over a specific order from the court that he not do so was "harmless error". See State v. Murray, supra; Castro, supra; Tibbs, supra. Whatever definition is placed on the term "interest of justice", it is clear that Omelus is entitled to a new trial free of the taint of intentional prosecutorial misconduct which infects the guilty verdict and penalty recommendation returned by this jury. This taint denied Omelus Due Process and a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Further, the error renders the sentence of death unreliable under the Eighth Amendment and Article 1, Section 17 of the Florida Constitution. The conviction must be reversed and the matter remanded for retrial.

POINT III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to the penalty phase defense counsel filed a motion seeking to have the instruction on an especially heinous, atrocious or cruel (hereafter "HAC") murder deleted because the factor is unconstitutionally vague and overbroad. (R2051-52) When the motion was heard, defense counsel asked that the HAC circumstance be struck on the basis of Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. 1853 (1988). (R1754) The trial judge denied the motion ruling, "I'm going to take care of Maynard. I'm going to [define] especially h, c and a at Dixon, 283 So.2d 1, and that will take care of the Maynard problem." (R1754). The court continued:

> I'm not going to, quote, dv on any aggravating circumstance. The law is if you cannot agree which do and which do not apply, then the court is authorized to instruct upon all of them. The legal sufficiency is going to be by virtue of the sentencing order of this court, should there be one necessary.

(R1754-55). The trial court modified the standard jury instruction to include the definition of this factor contained in State v. Dixon, 283 So.2d 1 (Fla. 1973), in both the written and oral instructions (R1921, 2568), but did not find the HAC factor when the sentencing order/findings of fact was entered. (R2196-2202) (Appendix A)

In Smalley v. State, 14 FLW 342 (Fla. July 6, 1989), this Court discussed the problem addressed in Maynard, supra:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious or cruel.

Smalley, 14 FLW at 342 (emphasis added). This Court's analysis in Smalley fails to address what affect the vague instruction may have had on the jury recommendation, which is also relied on (and supposedly relied on heavily) by the sentencer. See, Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987)(jury recommendation is "integral part"); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)("great weight); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974)(jury recommendation is "critical factor").

Omelus expressly contends that the HAC instruction, even as modified, was unconstitutionally vague under the Eighth and Fourteenth Amendments because that instruction was inadequate to channel the broad discretion of the sentencer and to genuinely narrow the class of persons eligible for the death penalty. Godfrey v. Georgia, 446 U.S. 420 (1980); Zant v. Stephens, 462

U.S. 862 (1983). Omelus further contends that, assuming that the instruction was on its face constitutionally adequate, the instruction was inapplicable as a matter of law and that, under the facts of this case, the jurors could and would have erroneously used this improper factor to recommend imposition of the death penalty. Accordingly, the jury's recommendation is tainted and unreliable under the Eighth and Fourteenth Amendments.

The trial judge was incorrect in ruling that he was authorized to instruct on all aggravating factors if the State and defense could not agree on which factors were applicable. When Omelus initially objected to the HAC instruction, the court ruled: "I'm not going to, quote, D.V. on any aggravating circumstance. The law is if you cannot agree which do and do not apply, then the Court is authorized to instruct upon all of them. The legal sufficiency is going to be by virtue of the sentencing order of this Court, should there be one necessary." (R1754-55) Cases where this Court has held that a trial judge may properly instruct on all statutory aggravating factors, regardless of evidentiary support, involve claims of ineffectiveness of counsel based on trial counsel's failure to object to all of the factors being revealed to the jury. See Jacobs v. Wainwright, 450 So.2d 200, 202 (Fla. 1984); Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982). If, as a tactical matter, defense counsel wants to educate a jury as to what all the statutory factors are so that he can argue that a particular murder, though "aggravated", could have been much more aggravated, then he is able to do so if the State does not object. He is not "ineffective" for this tactic.

However, the law is clear that, unless the parties agree that the judge may instruct on all the factors, the jury must be instructed on only those aggravating and mitigating factors that are supported by the evidence. See Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985)("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) ("The judge followed the standard instructions and specifically addressed all circumstances and gave instructions for those aggravating and mitigating circumstances for which evidence had been presented.") See also, Standard Jury Instructions in Criminal Cases, 2d Edition, p. 80, ("Give only those aggravating circumstances for which evidence has been presented.")

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new recommendation on resentencing.

Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). Accord, Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987)("If the jury's

recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.")(emphasis added).

Thus, this Court recognizes that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because the failure to do so skews the analysis in favor of imposition of the death penalty. A jury instruction on an improper statutory aggravating factor results in the same taint. When more aggravating factors are present, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the presence of an improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable under the Eighth and Fourteenth Amendments.

There can be no conclusion other than that the jury applied the HAC factor in recommending imposition of the death penalty. The stabbing murder of Mitchell would necessarily have been viewed by a lay person as especially heinous, atrocious or cruel. Evidence and argument was presented by the State to that end, and the prosecution devoted the entire penalty phase to convince the jury to that Mitchell suffered greatly before dying. Numerous color photographs taken during the autopsy were introduced and shown the jury. Even if these offensive things had not been stressed, in all likelihood the jury still would have attributed weight to this factor when told by the court that it was permissible under the law that they do so.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

The jury would not appreciate, however, that as a matter of law it could not properly weigh the heinousness of Mitchell's murder into the equation of whether to recommend life imprisonment or the death penalty for Omelus. Indeed, the jury is presumed to have used this instruction and to have followed the law given it by the trial judge. Grizzel v. Wainwright, 692 F.2d 722, 726-27 (11th Cir. 1982), cert. denied, 461 U.S. 948 (1983) The burden is on the State to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. See, Riley, 517 So.2d at 659; Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). The State cannot meet that burden. Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY SEPARATELY ON THE NON-STATUTORY CIRCUMSTANCES REQUESTED BY THE DEFENDANT WHICH WERE SUPPORTED BY THE EVIDENCE AND THE LAW.

Prior to the penalty phase, defense counsel sought to amend the standard jury instructions whereby the jury would receive separate instructions identifying non-statutory mitigating circumstances which have been previously recognized as valid mitigating circumstances and for which evidence had been presented. It is beyond dispute that the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982) requires that in capital cases the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Eddings, 452 U.S. at 110. A defendant's performance in prison and his potential for rehabilitation have been recognized as such bona fide mitigating factors.

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesireable element of criminal sentencing: "Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976)(opinion of Stewart, Powell, and Stevens, JJ.) The court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing,

> Jurek v. Texas, supra; see also Barefoot v. Estelle, 463 U..S 880, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration.

Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

Previously, the standard jury instructions were deemed faulty because they were reasonably understood to limit mitigating circumstances to those expressly contained in Section 921.141(6), Fla. Stat. See Hitchcock v. Dugger, 481 U.S. 393 (1987). In an effort to clarify that a jury or trial judge is not limited in the things that may be considered in mitigation, the list of mitigating factors contained in the standard jury instructions now concludes with the catch-all phrase, "Among the mitigating circumstances you may consider, if established by the evidence, are: ". . . (8) Any other apsect of the defendant's character or record, and any other circumstance of the offense." Fla. Std. Jury Instructions in Criminal Cases, 2d.Ed., p. 80-81.

The jury may reasonably conclude from that standard instruction that all mitigating factors other than those expressly set forth in the statute may only be considered as a single factor, as opposed to considering each aspect as a separate factor entitled to separate weight and consideration for each non-statutory factor. This construction results in distortion of the weighing process in favor of imposition of the death penalty in violation of the Fifth, Eighth and Fourteenth Amendments.

