IN THE SUPREME COURT OF FLORIDA

ULRICK OMELUS,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 73,911

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

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	)	
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	)	
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	)	
Plaintiff/Appellee.	)	
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REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-APPELLEE

PRELIMINARY STATEMENT

Appellant respectfully maintains that the untimely (nine-month late) notice of cross-appeal constitutes a procedural bar that prevents the state from receiving affirmative relief, where the state has advanced no justification for its failure to comply with Fla.R.App.P. 9.140(c)(2).[1] An Appellant is entitled to know when the issues in the initial brief are being selected/rejected, researched, framed and written whether the state also seeks affirmative relief. Allowing the state to cross-appeal after an unjustifiably late notice of cross-appeal gives the state an unfair tactical advantage and renders the respective appellate rule a nullity since it may be ignored with impunity.

[1] In pertinent part, Fla.R.App.P. 9.140(c)(2) provides, "Commencement. The State shall file the [notice of cross-appeal] with the clerk of the lower tribunal within 15 days of rendition of the order to be reviewed; provided that in an appeal by the state pursuant to Rule 9.140(c)(1)(H), the state's notice shall be filed within 10 days of service of defendant's notice." (emphasis added).

Insofar as the state's "lack of preservation" footnote that appears like a recurrent hiccup in virtually every issue (AB[2] at 6, 24, 26, 39, and 41), it is respectfully submitted that, as discussed on pages 19-23 of this brief, constitutional errors that affect the reliability of imposition of the death penalty are cognizable on appeal under the Eighth and Fourteenth Amendments regardless of whether the error was objected to at trial. Appellant otherwise relies on the argument and authority set forth in the Initial Brief of Appellant as to Points not argued further in this pleading.

SUMMARY OF ARGUMENTS ON CROSS-APPEAL

POINT I: The state asserts that the trial court should have allowed the state to present evidence of the murder of Dessama Cherry, arguing that "the Cherry murder was relevant, necessary, and material to the issue of who hired Jones to murder Mitchell . . . and to show motive - money - which was the same in both murders." As set forth in pages 13-18 of this brief, the trial court was absolutely correct to rule that evidence of a different murder was irrelevant and that, in any event, the prejudice of such evidence would far exceed the relevance. The state should have abided by this ruling rather than divulge facts concerning the murder of Dessama Cherry which, though inapplicable to the murder of Willie Mitchell, may have been used by the jury to render a verdict of guilty.

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[2] AB refers to state's answer brief.

POINT II: The state asserts that the trial court should have found that the statutory aggravating factor of an especially heinous, atrocious or cruel murder should have applied to Omelus. The evidence is clear that Omelus did not intend that the murder of Willie Mitchell be heinous, atrocious, or cruel. As set forth in pages 29-30 of this brief, the trial court did not err in not finding this aggravating factor to apply because the factor did not apply as a matter of law and fact, and in any event the state cannot constitutionally appeal the trial court's finding that this factor does not apply.

POINT III: The state contends that the trial court should not have instructed the jury that Omelus would receive a life sentence if the parole function ceased to exist in Florida. That instruction was correct, and the state did not ask relief or redress concerning this point.

POINT IV: The state contends that the court should have allowed testimony regarding other murders. The contention spans four sentences, the most specific of which states, "Furthermore, the narrow question of whether Omelus hired Jones to commit other murders, i.e., hired him as a contract killer, was relevant standing alone." The state does not say what this evidence was relevant for. This point on cross-appeal is addressed in point II of the Initial Brief of Appellant. This information stands for nothing more than to show bad character and propensity to commit crime. The state interjected this consideration solely to unfairly prejudice Omelus. The state has failed to demonstrate error.

POINT V: The state argues that the trial court should not have limited the testimony regarding the weapon. The trial court's ruling was necessitated by the fact that the prosecutor, in opening statement, implicitly revealed that Jones obtained a gun, a fact which, as belatedly realized and noted by the trial judge, has absolutely no relevance to the stabbing murder of Mitchell. The prosecutor's own misconduct is what occasioned the tailoring of the testimony to refer to a "weapon" as opposed to a gun. The state should not be heard to complain about the trial court's good faith effort to save a trial that was jeopardized by the prosecutor's intentional interjection of prejudicial, irrelevant evidence. It is doubtful that the trial court's ruling would apply to the retrial unless the state again improperly interjects the consideration of a gun being obtained by Jones on another occasion. Again, the state seeks no relief in reference to this point.

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.

The state contends that, "A substantive defect in an indictment or information may be waived unless challenged timely by a motion to dismiss." (AB at 7) The "substantive defect," the allegation that Omelus hired Jones to kill Mitchell "by STABBING WILLIE MITCHELL WITH A KNIFE OR OTHER SHARP INSTRUMENT" (R1937), is a substantive "defect" only because the state cannot prove it by competent evidence. Rather than being too vague or misleading, the indictment, in precise capitalized language, specifically alleged a single crime with particularity. There is no flaw that would render the indictment subject to a motion to dismiss, and the state's argument that Omelus should have moved to dismiss the indictment because it alleged incorrect factual matters is frivolous.

Attempting to distinguish the cases cited in the initial brief, the state argues, "the cases cited by Omelus are distinguishable because in those cases the state failed to prove what was charged." AB at 8 (emphasis added) Here, too, the state failed to prove what it charged. The state does not dispute that it did not prove that Omelus hired Jones to kill Mitchell by stabbing Mitchell with a knife, but instead suggests that the allegation detailing how the murder was to have been committed was a "minor semantical defect." (AB at 8) The actual commission of the crime is not what is being punished under this

statute, but instead that a person other than the perpetrator somehow "aids, abets, counsel, hires, or otherwise procures such offense to be committed." Section 777.011, Fla.Stat. (1987) How a defendant aided, abetted, counseled, hired, or procured another to commit the crime is a material part of the state's allegation. The state attorneys are professionals, and in a capital murder professionals should be held to high standards. It should be presumed that the state intended to prosecute Omelus on what it voluntarily and specifically alleged in the Indictment, and that is the charge against which Omelus defended himself at trial. The state failed to prove its specific accusation in this case and, accordingly, Omelus was entitled to have his timely motion for judgment of acquittal granted.

POINT II

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

The prosecutor's exact comments and defense counsel's precise objection during the opening statement are as follows:

> PROSECUTOR: Now, during the time that intervened, he 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'm 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 --
>
> MR. UDELL: Judge --
>
> MR. WHITE: -- at that point --
>
> MR. UDELL: Move for a mistrial. Can we approach the Bench?
>
> THE COURT: Yes, over here.
>
> (Thereupon, discussion was held at the Bench out of the hearing of the Jury as follows:)

MR. UDELL: Judge, I believe that's the Williams Rule evidence as has previously been declared to be irrelevant and highly prejudicial. We would move for a mistrial. I have not even opened my mouth yet. I did not open the door to this jury knowing anything about that Indian River County murder. I move for a mistrial at this time.

MR. WHITE: I haven't mentioned the Indian River murder.

THE COURT: Would you read back what the comment was.

MR. UDELL: "Show him the man he wanted killed." The jury is going to find out this murder did not occur in Wabasso. They are going to be able to infer the Defendant hired him to commit another murder.

THE COURT: He says a man was shown to him in Wabasso. Do you have evidence to show a man was shown to him in Wabasso that's related to this case?

MR. WHITE: They went to Wabasso to pick Willie Mitchell up, that's where Willie Mitchell was picked up.

MR. UDELL: That's true but you know as well as I do that the night they went down to get the gun --

MR. WHITE: But the jury doesn't know it.

MR. UDELL: -- within a day or two -- they're going to be able to figure it out.

THE COURT: No, they're not going to be able to figure it out.

MR. WHITE: That's all I'm going to say that's what the trip was for and they could logically infer it was Willie Mitchell.

THE COURT: First I need to know, the comment was, "Went down there for a

man to be pointed out who was the victim."

(Mr. White's last statement in Opening Statement was read.)

THE COURT: Was Mr. Mitchell -- do you believe -- I don't know the facts.

MR. WHITE: Okay, what's your question, I'm sorry?

THE COURT: Is that where Mr. Mitchell resided?

MR. WHITE: Yes, sir, the facts will show they had to go down to Wabasso to pick Mitchell up on the day they did the Mitchell murder.

THE COURT: I'm going to find it's neutral at this point, I'll deny it.

(R589-592)

The state argues, "[Omelus] did not Object (sic) to the statement for a curative instruction. This error has been waived. Ferguson v. State, 417 So.2d 639 (Fla. 1982)" Apparently the state is arguing that this error has not been preserved for appellate review because Omelus did not also move for a curative instruction after the trial court denied the timely motion for mistrial by ruling, "I'm going to find it's neutral at this point, I'll deny it." (R592) A curative instruction would have been useless. The improper revelation by the prosecutor of information concerning a different crime was of a nature that neither rebuke nor retraction could remove its sinister effect; any curative instruction would only have emphasized the content of the prosecutor's remarks. See Castro v. State, 547 So.2d 111, 115 (Fla. 1989) ("Williams rule error is presumed to infect the entire proceeding with unfair prejudice.") Defense counsel's

objection and motion for mistrial were timely and specific, and the fact that the trial court found the comments to be "neutral" obviated any requirement that defense counsel move for a curative instruction, because it would have been a useless act. See Ralston v. State, 15 FLW 1206 (Fla. 4th DCA January 17,1990) ("curative instruction would have been futile after the trial court overruled the objection and specifically stated that it found the objectionable evidence to be proper.").