The precise question presented is whether the foregoing "catch-all" instruction is sufficient to inform the jury that a particular circumstance can properly be considered when defense counsel requests the jury to be specifically instructed that a particular factor adequately supported by the evidence is valid mitigation under the law. The "catch-all" instructs the jury generally that it may consider "any" factor of a defendant's character or the crime which mitigates the offense. See Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). It is nonetheless appropriate, indeed, it is essential that the jury be informed by the trial judge that a particular consideration as a matter of law constitutes valid mitigation even when not recognized expressly by statute. Judge Moxley, in denying the defendant's request that separate instructions be given to identify these mitigating circumstances, stated,

> There is another paragraph to this motion for order amending standard jury instructions requesting a standard jury instruction on model prisoner in the past and model prisoner in the future and capacity for rehabilitation, I think. I think that that's covered by the standard jury instruction which provides that any other aspect of the defendant's character or record and any other circumstance of the offense, and I think that's included within eight on page 81 of the Standard Jury Instructions.

(R1809-10)

It is respectfully submitted that the failure to give independent instructions to the jury identifying each valid mitigating circumstance that has been recognized by law and which

is supported by the evidence and timely requested by the defendant results in vague and confusing jury instructions which are biased in favor of imposition of the death penalty. As such, the recommendation has been made in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. A defendant is absolutely entitled to have the jury accurately and fairly instructed on all factors that properly mitigate against imposition of the death penalty. The trial court is the only entity to give the jury instructions on its lawful function. Unless the court instructs the jury that these considerations may properly be used by them in determining whether the death penalty is warranted, the jury may conclude that factors previously recognized by the courts as being valid mitigation are baseless or spurious. It is absolutely imperative that the trial judge adequately and completely identify and define such considerations under the law when timely requested for the jury recommendation and attendant death penalty to be constitutionally sound. Because the trial court erred in refusing the timely request to instruct the jury that a defendant's performance while incarcerated and his potential for rehabilitation are lawful factors to consider in mitigation, despite there being uncontradicted evidence of those considerations, the death penalty must be reversed and a new penalty proceeding before a new jury conducted.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO MODIFY THE STANDARD JURY INSTRUCTIONS TO REFLECT THAT THE AGGRAVATING FACTORS MUST OUTWEIGH THE MITIGATING FACTORS FOR IMPOSITION OF THE DEATH PENALTY TO BE AUTHORIZED: THE STANDARD INSTRUCTIONS ARE ERRONEOUS AND VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Defense counsel moved to have the trial court amend the standard jury instructions so that the jury would clearly be instructed that the burden of proof is on the state to prove beyond a reasonable doubt that the aggravating circumstances must outweigh the mitigating circumstances before a recommendation could be made for imposition of the death penalty. (R1755-1756) The trial court ruled as follows:

> THE COURT: I think that Dixon v. State, speaks upon that. It says, quote, at page 9, "when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statute 921.141, Florida Statutes Annotated. All evidence of mitigating circumstances may be considered by the judge or jury," unquote. I am not going to, I'm not going to give defendant's requested special instruction with regard to the burden shifting, and I'm going to mark that as number one and I'm not going to give that. I will mark that denied under authority of Dixon v. State, 283 So.2d 1.(sic) Okay? Anything else?

(R1757) See Arrango v. State, 411 So.2d 172 (Fla. 1982)(standard jury instructions, when considered as a whole, do not effectively shift the burden of persuasion to the defendant)

The standard preliminary jury instruction in death penalty cases reads:

> The state and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that [this evidence when considered with the evidence which you have already heard][this evidence] is presented in order that you might determine first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any." At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Florida Standard Jury Instructions in Criminal Cases, page 77. That standard instruction was given the jury after defense counsel requested that it be modified. (R1757,1768-69) At the conclusion of the penalty phase, the trial judge instructed the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be on of life imprisonment without possibility of parole for 25 years, or if the parole function ceases, for life. <u>Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances</u>.
> ...

(R1922).

In this regard, the standard jury instructions violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by instructing the jury that the mitigating

circumstances must "outweigh" the aggravating circumstance. Mitigating circumstances need not weigh "more" than aggravating circumstances. The mitigation must only be of such weight that imposition of the death penalty is unwarranted. By informing the jury that mitigation must "outweigh" (weigh "more" than) the aggravation, the jury is given an unworkably vague standard, the weighing process is distorted in favor of imposition of the death penalty, and the burden of persuasion is placed on the defendant in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The standard jury instructions are susceptible to being misunderstood by reasonable jurors. The instructions do not clearly define for the jury what is required to impose the death penalty. A death recommendation based on such instructions is fundamentally unreliable under the Eighth Amendment.

Taken literally, the standard instructions require that, for a life sentence to be recommended by the jury or imposed by the trial judge, the mitigation must weigh more than ("outweigh") the aggravating circumstances. If, under these instructions, the reasons to impose the death penalty weigh the same as the reasons not to impose the death penalty, the death penalty must be imposed because the mitigation does not outweigh the aggravation. A burden of persuasion rather than a burden of production exists under the standard instructions, and the presence of a presumption that death is the appropriate penalty when one aggravating factor is found results in the state bearing the burden of persuasion only until one statutory aggravating factor is established.

The jury is instructed that the State only has to prove beyond a reasonable doubt that the death penalty is appropriate before mitigation is shown. The standard instructions tell the jury that, when mitigation is shown, it must outweigh the aggravating circumstances in order for a recommendation of life imprisonment to be appropriate. This shifting standard violates the Due Process clause of the Fifth and Fourteenth Amendment and renders the death penalty unreliable under the Eighth Amendment.

> In this circuit, then, the state of the law is well settled. Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found, violate the Eighth and Fourteenth Amendments.

Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982).

A presumption which, although not conclusive, has the effect of shifting the burden of persuasion to the defendant, is constitutionally deficient. The threshold inquiry is to determine the nature of the presumption the jury instruction describes. "That determination of words requires careful attention to the words actually spoken to the jury (citations omitted), or whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). The defective nature of the burden shifting instruction has been noted by this Court in Arrango v. State, 411 So.2d 172 (Fla. 1982), where this Court held that the standard instructions when considered as a whole do not effectively shift the burden:

> A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Arrango, 411 So.2d at 174. This Court expressly recognized, however, that the death penalty can only properly be imposed when the state shows that the aggravating circumstances outweigh the mitigating circumstances. Arrango, 411 So.2d at 174.

It is respectfully but expressly submitted that the standard instructions given in this case, even when considered in their entirety, do not fairly apprise the jury of their function or the burden that rests upon the state. Further, in light of the timely and express request to have the standard instructions clarified so that they clearly and unambiguously state the law as this Court viewed it to be in Arrango, it is urged that reversible error has here occurred. A defendant in a case with a penalty of this magnitude is absolutely entitled to unambiguous instructions upon timely request. Because the standard jury instruction is unconstitutionally vague under the Eighth Amendment, violative of Due Process under the Fifth and Fourteenth Amendments, and because it was timely objected to by defense counsel, this Court is asked to vacate the death penalty and to remand for a new penalty phase before a new jury.

POINT VI

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY: THE FACTORS ARE ARBITRARILY AND CAPRICIOUSLY APPLIED.