The prosecutor revealed facts concerning a different crime, but the judge concluded that the information would be viewed by the jury as pertaining to Mitchell because Mitchell was later allegedly picked up in Wabasso by Omelus and Jones. The prosecutor, however, understood that he was violating the trial court's earlier ruling concerning the Williams rule testimony.

> PROSECUTOR: They went to Wabasso to pick Willie Mitchell up, that's where Willie Mitchell was picked up.
>
> DEFENSE COUNSEL: That's true but you know as well as I do that the night they went down to get the gun --
>
> PROSECUTOR: But the jury doesn't know it.
>
> DEFENSE COUNSEL: -- within a day or two -- they're going to be able to figure it out.
>
> THE COURT: No, they're not going to be able to figure it out.

(R590-591)(emphasis added). What the judge did not appreciate YET is that the entire discussion involving a gun, as opposed to a knife, was as much an intrusion into the forbidden Williams Rule evidence as was the seemingly "neutral" trip to Wabasso. The

trip, even if "neutral," was still a deception of fact to the jury. The remarks concerning a gun and showing Jones a victim was inaccurate, unfair, and a prejudicial deception.

The state argues that the prosecutor's later questioning of Jones concerning whether Omelus hired Jones to commit other murders was not to prove that other murders were committed, but instead to establish the "relationship" between Jones and Omelus, (AB at 12), this despite a trial court order that facts concerning other murders not be mentioned. In context, the prosecutor's questioning of Jones went as follows:

> Q. (Prosecutor): Let me ask you this, at the time he was talking about this, about the insurance, did he tell you what the victim's name was then?
>
> A. (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 --
>
> MR. UDELL: Judge, I'll object.
>
> THE COURT: Sustained.

MR. UDELL: May we approach the bench?

THE COURT: Yes.

(Thereupon, discussion was held at the Bench out of the hearing of the Jury as follows:)

MR. UDELL: 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 alleged relationship between Omelus and Jones was well-established before the offensive question and response occurred. Jones had already testified that Omelus hired him to murder Mitchell for insurance proceeds. That "relationship" is relevant to this trial, but information concerning discussions of other murders was irrelevant[3], squarely within the ambit of the trial court's ruling and, contrary to protestations of "harmless error" by the state, the intentional interjection of that consideration over a prior specific court ruling was unfairly prejudicial. These errors cannot be viewed in a vacuum, and the state cannot meet its burden of showing that these intentional prosecutorial ploys were harmless. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988)

The state asserts that "Jones' testimony was corroborated by state's witnesses Lottie Baker, Willie Smith, Bernard Knight, Irving Cartwright, and Gerald Crayton." (AB at 14) Jones' claim that Omelus hired him to murder Mitchell was

[3] During the objection and motion for mistrial, defense counsel correctly noted that the state had not provided notice of any other Williams rule evidence but that of the murder of Dessama Cherry. (R842).

certainly NOT corroborated. At most, the testimony of these witnesses corroborates that Jones killed Mitchell, which Jones admits. None of these witnesses had direct knowledge that Omelus hired Jones to murder Mitchell. For example, Bernard Knight saw Jones and Omelus talking together twice. (R1192) Knight did not hear what they were talking about, and Knight contradicted Jones testimony in other respects, in that Knight testified Jones never asked him to test cocaine as had been represented by Jones. (R1194-95)

Even Gerald Crayton, the person who taped conversations with Jones to find out who hired Jones to kill Mitchell (R1380-87), clarified on cross-examination that the only way he knows that Omelus is the "John" who hired Jones to kill Mitchell is because that is what Jones said. (R1390) Jones, however, testified that no one was ever around when Jones and Omelus discussed killing Mitchell. (R1062) Thus, it is solely Jones' word that Omelus hired him to kill Mitchell, corroborated by circumstances. This is sufficient to sustain a conviction, but not to withstand a harmless error analysis. The credibility of witnesses is solely for the jury to determine. Here, the testimony was extremely confusing, and it is impossible to determine whether the prosecutor's deliberate violation of the court's pre-trial rulings affected the outcome of this case. Indeed, the first trial resulted in a hung jury.

In Point I of the state's cross-appeal, the state argues that the trial court should have allowed the state to introduce evidence concerning the murder of Dessama Cherry by

Jones. (AB at 47-50) At the first trial, following a proffer, Judge Johnston ruled that Williams rule testimony to be inadmissible. (R29-30) After the first trial resulted in a hung jury, the prosecutor had Judge Johnston recused, and in doing so said the state would not seek to revisit adverse rulings with the new judge. (R40-41) Yet, at the second trial, the state immediately took the position that the court could re-address the admissibility of the Williams Rule evidence. (R31) Even so, when presented the opportunity, Judge Moxley specifically ruled that the testimony was irrelevant and unfairly prejudicial, as had Judge Johnston:

> THE COURT: I've ruled, no, I've ruled. It's not under our recent pronouncement of the Supreme Court of Florida. I find as a matter of fact that it is not relevant and material and, even if relevant and material, it is so unfairly prejudicial to the accused that he could not under any circumstances have a fair trial if such evidence were admitted. So I think you have an idea of the parameters of it.

(R928)

The state has totally failed to demonstrate that the trial judges were incorrect in ruling that this evidence was irrelevant and unfairly prejudicial. Rather than violate the trial court's order excluding this evidence, the state should have either accepted and adhered to the ruling or sought a stay of the proceedings and filed a Petition for Writ of Certiorari for review of the rulings. Instead, the state improperly revealed the irrelevant facts during the opening statements, and then asked the loaded question to Jones concerning other murders.

These intentional violations of the prior ruling, combined, are unfairly prejudicial under the Fifth, Sixth, And Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution. Further, the improper revelations render the jury's death penalty recommendation unreliable under the Eighth and Fourteenth Amendments.

The trial judge belatedly realized that a gun had no relevance whatsoever to the murder of Willie Mitchell. Judge Moxley states, "I mean, you don't have to show -- a gun wasn't part of this case, you know." (R920) The following exchange between the court and the prosecutor, which occurred just after the court ruled that the evidence was inadmissible, shows why these errors, considered together, cannot reasonably be viewed as harmless error.

> PROSECUTOR: * * * We'd proffer this, John Henry Jones, we would limit his testimony to "I went with him, I saw Gerald Crayton, we got a gun." and Crayton would corroborate that and say, yes, they got a gun. John Henry Jones would not say that "we went down to Wabasso and we killed Dessama Cherry." There would be no statement about that. And my next question to John Henry Jones would be, "When you went down that day and you found Willie Mitchell, did you still have that gun?" "No, I didn't." "What had happened to it?" "Well, I had to pawn it off." Now, what about that suggests another murder.
>
> THE COURT: Well - -
>
> PROSECUTOR: Nothing does, nothing does.
>
> THE COURT: It might not suggest another murder alone. But the jury has just heard "Were you thinking about others?" Now, coupled with the testimony that

> they went to get a gun, that would break the camel's back. I'm not going to permit that.

(R922-923). Compare the questions and responses outlined by the prosecutor to those objected to by defense counsel during opening statement; they are identical!

> 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)(emphasis added).

The trial court was left with the impression just after the offensive question was asked that, "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." (R843-844) It was only after the remainder of the day was taken up by a proffer and argument that the court concluded that the error could be cured by an instruction to the effect that what the attorneys said is not evidence:

> THE COURT: I'm not going to give the instruction what would specify what it was that was said. I'm going to give an instruction pretty much like I just told you, that answers of witnesses are only to be considered by the jury. Indeed, what we have here is by your quick objection the witness did not answer. He just said, "He mentioned . . . " Then we're back to the point whereby the question and the question was, "Did he give any indication whether he intended one murder or whether he was thinking about others?" Okay, we know under the law that thinking about others is not a crime. I thought it was a little more specific than that. And there the answer is, "He mentioned. . . . "

(R917).

The reason why the court's first impression was that another murder was being referred to is because of the information improperly conveyed in the state's opening statement. It is only with a strained, critical reading of what transpired, viewed in a light most favorable to the state, that the error can be said not to have affected the jury's verdict. That is not the correct standard to be applied. Rather, the state has the burden of showing beyond a reasonable doubt that this intentional error did not affect the jury's verdict. See Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988)("[I]t is not enough to show that the evidence against a defendant is 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.")

The state calculated that it could reveal this information to the jury, even though the judge forbade it, because the error would ultimately be viewed as "harmless." The state should not succeed in this tactic because the state has failed to show that the error did not affect the jury's assessment of Jones' credibility and, ultimately, the verdict. The conviction should 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.