The trial court found the existence of two statutory aggravating circumstances in this case, those being a murder committed for pecuniary gain and a cold, calculated and premeditated murder with no pretense of moral or legal justifica- tion. The jury was erroneously instructed on a third statutory aggravating circumstance as set forth in Point III, supra. Those factors have proved to be too inspecific and malleable, such that each is unconstitutionally vague and overbroad under the Eighth Amendment. Aggravating factors must be sufficiently definite to provide consistent application and aggravating circumstances that are too subjective and non-specific to be applied consistently are unconstitutional. See Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)(aggravating circumstance of "especially heinous, atrocious or cruel" too indefinite); Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "outrageously or wantonly vile, horrible and inhumane" too subjective).

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court upheld Florida's death penalty statute against an Eighth Amendment challenge, indicating that the required consideration of specific aggravating and mitigating circumstances prior to authorization of imposition of the death

penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of jurys with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 196 n. 46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted).

Florida's statutory aggravating circumstances are set forth in Section 921.141(5), Fla. Stat. (1987). This Court has vacillated in its dealings with the statutory aggravating circumstance of a cold, calculated or premeditated murder, with no pretense of moral justification. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985), this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated, "the cold, calculated and premeditated factor applies to a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder." Caruthers, 465 So.2d at 498 (emphasis added). Eight pages later, in the next reported decision, this Court approved the same factor, stating, "This

factor focuses more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So.2d 499, 507 (Fla. 1985). Then, in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court reverted to the prior standard, stating ". . . as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano, 497 So.2d at 1183.

At times, this Court recognizes the second prong of this aggravating factor, that is, that this aggravating factor is inapplicable if there is a pretense of moral or legal justification, and at other times this Court totally disregards that second aspect. For instance, in Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the trial court's finding of a cold, calculated, or premeditated murder because, based solely on the statement of the defendant, the victim rushed at him before being shot five times: "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of moral or legal justification, protecting his own life." Cannady, 427 So.2d at 730. But, in Provenzano, 497 So.2d 1177 (Fla. 1986), this Court rejected as a pretense of moral justification uncontroverted fact that the victim (a courtroom bailiff) emptied his pistol at Provenzano before being shot. See Turner v. State, 530 So.2d 45 (Fla. 1988)(no pretense of moral justification where defendant believed victims [his wife and another woman] had a lesbian relationship which resulted in loss of his family).

The inability of this Court to provide a consistent application of this circumstance in the face of compelling facts, and the subjectivity left open in the actual wording of the statutory factor, renders this circumstance too vague to restrict the discretion of the sentencer, the jury and/or this Court. An example can be found by comparing the rejection of this factor due to a "pretense" of justification established solely by the defendant's own statement in Cannady, supra, and the finding of this factor in Turner, supra, where this Court noted in a footnote: "We emphasize that these beliefs, as recounted to his examining psychiatrist and subsequently testified to by this doctor, are not supported by record evidence.") Turner, 530 So.2d at 51, footnote 4 (emphasis added). The vacillation by this Court in the application of these factors is patent. See, Barnard, Death Penalty, Nova Law Review, Vol. 13, number 3, part I, pp.936-43 (Spring 1989)

Because, as discussed in this point, the inconsistent affirmance and application of these factors has resulted in arbitrary and capricious imposition of the death penalty, the circumstance of a cold, calculated and premeditated murder with no pretense of moral or legal justification is unconstitutionally vague under the Eighth and Fourteenth Amendments. The death penalty which has been imposed in reliance on this unconstitutional factor must be reversed and the matter remanded for resentencing.

POINT VII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY RESTRICTING THE DEFENDANT'S RIGHT TO CROSS-EXAMINE KEY STATE WITNESSES.

The right of cross-examination is included in the Sixth Amendment's guarantee of a defendant's right to confront witnesses against him; that right is applicable to the states pursuant to the Due Process clause of the Fourteenth Amendment. Smith v. Illinois, 390 U.S. 129 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place a witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.... To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the witness in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . . .

Alford v. United States, 282 U.S. 687, 692-94 (1931). Similarly, Article I, Section 16 of the Florida Constitution provides the accused the right "to confront at trial adverse witnesses." The free exercise of this right is the mainstay of the adversary system of truthfinding.

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross examination. The opponent demands

> confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. (citation omitted).
>
> Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harrassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 308, 316 (1974). The restriction of cross-examination of several key state witnesses denied Omelus his Fifth Amendment right to due process and his Sixth Amendment right to confront adverse witnesses. The ruling further tainted the death sentence by making it unreliable and arbitrary under the Eighth Amendment.

Specifically, the trial court interfered with the cross-examination of several state witnesses. Jones was desperately seeking to avoid the death penalty when first arrested:

> Q. (By defense counsel): In fact, isn't it true when you were talking with Mr. Jones you had a tape recorder there, right?
>
> A. (Detective White): That's correct.
>
> Q. And you kept pushing it on and Jones would keep pushing it off, right?
>
> A. Correct.
>
> Q. The first thing, in fact, out of his mouth, was he wanted a deal, he wanted to speak to a state attorney, right?

A. That's correct.

Q. In fact, I think he said to you, "What are you offering?"

A. That's correct.

Q. He wouldn't talk to you unless you were offering him something, right?

A. That's correct.

(R1287-88) Omelus sought to demonstrate that Jones made several attempts to evade the death penalty by offering to testify against others who allegedly had arranged contract murders. On cross-examination Omelus began to cross-examine Jones concerning his efforts to avoid the death penalty by accusing Gerald Crayton of hiring someone to kill Cookie Dorsey because Dorsey had stolen drugs from Crayton. (R2333-39, Court Exhibit 1). Interestingly, the scenario advanced by Jones was identical for both Omelus and Crayton, that being that someone had stolen drugs from them and they hired another to kill that person. The state objected to the testimony concerning Jones' accusations against Gerald Crayton, and the court precluded that line of cross-examination, ruling that it was impeachment on a collateral matter and that the information therefore was not relevant. (R1161-63)

The trial judge based his ruling on Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981). However, Gelabert is inapposite because it dealt with the introduction of prejudicial rebuttal evidence to impeach a defendant on an irrelevant matter (the defendant's prior, unrelated assault on his son). Such is not the case here. This cross-examination concerned Jones' bias and motive to testify falsely, and Jones' other attempts to secure a

deal from the state attorney by making similar accusations against other persons is highly relevant.

> The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." (citations omitted). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. (citations omitted).

Davis, supra, 415 U.S. at 316. Further, the information was relevant to Omelus' theory of defense, that being that Jones was simply fabricating the story in order to avoid the death penalty after having killed Mitchell in the commission of a simple robbery for drugs and money. Jones, after having driven Omelus' car and seeing the insurance policies in the glove box, took advantage of his boasting to Crayton about being a contract killer and seized the opportunity to make a deal with the state attorney in order to avoid the death penalty. Omelus was constitutionally entitled under the Sixth Amendment to cross-examine Jones concerning identical accusations he was making against other people in order to avoid the death penalty.

The limitation of the cross-examination of Jones did not end here. Omelus was also prevented from establishing that Jones had previously cut deals with the state, and was therefore an experienced negotiator; that he knew that if he could trade something important enough, he could receive a deal to avoid the death penalty.

Q. (Defense counsel): Have you ever cut

any deals before with the State of Florida?

A. (Jones): I pleaded guilty to a grand larceny charge; that was fourteen years ago.

Q. Okay. And that was a reduced charge?

A. They never did prove I did it, I just --

Q. There was a plea there that you would get X amount of years instead of some greater amount of prison, right?

A. No, it was not.

PROSECUTOR: Objection, it's not --

THE COURT: Sustained, not part of this case, sustained.