Annoyingly emphasized by a repetitive footnote, the state relies on the doctrine of waiver to argue that the lack of a contemporaneous objection by trial counsel prevents this Court from reviewing errors advanced on appeal. Such reliance is woefully misplaced when it concerns the Eighth Amendment and imposition of the death penalty. The requirement of an objection to preserve an issue for appeal is procedural in nature. See Bateh v. State, 101 So.2d 869, 974 (Fla. 1st DCA 1958), cert. discharged, 110 So.2d 7 (Fla. 1959), cert. denied, 361 U.S. 826, 80 S.Ct. 74, 4 L.Ed.2d 69 (1959). A state procedural rule which circumvents the reliability of review of imposition of a death sentence conflicts with the Eighth and Fourteenth Amendments and such a rule must necessarily give way. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

> [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. (citations omitted). From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be,

> based on reason rather than caprice or emotion.
>
> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceedings at which he is entitled to the effective assistance of counsel. (citations omitted). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Gardner, 430 U.S. at 357-58. It is now widely recognized that, in capital cases, the contemporaneous objection rule is out the window. See ex. parte Tomlin, 540 So.2d 668, 670 (Ala. 1988) ("while no objection was made [to improper closing argument], we still must review the record for error because this is a capital case."); State v. Copeland, 419 So.2d 899, 910 (La. 1982) (exception to contemporaneous objection rule "is made in capital cases because the Court has an obligation to examine the record for passion, prejudice or arbitrary factors which may have contributed to the death penalty recommendation."); Williams v. State, 445 So.2d 798, 810 (Miss. 1984)(In death penalty cases, court has prerogative of relaxing contemporaneous objection rule due to "the uniqueness and finality of the death penalty. Because the penalty is different in quality and severity, so is the nature of our review responsibility."); See also Mack v. State, 180 N.E. 279, 203, Ind. 355; Tuggle v. State, 119 P.2d 857, 73 Okl. Cr. 208 (1941); State v. Hester, 134 S.E. 885, 137 S.C. 145; State v. Morris, 283 P. 406, 41 Wyo. 128.

In a specially concurring opinion, Judge Bistline, in State v. Osborne, 631 P.2d 187 (Idaho 1981), noted that the general rule which precludes appellate review of matters not objected to is not controlling in death penalty cases, where "the gravity of a sentence of death, and the infrequency with which it is imposed, outweigh any administrative convenience that might be achieved by refusing to consider un-alleged errors." Osborne, 631 P.2d at 205.

There is a critical constitutional difference between capital and non-capital cases. The difference is that a procedure must ensure reliability in imposition of the appropriate sanction. See Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)("To ensure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.") Compare Jones v. State, 484 So.2d 577 (Fla. 1986)(waiver of lesser included offenses in non-capital case need not be by defendant personally) with Mack v. State, 537 So.2d 109, 110 (Fla. 1989) (waiver of lesser included offenses in capital cases must be by defendant personally). The basic rationale for this distinction stems from the irrevocability of the death penalty sanction:

> We believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, (citation omitted), requires consideration of the character and record of the individual offender and the circumstances of the particular

> offense as a constitutionally indispensable part of the process of inflicting the death penalty. This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability and the determination that death is the appropriate sentence in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 304-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1966).

This Court has straddled a fence in dealing with this issue. For example, in Grossman v. State, 525 So.2d 833 (Fla. 1988), this Court stated that a contemporaneous objection is needed for appellate review of the erroneous introduction of victim impact evidence, but went on to hold that the erroneous introduction of such evidence is subject to harmless error analysis on a case by case basis. Grossman, 525 So.2d at 845. Since Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court has required that the state impose the death penalty with procedures designed to assure reliability in the sentencing determination. See Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)(Justice Stephens) ("The Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it finds that error is harmless.") An arbitrary refusal to consider putative error solely because defense counsel did not timely object to the

occurrence of plain error becomes "automatic" and "mechanical" appellate review. Such rote appellate review is not constitutionally adequate, nor does it fulfill the statutory requirement for appellate review of death sentences. See Section 921.141(4).

> In the field of criminal law, there is no doubt that "death is different" but, in the final analysis, all competent defendants have the right to control their own destinies. This does not mean that courts of this state can administer the death penalty by defaults. The rights, responsibilities, and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

Hamblen, 527 So.2d 800, 804 (Fla. 1988)(emphasis added). If, as held by this Court, a defendant cannot constitutionally waive his appeal but must instead pursue all potential errors in a truly adversary manner, there can be little doubt that a procedural requirement of an objection cannot circumvent effective appellate review concerning the reliability of imposition of the death penalty. For these reasons, it is unnecessary that a trial counsel timely object to an error which violates the Eighth Amendment and infects either a sentence of death or the jury recommendation. This rational applies not only to this point, but to all claims of Eighth Amendment error set forth in this brief.

Though initially requesting instructions on all statutory aggravating factors (R2026), Omelus thereafter

challenged the constitutionality of Section 921.141(5)(h). (R2051-52) No waiver can be said to have occurred concerning the constitutionality and/or the applicability of this factor when an objection was timely made before the instruction was given. In fact, before any evidence was presented concerning this factor, defense counsel again objected and the court ruled that it was going to modify the standard instruction and that the court was "not going to, quote, DV on any aggravating circumstance. The law is if you all cannot agree which do and which do not apply, then the Court is authorized to instruct on all of them." (R1754) As discussed in the Initial Brief, that is an erroneous statement of law. (IB at 52-53)

In Point II of its cross-appeal, addressed here rather than as a separate point, the state argues that the court should have found the HAC factor to apply. (AB at 51) The trial judge did not find this factor because it did not apply, both as a matter of law and as a matter of fact. The trial court was manifestly correct on both grounds, and the finding by the trial court that this aggravating factor does not apply was tantamount to a judgment of acquittal which cannot be reviewed on appeal without violating the double jeopardy clause of the Fifth Amendment.

HAC INAPPLICABLE AS A MATTER OF LAW

In a superficial blurt spanning six sentences, the state asserts that, "It is axiomatic that a principal is responsible for all acts of his accomplices and guilty to the

same degree of crime whether or not he is actually present at the commission of the offense," and from that concludes, "The state respectfully submits that since Omelus is responsible for all the 'acts of Jones under a principal theory, he should also be held responsible for the manner of death which he orchestrated." (AB at 51)(emphasis added) It is uncontested that Omelus did not "orchestrate"[4] that Jones kill Mitchell with a knife. If anything, Omelus expected the murder of Mitchell to be committed by firearm, a fact so evident that it is reflected in the state's own brief. ("The fact that Fitch was shot and Mitchell stabbed is irrelevant, since Omelus intended that Mitchell be shot. . . " AB at 49) This is not a case where Omelus specifically hired Jones to kill Mitchell "by stabbing him with a knife", though that is what the state alleged. This is instead a case where the manner in which the murder was to be committed, according to the state's key witness who was the actual murderer, was never discussed. (R1073-75)

The state fails to appreciate the distinction between the guilt and penalty phase of trial, a distinction caused by the Eighth Amendment and the consideration that "death is different." See Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). Imposition of the death penalty requires an individualized consideration of the crime and the character of the defendant.

> In making an analysis whether the homicide was especially heinous, atrocious and cruel, we must of

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[4] Orchestrate. "To compose or arrange (music) for an orchestra: to arrange, develop, organize, or combine so as to achieve a desired or maximum effect." Webster's Third New International Dictionary (1981), p. 1587.

> necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined. The same factual situation was presented in Teffeteller v. State, 439 So.2d 840 where this Court set aside the trial court's finding that the murder was heinous, atrocious and cruel.

Mills v. State, 476 So.2d 172, 178 (Fla. 1985)(emphasis added)

To avoid being unconstitutionally vague, "an aggravating circumstance must genuinely narrow 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, 877-78 (1983)(emphasis added) The second consideration emphasized above is especially relevant here. For an especially heinous, atrocious or cruel murder to satisfy the second consideration, that consequence (an HAC murder) must have been intended rather than a fortuity. But see Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983) ("the defendant's mind set is never at issue.") This Court has previously recognized this premise in cases where a murder involved all of the traditional indicia of a heinous murder, great pain, suffering, knowledge of death, yet because the pain and suffering was an unintended consequence of a

single act, the fact that such consequences fortuitously occurred did not justify the application of the HAC factor. See Teffeteller v. State, 439 So.2d 840, 843 (Fla. 1983) (The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."; See also Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). There is no logical reason to apply a statutory aggravating factor in "strict liability" fashion simply because it occurred as an unintended consequence. If it can be shown that a particular person intended that a victim suffer greatly as a result of being shot once, a rational basis would exist for application of the HAC factor, notwithstanding the general rule that a death resulting from a single shot will not result in application of the HAC factor. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989)("Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstances does not apply.")

People are presumed to intend the consequences of their acts.

> The law sometimes does inquire as to mental state, but only so far as I recall when it is incidental to, and

> determines the quality of, some overt act in question. From its circumstances, courts sometimes must decide whether an act was committed intentionally or whether its results were intended, or whether the action taken was in malice, or after deliberation, with knowledge of certain facts. But in such cases the law pries into the mind only to determine the nature and culpability of an act, as a mitigating or aggravating circumstance, and I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. Our trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to actions, but they do not even pretend to ascertain the thought that has no outward manifestation.