(R1047-48). The court's ruling, which was heard by the jury, reasonably misled them into believing them that Jones' prior experience with the police in negotiation was irrelevant because it was not part of this case. It was essential for Omelus to demonstrate Jones' familiarity with the process of plea bargaining to establish that Jones would know how to get his sentence reduced by testifying against someone else. Indeed, after his specious stories to Crayton concerning his prior experiences as a collector and the manner in which he killed Mitchell, which Jones at trial said were lies, Jones as an experienced negotiator knew how he could turn his fortuitous boasting of being a contract killer for insurance proceeds to his advantage. This is especially so, where the police instructed Crayton to channel the discussion with Jones to find out who hired him to kill Mitchell. Obviously, the end result is going to be a conversation implying

that someone hired Jones to kill Mitchell. Omelus should have been afforded wide latitude in this area. Instead, he was given none whatsoever. The ruling was an abuse of discretion and a denial of Jones' right to confront witnesses against him guaranteed by the Sixth Amendment and Article 1, Sections 9, 16 and 22.

In the prior trial, Jones had stated that he had never, ever done collection work before, and that Omelus approached him out of the blue and asked him to murder Mitchell. (Court exhibit #2) Jones was effectively impeached with that testimony, and his credibility severely undermined during the first trial. In the second trial, the judge ruled that Jones' prior collections concerned a collateral matter and that, therefore, no impeachment on that issue would be allowed. (R955-59) Jones' credibility was much better during the second trial, either because the state had effectively rehearsed him or because Jones had experienced being impeached during the first trial and had learned from his prior mistakes, or both. It was established that the prosecutor provided at least one witness (Hagerman) with a transcript of his testimony in the first trial to prepare for the second trial. The refusal of the trial judge to allow Jones to be cross-examined on the issue of his prior collections and the inconsistent statements he had given during cross-examination at the first trial also denied Omelus the right to confront his accuser. Jones' prior collections was not a collateral issue. Instead, it was integral to whether Omelus would contact Jones, a stranger, to commit a murder for hire the very first time they met.

The trial court also restricted the cross-examination of Hagerman, the insurance salesman. Hagerman had obviously enlisted Omelus to obtain insurance for Haitians in the community, and Omelus had been fairly successful at it, having brought in at least five people who had obtained substantial life and health insurance policies. Hagerman, who also is now experienced from being cross-examined during the first trial, learned where the majority of pitfalls were in his prior testimony and he attempted to avoid them at this trial. For example, when asked by defense counsel if he would be surprised to learn that names scratched through on Mitchell's insurance application were those of Mitchell's parents, Hagerman stated, "not now, I wouldn't, I found that out at the last trial." (R1444)

At this trial, Hagerman explained his failure to initially give the police Mitchell's initial insurance application by saying that he offered the police the file and that they took whatever they considered important rather than Hagerman giving them anything. (R1454) This suggests that the police did not feel an insurance application form for the victim was significant enough to warrant obtaining a copy, which is rather absurd. At this trial, Hagerman represented that he gave Omelus a blank form to show to his friends and familiarize them with the paperwork so that, when they came in to get insurance, they would know what questions and information would be needed and would therefore not waste Hagerman's time when obtaining the insurance. (R1399) However, Omelus barely speaks English; he can not read it. An issue exists as to whether Hagerman ever gave Omelus a blank

insurance form that was later forged by Omelus, or whether Hagerman produced the form to bolster his own story. (R1440) Defense counsel asked Hagerman straight out if he was lying when he said Omelus visited his office to get the blank insurance form, a visit not initially revealed to the police, and a state objection was sustained:

> Q. (By Mr. Udell): You told [the police] the next visit after August 15th of 86 was October 4 of 86 when they told you the date and you agreed, right?
>
> A. (Hagerman): Where something transpired, yes.
>
> Q. Isn't it true that you left out the two visits with Omelus between August 15th and October 4 and isn't it true you left them out because they didn't occur?
>
> A. No.
>
> Q. Okay, tell me something, 11-6-86, how --
>
> A. He had to get the form somehow.
>
> Q. If he came in.
>
> A. He stopped in and discussed insurance for a friend.
>
> Q. Okay, that's what you're telling us today, but you didn't tell law enforcement that back on 11-6-86.
>
> A. Okay.
>
> Q. Were you lying to law enforcement?
>
> Prosecutor: Objection, Your Honor, Mr. Udell's --
>
> A. There's a difference between --
>
> Prosecutor: -- Mr. Udell has never asked that statement and I would be

willing to offer that statement in its entirety.

The Court: Sustained.

(R1452-53)

On redirect examination, the prosecutor delved into the area of whether Omelus personally gave Hagerman the fifteen dollars on October 30 that was advanced by Hagerman for the purchase of an insurance policy. (R1489-90) On recross examination, defense counsel sought to go into that subject, and an "asked and answered" objection by the state was sustained. (R1491) This area of cross-examination was critical, because it was on October 30, that Omelus allegedly told Hagerman that Mitchell had been in a knife fight:

> Hagerman: Our conversation [on October 30] was related to the fact that Mr. Mitchell had been in a knife fight and did he have health insurance, and he got in about twenty or quarter to five in the evening and I told him I couldn't remember whether Mr. Mitchell had health insurance. And we went back to the files, we went through the files and we looked and I informed him that he did not have health insurance, he only had life insurance. And the visit was terminated in about twenty minutes and he left about five after five.

(R1410). Significantly, this is before Omelus allegedly met Jones, identified Mitchell as the victim after driving to Wabasso to pick Mitchell up, and before Jones procured the knife to murder Mitchell when he [Jones] could not obtain a pistol. Omelus would have to have been psychic to have informed Hagerman at 5 o'clock on October 30th that Mitchell had been in a knife fight. Hagerman offered the police his file and that they took

The state's case against Omelus rested exclusively upon the credibility of these two witnesses. Both witnesses had good reasons to lie, and their testimony could not effectively be challenged but through vigorous, unfettered cross-examination that probed the finite details of their stories. The burden is on the state to show that the undue restriction on the right to effectively cross-examine these critical state witnesses was harmless beyond a reasonable doubt. Chapman, supra; Ciccarrelli, supra. In light of the jury's difficulty in returning a verdict, it is apparent that the credibility of Jones' and Hagerman was doubted. The restriction on cross-examination may well have affected the verdict. The limitations on cross-examination denied Omelus a fair trial, due process, and the right to confront adverse witnesses guaranteed by the Fifth, Sixth and Fourteenth Amendments and Article 1, Sections 9, 16 and 22 of the Florida Constitution, as previously set forth. Accordingly, the conviction must be reversed and the matter remanded for a retrial.

POINT VIII

THE TRIAL COURT VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS IN FAILING TO CONSIDER AND/OR REFUSING TO FIND VALID MITIGATING FACTORS WHICH WERE AFFIRMATIVELY ESTABLISHED BY THE DEFENDANT AND WHICH HAVE BEEN IN THE PAST RECOGNIZED AS VALID MITIGATION: IMPOSITION OF THE DEATH PENALTY IS OTHERWISE DISPROPORTIONATE.

In State v. Dixon, 283 So.2d 1, 10 (Fla. 1983), this Court guaranteed that the death penalty would be consistently imposed for the same reasons. "Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case."

> [T]he trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors. These reasons are taking from all the evidence in the case and any further evidence presented at the time of sentencing.

Provenzano v. State, 497 So.2d 1177, 1985 (Fla. 1986). Omelus expressly contends that this Court's use of an abuse of discretion standard to review the trial court's findings as to the existence of mitigation when the jury recommends the death penalty violates the Fifth, Eighth, and Fourteenth Amendments and renders the death penalty unreliable under the Eighth and Fourteenth Amendments. When this Court presumes the findings of the trial judge to be correct, the promise of consistency of imposition of the death penalty for the same reasons made in Dixon is compromised. Cf. Miller v. Fenton, 474 U.S. 104 (1985)(no presumption of correctness of state court finding concerning voluntariness of confession).

The findings of the trial court as to the presence of aggravating and mitigating factors are set forth in the judgment and sentence, a copy of which is appended to this brief as Appendix A. The trial court found two statutory aggravating factors, those being a murder committed for pecuniary gain and a cold, calculated and premeditated murder with no pretense of moral or legal justification. (R2196-97) The court then listed, discussed, and rejected the applicability of each statutory mitigating circumstance. (R2198-99) The court's order then discussed two areas of non-statutory mitigating circumstances, finding as valid mitigation that the person who actually killed the victim received a life sentence, and rejected as valid mitigation the defendant's impoverished youth, the fact that he had come from a broken family, was a hard worker who supported his family and was a good father to his child. (R2199)

It is respectfully submitted that the trial court failed to consider valid non-statutory mitigating circumstances, that it failed to attribute adequate weight to the sole mitigating factor that it did find, and that the mitigation in this case renders imposition of the death penalty inappropriate. The trial court reasoned:

> [T]he facts that the defendant suffered from an impoverished youth, came from a broken family, was a hard worker who supported his family and was a good father to his child were presented. The real inquiry is whether such facts justify a contract murder for insurance proceeds. Do they extenuate, explain away or mitigate this cold hearted plan to kill for money. These non-statutory mitigating circumstances do not have a rational nexus to the avarice and greed

> that motivated the defendant to mastermind this killing for money. These four facts describe many people who do not engage in contract killings for money. The court therefore rejects these facts as non-statutory mitigating circumstances.

(R2199) The emphasized language above shows clearly that the trial court neither considered nor weighed the above evidence in deciding whether imposition of the death penalty was appropriate, but instead categorically rejected them because they did not comport with the court's definition of a mitigating factor. A trial judge cannot refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant. Lockett v. Ohio, 438 U.S. 586 (1978). See also Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). Though the judge alluded to these factors, it was only in the context of dismissing them; not in the context of according them the weight and recognition that precedent and consistency demands they receive, especially if there is to be uniform application of the death penalty.

The trial court here used its own definition of what constitutes a mitigating circumstance. The court explicitly stated that the real inquiry concerning a mitigating circumstance is whether "such facts justify a contract murder for insurance proceeds." (R2199) The definition of a non-statutory mitigating circumstance is not so limited. Rather, the sentencer must, under the Eighth Amendment, "make an 'individualized determination' of whether the defendant in question should be executed, based on

'the character of the individual and the circumstances of the crime.' Zant v. Stephens, 462 U.S. 862 (1983)(emphasis in original)." Booth v. Maryland, 482 U.S. 496, 502 (1987).

> There is no disputing that this Court's decision in [Eddings v. Oklahoma, 455 U.S. 104 (1982)] requires that in capital cases 'the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record in any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' Eddings, supra, at 110. . . . Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." 455 U.S., at 114 [.] These rules are well established, and the State does not question them.

Skipper v. South Carolina, 476 U.S. 1, 4 (1986)(emphasis added).

The sentencer did not consider as mitigation that Omelus was a good father to his child. See Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981)("the jurors in this case may have considered [as a non-statutory mitigating circumstance] that Ms. Jacobs was the mother of two children for whom she cared.") The sentencer did not consider as mitigation Omelus' exemplary performance in jail while awaiting trial in this case. See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The sentencer did not consider that Omelus was employed, working two jobs at the time of the murder. See Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987)("[Proffitt] was employed at the time of the offense and was described as a good worker and responsible employee.") These factors may not "justify" the crime that was committed, assuming that Omelus did hire the murder of Mitchell, but they are valid

considerations concerning Omelus' character that must be weighed prior to imposition of the death penalty.

The failure of the trial court to acknowledge and consider the foregoing as valid mitigation results in arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment, where these precise factors have in the past been held to constitute mitigation that offsets the propriety of imposition of the death penalty. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court stated, "Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex." See Proffitt v. Florida, 428 U.S. 242, 258 (1976)("The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases.") (emphasis added). Indeed, consistency in application of the death penalty, that is, consistency in recognizing the same factors as valid mitigation, is the one vital premise upon which imposition of the death penalty is authorized.

> [T]he rule in Lockett followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," (citation omitted), the rule in Lockett recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of

> the offender. (citation omitted). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency.

Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). It could not be more clear that the sentencer rejected as mitigating factors the foregoing which have previously been recognized as mitigation.

Assuming that the trial court correctly found the presence of the two aggravating circumstances, imposition of the death penalty in this case is unwarranted where the person who actually committed the murder did not receive the death penalty. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court again acknowledged that it performs a proportionality review in every capital case in Florida.

> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this state. A high degree of certainty and procedural fairness as well as substantive proportionality must be maintained in order to ensure that the death penalty is administered even handedly.

Fitzpatrick, 527 So.2d at 811. In Fitzpatrick, this Court acknowledged that the Florida Legislature has chosen to reserve application of the death penalty "only to the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811. Imposition of the death penalty, "should not be, or appear to be, merely the subjective views of the individual justices; judgment should be informed by objective factors to the maximum possible extent." Coker v. Georgia, 533 U.S. 584, 592 (1977). It

is clear that this case is not the most aggravated of serious crimes, and comparison of this case to other similar cases establishes that imposition of the death penalty is inappropriate.

> In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), we recognized that a jury may reasonably base its recommendation of life on disparate treatment accorded a co-perpetrator. Pentecost v. State, 545 So.2d 861 (Fla. 1989); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988). More recently, in Brookings v. State, 495 So.2d 135, 143 (Fla. 1985), on facts quite similar to those presented in this case, we held that the disparate treatment accorded "principals in [a] contract murder, helping to plan and carry out [the] crime" could serve as a reasonable basis for a recommendation of life. In Brookings, the woman who hired Brookings to kill the victim was allowed to plead to second-degree murder and the active participant in the killing received total immunity. In Brookings, there were four valid aggravating circumstances: 1) convictions of three violent felonies; 2) the murder was committed for pecuniary gain; 3) the murder was committed to prevent the victim from testifying as a state witness; and 4) the murder was committed in a cold, calculated, and premeditated manner. Id at 142 n. 3. The trial court in Brookings found three nonstatutory mitigating factors, two of which specifically dealt with the differing treatment accorded the co-participants. Id at 142. Although Brookings had pulled the trigger, we concluded that the fact that one participant would escape the death penalty and the other would walk away totally free while the ultimate penalty was sought against Brookings were facts that could reasonably be considered by the jury. Therefore, under the Tedder standard, the override was improper. Id at 142-43. Brookings cannot be distinguished from this case by the act that the trial court in Brookings found the disparate treatment

> of the co-perpetrators a mitigating factor and the trial judge in this case did not. See Caillier v. State, 523 So.2d 158 (Fla. 1988)(disparate treatment accorded equally culpable accomplice could have served as basis for jury's recommendation of life despite fact that trial judge specifically rejected such treatment as a mitigating factor). Because the jury in this case could have reasonably based its recommendation on the fact that Salerno and the victim's wife would likely not be prosecuted for their participation in the murder, the override was improper.