American Communications Association C.I.O. v. Douds, 339 U.S. 382, 487, 70 S.Ct. 674, 94 L.Ed. 925 (1950)(Jackson, J., concurring in part). This is why most strangulations and stabbings result in application of the HAC factor. See Barnard, Death Penalty, Vol. 13, Nova L.Journal, Number 3, Part 1, pp.927, 936 (1989). The increased pain and suffering, unnecessary to simply inflict death, is reasonably found to have been intended by the perpetrator who intentionally performs such acts. This is not necessarily so in the context of a murder for hire, where although a co-defendant can be responsible for the actions of his accomplices such that he, too, is guilty of first-degree murder, there is no reason to apply the HAC factor for an unintended occurrence in strict liability fashion. There is no logical reason to impose the death penalty due to a fortuitous occurrence, and to do so results in a penalty based on caprice rather than reason.

HAC INAPPLICABLE AS A MATTER OF FACT

Jones, the murderer, testified that Mitchell had smoked cocaine continuously for hours before being killed. (R110-13) Mitchell was obviously very intoxicated by the time of the murder. The toxicology tests performed during the autopsy revealed the presence of cocaine, alcohol and marijuana in Mitchell's blood. (R734-35) The medical examiner testified that several of the wounds were consistent with having been inflicted after death (R1778-80), that several lethal stab wounds existed (R1782), and that the longest period of time that elapsed from the beginning of the attack until Mitchell died would have been two to three minutes, and for a portion of that time Mitchell would have been unconscious. (R1818) These facts do not necessarily establish beyond a reasonable doubt that an especially heinous, atrocious or cruel murder occurred.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held the evidence insufficient to prove beyond a reasonable doubt an especially heinous, atrocious, or cruel killing where the female victim had been induced by the defendant to take drugs, then gagged, placed on a bed and smothered with a pillow, and ultimately dragged into a living room where she was successfully strangled to death with a telephone cord. This Court stated:

> As to the manner by which death was imposed, we find that in this factual context the evidence is insufficient, standing alone, to justify the application of the section (5)(h) aggravating factor. We have previously stated that this factor is applicable "where the actual commission of the capital felony was accompanied by such

> additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Tedder v. State, 322 So.2d 908, 910 n.3 (Fla. 1975)(quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1974) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.E.2d 295 (1974).

Herzog, supra at 1380 (emphasis added). The state has failed to show that the trial court abused its discretion in finding that this factor had not been proved beyond a reasonable doubt.

It is further submitted that the trial court should have made the determination concerning the applicability of this factor before the instruction was provided for use by the jury to weigh the aggravation against the mitigation. The erroneous presence of this instruction rendered the jury recommendation unreliable under the Eighth Amendment. Accordingly, the death sentence must be reversed 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.

Omelus does not accept the state's position (AB at 21) that a trial judge has the discretion to refuse to give a valid, timely requested instruction specifically identifying, as a legally valid consideration, an area of mitigation which is amply supported by the evidence and which has in the past been expressly recognized as a valid mitigating consideration. Rather, the refusal to give a valid, timely requested instruction that is so clearly supported by the evidence and the law is per se unreasonable and per se a violation of the Eighth and Fourteenth Amendments.

The instructions requested here concerned areas of non-statutory mitigation that have expressly been recognized as valid mitigation by the United States Supreme Court, factors which were undeniably supported by the evidence. The state relies on Franklin v. Lynaugh, 487 U.S. __, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) to argue that no constitutional error occurred because the defendant was not precluded from presenting the mitigating evidence and the jury was not precluded from considering it. (AB at 22). Franklin, which involves the Texas death penalty statute, is inapposite because the mitigating evidence presented by Franklin was already expressly covered by a separate jury interrogatory concerning the probability that Franklin would "constitute a continuing threat to society." Franklin, 101

L.Ed.2d at 162, 168-71. The Florida statutory scheme is materially different for several reasons and the state's response otherwise does not address the contention being made, to wit: that the catch-all instruction was too broad to adequately inform the jury that a defendant's potential for rehabilitation is a valid concern. The risk that the jury did not believe that this area of mitigation is valid renders the death sentence here unreliable under the Eighth Amendment.

The Florida statute expressly identifies certain categories of mitigation, none of which concern the defendant's potential for rehabilitation or his conduct while imprisoned. Intuitively, the jury, upon being read such a list, would conclude that the inclusion of certain factors is the exclusion of the others. This consideration was recognized in Hitchcock v. Dugger, 481 U.S. 393 (1987), which accounts for the catch-all phrase, "Any other aspect of the defendant's character or record, and any other circumstance of the offense," being added to the standard jury instructions. See Fla. Std. Jury. Instr. (Crim.) 2d. Ed., p.81. This language is broad enough to encompass the mitigation upon which the separate instruction was here sought, but that is the problem; that instruction encompasses everything, even considerations that will be categorically rejected as frivolous.