Fuente v. State, 14 FLW 451, 454 (Fla Sept. 14, 1989)(footnotes omitted).

Viewing the facts in a light most favorable to the state, Omelus' participation can be summarized as having hired the killing of Mitchell, having identified Mitchell as the person he wanted killed, and bringing the two together. There was no "pressuring" by Omelus for Jones to kill Mitchell, as was present in Antone. Indeed, Judge Moxley observed the following in reference to Jones when sentence was pronounced:

> THE COURT: He had no conscience, John Henry Jones had absolutely no conscience. . . He operates on animal love. He has no conscience, no conception, he is pathologic, John Henry Jones, you know, he was -- the question is how dominating was Mr. Omelius (sic). John Henry Jones didn't need a lot of domination, he had no conscience, whatever it took to do he was going to. It wasn't like a seventeen year old kid that was in a situation he found himself in an untenable situation, he killed. John Henry Jones was -- .... it could have been anything. John Henry Jones didn't need a lot of motivation to kill people. . . . He made a decision to kill. . . He decided, the defendant chose this person should be killed for insurance purposes. The actual decision

> to kill, the actual decision to kill was made by a conscienceless person who needed little motivation to kill, other than the fact of a little bit of cocaine and that life meant less to him than a little bit of cocaine. That's the facts that I gathered but that really is -- I just wanted to clarify so the record is clear. I mean, that's not necessarily inconsistent with being dominated but it is also is not the person that was to be dominated didn't need a whole lot of drive to do what he needed to do. It didn't have to take a whole lot for John Henry Jones unfortunately.

(R2798-2800)(remarks of prosecutor deleted). If anything, Jones and Omelus are equally culpable, each participating in murder for pecuniary gain (if Jones is to be believed, Omelus' pecuniary gain was much more than Jones') yet Jones, who additionally committed the brutal, heinous murder, received a life sentence, whereas Omelus, who at most initiated a murder, is receiving the death penalty. Proportionately, the penalty to Omelus is unfairly severe when contrasted to the penalty received by the actual murderer.

> We pride outselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. Imposition of the death sentence in this case is clearly not equal justice under the law. Ironically, the trial judge stated in his reasons, "I don't feel you can treat Darius [the appellant, Darius Slater] and Charles Ware [the "triggerman"] separately in that fashion," and then went ahead and did so. We recognize the validity of the Florida death penalty statute has expressed in State v. Dixon, 283 So.2d 1 (Fla. 1973), but it is our opinion that the imposition of the death penalty under the facts of this case

> would be an unconstitutional application under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Slater v. State, 316 So.2d 539, 542 (Fla. 1975). Significantly, Slater was one of eight cases expressly mentioned by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 253 (1976) when the constitutionality of Florida's death penalty statute was upheld. This Court has frequently held that the trial judge erred in overriding a jury recommendation of life imprisonment where the jury could have reasonably concluded that the defendant was an accomplice whose culpability was less than the triggerman, who received a sentence of life imprisonment.

> This Court has upheld the reasonableness of jury recommendations of life, which could have been based, to some degree, on the treatment accorded one equally culpable of the murder, McCampbell v. State, 421 So.2d 1072 (Fla. 1982). In such cases, we have reversed the judges decision to override the recommendation when the accomplice was a principle in the first degree; Herzog v. State, 439 So.2d 1372 (Fla. 1983); McCampbell v. State; when the accomplice was the actual triggerman; Barfield v. State, 402 So.2d 377 (Fla. 1981); Slater v. State, 316 So.2d 539 (Fla. 1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; Smith v. State, 403 So.2d 933 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975); or when the accomplice was the controlling force instigating the murder; Stokes v. State, 403 So.2d 377 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980). In every case, the jury has had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself.

Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). Undoubtedly, had

the jury in this case issued a recommendation for life imprisonment, it would have been an abuse of discretion for the trial court to override that recommendation based on the foregoing cases. It is respectfully submitted that the death recommendation by the jury is unreliable in this case because of faulty jury instructions and improper argument by the prosecutor during the penalty phase. Though unobjected to, it is respectfully submitted that this argument undermined the reliability of the recommendation, and that it was of such nature that neither rebuke nor retraction could have cured its sinister effect.

Specifically, the prosecutor argued the existence of three statutory aggravating circumstances, those being a murder for pecuniary gain, a cold, calculated and premeditated murder with no pretense of moral or legal justification, and an especially heinous, atrocious or cruel murder. (R1887-88) As set forth in Point III, the argument that the jury should weigh the heinousness of this murder was inapplicable as a matter of law to Omelus, and as such the presence of this argument undermines the reliability of the jury's recommendation. The prosecutor argued that it is appropriate to impose the death sentence when, "the mitigating circumstances that you should find do not outweigh the aggravating circumstances that you may find." (R1887) As submitted in Point V, this argument distorts the law and places the burden of persuasion on the defendant in Violation of the Fifth, Eighth, and Fourteenth Amendments. The prosecutor further argued that, in the presence of one valid aggravating factor, death is presumed to be appropriate.

Now, the significance of this or the importance of this is that the law provides that the death sentence is presumed to be the appropriate sentence if you find that one of the aggravating circumstances exists. One aggravating circumstance is sufficient under the law to set this crime apart from all other first degree murder cases and make this crime a case wherein the death sentence is the appropriate sentence, unless that aggravating circumstance is outweighed by the mitigating circumstances that you should find.

These aggravating circumstances are the circumstances which the law of this state have found to be so egregious that individually those aggravating circumstances support the death sentence. In this case it's particularly important that you keep that in mind, one is enough. Here we have three, three statutory aggravating circumstances that I submit have been proved. And the burden of proof in this phase of the trial is the same as the state's burden in any other phase of the trial, beyond and to the exclusion of every reasonable doubt.

The mitigating circumstances, and I use that term as the statute requires me to do so in the sense that any evidence that's offered by the defendant may be considered, any evidence whatsoever, may be considered by you as a mitigating circumstance.* But a mitigating circumstance is one that is presumed to give reason for or excuse in some respects the egregiousness of the crime, designed to be considered as, on the defendant's side to outweigh, to overcome the presumed appropriate sentence, which is the death sentence when one aggravating circumstance is proven.

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* The prosecutor's argument highlights the importance of the trial court's refusal to instruct the jury that particular factors (i.e., the defendant's performance while in prison and his potential for rehabilitation) are valid mitigating circumstances under the law. See Point IV, supra.

(R1889-91). The prosecutor argued a non-statutory aggravating circumstance, that being that Omelus converted a hopelessly addicted cocaine addict into a vicious and cruel murderer. (R1895) The state argued that the 42 wounds suffered by Willie Mitchell, the defensive wounds to his hands and wrists, and that Mitchell, "pled for his life, experienced excruciating pain from these wounds and the agony of drowning in his own blood" (R1896) establish the heinousness of the murder. See Point III, supra. The state further argued, even though defense waived the statutory mitigating circumstance of no prior significant criminal history, that Omelus dealt in cocaine in the Haitian community in Vero Beach, Gifford, and Wabasso. (R1896) ("Dealing in cocaine wasn't enough for him.")(R1896-97)

To clarify that the especially heinous, atrocious or cruel aggravating factor applied to Omelus, the prosecutor reminded the jury that the law of principals required that they treat the acts of John Henry Jones as those of Omelus:

> You've already heard the instructions on principals, instructions that make persons who conspire together responsible for the acts of each other. John Henry Jones' criminal responsibility in this case is directly connected to this defendant. John Henry Jones was burned out, addicted to cocaine and became an extension of the defendant's evil. All of his actions were controlled as a puppeteer would control a puppet. This defendant told him where to go, told him when to go. John Henry Jones was not acting in his own behalf. But the hand that held that knife, the knife that stabbed, slashed and mutilated Willie Mitchell, left him still alive bleeding to death, strangling and choking on his blood, that hand was controlled in all

> respects by this defendant. This defendant knew John Henry Jones' character. He conspired with him knowing that John Henry Jones was Ulreck Omelus' private monster waiting to be unleased.

(R1898-99). The prosecutor also violated the proscription against arguing that the death penalty is appropriate based on the characteristics of the victim as set forth in Booth v. Maryland, 486 U.S.__ , 107 S.Ct. 2529 (1987). The prosecutor argued,

> I submit to you ladies and gentlemen, that on the basis of all three of these aggravating circumstances that as a matter of law and as a matter of fact it takes more than an interesting story about an impoverished childhood and youth of the defendant and a sailing trip from Haiti to Miami. Before you let that story in any way interfere with justice in this case, think for a moment. It crosses my mind that Willie Mitchell probably has an equally entertaining story. But we won't hear it. There's no advocate here for willie Mitchell. I want you to think about this before you allow this story to rise to the level that it must under the law to outweigh three aggravating circumstances.

(R1899-1900)

The prosecutor's concluding argument implied that Omelus should receive the death penalty because John Henry Jones did not. "We may have heard a sad story about John Henry Jones' childhood. You may feel that John Henry Jones should have gotten the death sentence in this case and if you feel it's wrong that he didn't, it's just as wrong that this defendant not get it and two wrongs don't make a right. Thank you very much." (R1901) The prosecutor argued that for policy reasons based on facts not

in evidence, the death penalty must be imposed in this case lest it not ever be imposed again in a murder for hire case;

> Mr. Udell will likely tell you that because John Henry Jones only got the life sentence that Ulrick Omelus should only get a life sentence in this case. In telling you that, ladies and gentlemen, he's asking you to endorse a policy that in a contract murder case such as we have here, a case which has, a case of this sort which has no justification, the person who did the hiring could never, ever suffer the death penalty because in a case such as this there is no way to ever bring the truly responsible person, the one who did the hiring, the one who conceived the crime to justice without the cooperation of John Henry Jones.

(R1900).

The foregoing are examples of improper argument by the prosecutor which, under the Eighth and Fourteenth to the United States Constitution and Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution undermined the reliability of the jury recommendation. See Garron v. State, 528 So.2d 353, 358-59 (Fla. 1988). It is respectfully submitted that foregoing conclusively demonstrates that the jury recommendation should be afforded no weight whatsoever, and that the totality of circumstances require that the sentence of death be vacated and the matter remanded for imposition of a life sentence.

POINT IX

THE APPELLATE REVIEW PROVIDED BY THE SUPREME COURT OF FLORIDA RESULTS IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION.

Three members of this Court have now recognized that the death penalty in Florida is being unconstitutionally applied. In Burch v. State, 522 So.2d 810 (Fla. 1988), in the context of what constitutional function the jury plays in capital cases in Florida, Justice Shaw stated the following in a dissenting opinion joined in by Justices Ehrlich and Grimes:

> [O]ur decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with e.g., Combs and our death penalty statute. Moreover, the situation of largely unfettered jury discretion is disturbingly similar to that which led the Furman court to hold that the death penalty was being arbitrarily and capriciously imposed by a jury with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was not. Absent factual findings in the advisory recommendation, any distinctions we might draw between cases where the jury recommends (sic) death and those where it recommends life, must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as Furman requires.

Burch v. State, 522 So.2d at 815 (Fla. 1988)(Shaw, Ehrlich, and Grimes, JJ., dissenting)(emphasis added).

The United States Supreme Court has determined that the Sixth Amendment does not require that the jury find the presence of statutory aggravating circumstances. Hildwin v. Florida, 490 U.S. __, 109 S.Ct. __, 104 L.Ed.2d 728 (1989). In Spaziano v. Florida, 468 U.S. 447 (1984), the United States Supreme Court held that a trial judge override of a jury recommendation of life does not in and of itself violate the Eighth Amendment.

> The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. 'Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment is violated by a challenged practice.' (citation omitted)

Spaziano, 468 U.S. at 464. Significantly, Spaziano challenged the authority of the trial judge to override the jury recommendation of life, contending specifically that because the majority of other states require the jury to be the sentencer, the Eighth Amendment required that the jury also be the ultimate sentencer in Florida. The Eighth Amendment challenge made in this issue on appeal is significantly different than that made in Spaziano, in that this challenge concerns the consistency of imposition of the death penalty following appellate review by this Court.

At the onset, it must be noted that there is no necessity that this issue be presented to the trial court to preserve appellate review, in that it is not for a trial court to judge the constitutionality of the practice of this Court. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court guaranteed that the same results in one case would occur based on the same facts.

The guarantee has proved hollow, in that this Court indulges in speculation and conjecture when faced with a jury recommendation of life in order to gleen anything in the record which may have supported the recommendation. However, when the jury recommends death, this Court simply presumes that death is the appropriate penalty. It is expressly submitted that the use of that presumption and this practice violates the Eighth and Fourteenth Amendments by skewing the appellate review process in favor of imposition of the death penalty. This procedure further injects arbitrariness and capriciousness into imposition of the death penalty, in that the reasons that constitute mitigation in cases where the jury recommends life are summarily rejected without consideration by this Court when the jury recommends death. This Court routinely relies on the presumption that death is the appropriate penalty in the presence of one statutory aggravating factor and "nothing in mitigation". By applying an abuse of discretion standard to review the trial court's findings of mitigation or, more aptly stated, No mitigation, this Court emasculates the guarantee of consistency made in Dixon. This practice violates the requirement that every death sentenced defendant be focused upon as a "uniquely individual human bein[g]." Woodson v. North Carolina, 428 U.S. 280, 304.

At issue here is not the severity of punishment contrasted against the moral culpability of the defendant, as was the case in Tyson v. Arizona, 481 U.S. 137, 157-58 (1987), but rather the indiscriminate fashion in which the presence of mitigation is recognized or disregarded by this Court. The review by this

Court does not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420 (1980)(opinion of Stewart, J., see also Skipper v. South Carolina, 476 U.S. 1, 14-15 (1986)(Powell, J., concurring). In reviewing a death sentence, this Court has only the written findings by the trial court. The failure of this Court to provide plenary review of the record in all instances for mitigation as a question of fact and law, and the use of the presumption that death is the appropriate sentence in the presence of one aggravating factor and nothing (found by the trial court) in mitigation violates the Eighth and Fourteenth Amendments. The review provided by this Court is arbitrary and capricious because of the lack of any structured objective means by which to review in every case in which the death penalty is imposed the presence of valid mitigation regardless of the recommendation of the jury. Accordingly, this Court is asked to reverse the death penalty and remand for imposition of a life sentence.

POINT X

CONTRARY TO THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, OMELUS WAS DENIED THE RIGHT TO A FAIR TRIAL, DUE PROCESS AND THE RIGHT TO CONFRONT ADVERSE WITNESSES WHEN THE JURY WAS EXPOSED TO MATERIAL DURING DELIBERATIONS THAT WAS NOT INTRODUCED INTO EVIDENCE IN OPEN COURT.

The record on appeal, when transmitted to this Court, contained material which concerned the murder of another person (Dessama Cherry) by Jones in Indian River County, allegedly at the request of Omelus. Those items* were presumptively viewed by the jury when deliberating their verdict, in that the material was contained in the record on appeal along with certification by the deputy clerk that the record contained "a true and correct recital and copy of all such papers and proceedings in said cause as appears from the records and files of my office that have been directed to be included in said record by the directions furnished me." (R2751). The clerk was directed to prepare the record on appeal in conformity with Fla.R.App.P.9.200(a)(1), (R2188), which in pertinent part states:

> The record shall consist of the original documents, exhibits, and transcript of proceedings, if any, filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices, depositions, other discovery and physical evidence.

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* The items contained amid the evidence and exhibits in the record on appeal were State's Exhibits AN (bullets), OO (2 .45 caliber empty shell casings), PP (projectile fragments), SS (projectile fragments), and HHH (photograph of nude black-male gunshot victim)(R2326-2330).

Omelus successfully moved this Court to have the record returned whereby any exhibits that had not been properly introduced at trial were removed. The previously mentioned items have been extracted from the record, and accordingly it should be sufficiently established that they were never properly introduced into evidence. However, Omelus has been wholly unable to ascertain whether the jury viewed the exhibits that have now been removed from the record, and the presence of those items in the evidence box forwarded to this Court by the clerk has not been explained. Omelus sought permission to ask the jurors whether they in fact viewed those exhibits during deliberations, but the trial court and this Court denied the motions to contact the jurors concerning this matter. It is respectfully but expressly submitted that the denial of the motions to contact the jurors prevents Omelus from creating the record that he needs to demonstrate prejudice, and that the rulings deny Omelus Due Process and the right to a meaningful appeal in violation of the Fifth and Fourteenth Amendments to the United States Constitution. See Picirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976).

Omelus further respectfully submits that the inexplicable presence of the previously listed items amid the evidence that was considered by the jury during deliberation of Omelus' guilt or innocence denied Due Process, a fair trial, and the right to confront adverse witnesses in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and that it also renders the death recommendation

of the jury unreliable under the Eighth and Fourteenth Amendments. Consideration of matters outside of the evidence properly presented during open court in the presence of the accused is presumptively prejudicial, and it does NOT inhere in the verdict. See Russ v. State, 95 So.2d 594 (Fla. 1957). Any presumption of prejudice aside, it is clear that the unexplained presence of this particular material in the evidence box was prejudicial to Omelus.

Specifically, the material at issue directly concerned the Williams rule evidence which was previously ruled by the trial judge to be inadmissible, in that the information was both irrelevant and, assuming relevance, its prejudicial effect far outweighed any probative value. (R927-929) Opening statement by the prosecutor included acts and conduct concerning the murder of Dessama Cherry intermingled into references to acts and conduct concerning the murder of Willie Mitchell, and a timely motion for mistrial was denied because the judge viewed the remarks as innocuous. (See Point II, supra). The material also concerned the references made by the prosecutor which prompted the second motion for mistrial, which was just barely denied by the trial court. Clearly, the exposure of the jury to this additional material contaminated their deliberations and tainted their verdict and penalty recommendation. Omelus has never had a meaningful opportunity to explain, confront, or even be aware of this material until it was fortuitously discovered by the undersigned amid the evidence lodged in this Court after the appeal was commenced.

The unexplained presence of prejudicial items (bullets and picture of a gunshot victim) amid the evidence submitted to the jury during deliberation of the guilt verdict violates the Sixth Amendment right to confront witnesses, and it further renders the recommendation of the jury unreliable under the Eighth Amendment; it also violates the right to Due Process under the Sixth Amendment. Gardner v. Florida, 430 U.S. 349 (1977).

> It is a fundamental principle of our jurisprudence that "the jury's verdict must be based on evidence received in open court, and not from outside sources." (citation omitted). Nevertheless, a new trial is not required automatically whenever a jury is exposed to material not properly in evidence. Rather, a new trial is required only when there is a "reasonable possibility" that the material affected the jury verdict. (citation omitted). Each case "must turn on its special facts," (citation omitted), and in each case the crucial factor is "the degree and pervasiveness of the prejudicial influence possibly resulting" from the jury's exposure to the extraneous material. (citation omitted). The trial court has the primary responsibility for making this determination of prejudice, and an appellate court must review the trial court's determination under an "abuse of discretion" standard. (citation omitted).

United States v. Weisman, 736 F.2d 421, 424 (7th Cir. 1984). The court noted in a footnote that the better practice is to contact the juror(s) who were exposed to the material in determining the prejudicial effect, but concluded that the failure of the district court to do so, after conducting an inquiry of the other jurors, was not necessarily error. Id at 423.

The exposure of a juror to extra-record evidence raises a presumption of prejudice and the government has the burden of rebutting that presumption. U.S. v. Wiley, 846 F.2d 150, 157 (2nd Cir. 1988).

> Courts have applied varying legal standards to determine whether the jury's use of or exposure to extrinsic material requires a new trial. E.G., United States v. Griffith, 756 F.2d 1244, 1252 (6th Cir.)(trial judge should determine whether jury actually used material and whether there was prejudice to the defendant; trial court's decision will be reviewed under abuse of discretion standard), cert denied, 106 S.Ct. 114 (1985); United States v. Camporeale, 515 F.2d 184, 188 (2d Cir. 1975)("evidence was so prejudical that the defendant was denied a fair trial"); United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975)(new trial required if there is a "reasonable possibility" that the defendant was prejudiced); United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973)("if there is the slightest possibility that harm could have resulted from the jury's viewing of unadmitted evidence, than reversal is mandatory."), cert. denied 416 U.S. 986 (1974); Edwards, supra, 637 P.2d at 887 ("reasonable possibility" standard).

Johnston v. Makowski, 823 F.2d 387, 390 (10th Cir. 1987). The court agreed that the correct standard of review was whether there was the "slightest possibility" that harm could have resulted as stated in United States v. Marx, 485 F.2d 1179 (10th Cir. 1973). Johnston, 823 F.2d at 390.

The extraneous material that was contained in the evidence box in Omelus trial is presumptively prejudicial. Even without that presumption, there is certainly more than a "slight possibility" that exposure of the jury to these items tainted the

deliberations. After the prosecutors improper interjection of comments and remarks concerning this very murder over objection of the defendant and the rulings of the trial court, there is no way that it can reasonably be said beyond a reasonable doubt that the error did not affect the jury deliberation, bearing in mind the amount of time that the jury was out, combined with the fact that the first trial resulted in a hung jury. It is respectfully submitted that the state cannot show that the unexplained presence of the foregoing material did not contribute to the guilty verdict and/or death recommendation by the jury in this case. Omelus has been denied the right to Due Process, a fair trial and confrontation of witnesses guaranteed by the Fifth, Sixth and Fourteenth Amendments and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Accordingly, the conviction must be reversed and the matter remanded for retrial.

CONCLUSION

Based on the argument and authority set forth in this brief, this Court is respectfully asked for the following relief:

Points I, II, VII, IX - to reverse the conviction;

Points III, IV, V, VI, VIII - to vacate the death penalty and remand for a new penalty phase and/or imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Daytona Beach, Fla. 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Ulreck Omelus, #115678, P.O. Box 747, Starke, Fla. 32091 on this 6th day of October 1989.

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