The trial court violated the Eighth Amendment and denied Omelus Due Process by refusing to clarify that having a great potential for rehabilitation is a legally valid area of mitigation, where the catch-all instruction fails to identify

with particularity which concerns are valid and which are not valid. The failure to identify that a particular consideration is, in the eyes of the law, a bona fide consideration is unexcusable where a jury might reject such a consideration as frivolous in the absence of a specific instruction. This mitigating factor was amply supported by the evidence, and a real danger exists that the jury did not consider that Omelus' great potential for rehabilitation was legitimately a mitigating factor deserving weight in opposition of the death penalty. The "catch-all" instruction simply failed to provide adequate guidance to the jury. Because the jury recommendation is unreliable, the death sentence must be reversed and a new penalty phase conducted.

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.

The state argues, "Although Omelus contends that the trial court did not consider the non-statutory mitigating circumstances presented by Omelus, the trial court's order belies this contention by specifically discussing the mitigating factors." (AB at 30). The sentencing order is appended to the back of the Initial Brief of Appellant. Specifically, in reference to the non-statutory mitigating evidence which was unrebutted by the state, the trial judge wrote as follows:

> The 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 and the court therefore rejects these facts as non-statutory mitigating circumstances.

(R2199, emphasis added). The last statement of the trial court really explains why these factors are valid mitigation; it is because these factors exist in people other than first-degree

murderers that the death penalty is unwarranted. It is clear from the trial court's order that these considerations were rejected, not due to lack of evidentiary support, but instead because those "facts" in the trial court's opinion, did not "justify a contract murder for insurance proceeds." (R2199) The effect was the same as if the mitigating evidence had been excluded by the trial judge . . . these unrebutted factors were not given any weight by the trial court when the death penalty was imposed. It is truly an arbitrary and capricious system if factors justifying imposition of a life sentence in some cases can be categorically rejected as improper mitigation in others.

The state argues that the death penalty here is proportionate to the sentence imposed in several cases. (AB at 36-37) In Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987), Craig v. State, 510 So.2d 857, 868 (Fla. 1987); Hoffman v. State, 474 So.2d 1178, 1181 (Fla. 1985), Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985); and Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980), death sentences were affirmed where the defendants had previously been convicted of prior violent felonies, mostly other capital murders. That statutory aggravating factor is not present here, and it renders the cases cited by the state greatly distinguishable.

Further, it cannot reasonably be said that John Henry Jones was dominated by Omelus. The state argues, "In the present case, Omelus took Jones to look for a weapon, gave Jones cocaine and money for keeping his car, agreed to pay for the task, and let Jones know he should not cross him." (AB at 37) These

actions hardly qualify as Omelus dominating Jones. The state and trial court overlook that Jones VOLUNTEERED to do "collections" work for Omelus, with full appreciation of what that entailed. (R839) It was Jones who decided when, where and how he was going to commit the murder, who decided how he would perform the task and who on his own procured the murder weapon, and who committed the murder while in the absence of Omelus. The following observation made by the trial court is pertinent:

> 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)(emphasis added).

THE JURY DEATH RECOMMENDATION IS UNRELIABLE:

The cases which have valid jury recommendations one way or another cannot be fairly compared to this case because this jury recommendation is unreliable under the Eighth Amendment in several respects. Initially, the recommendation is tainted due to the improper presence of an instruction allowing the jury to improperly consider whether the murder was especially heinous, atrocious or cruel. See Point III, infra. The state's entire effort during the penalty phase was to convince the jury that the murder of Mitchell was especially heinous, atrocious or cruel. The state presented only one witness during the penalty phase, the medical examiner, Dr. Reeves. (R1769-1821) The state displayed photographs taken during the autopsy. (R1770-1776) The doctor discussed Mitchell's nineteen stab wounds and twenty-three incised wounds in detail. (R1774-84)

The doctor described the pain that would be felt based on the type wounds suffered by Mitchell. (R1788-89) The descriptive testimony continued, emphasized by the use of photographs. (R1790-1808). It cannot reasonably be claimed that the jury was unaffected by this evidence, especially where it was followed by prosecutorial argument, which itself was followed with a judicial imprimatur that such evidence should be considered in returning the recommendation:

> PROSECUTOR: The Court will instruct you that there are, that the Legislature and the Court have approved certain aggravating circumstances. It is [sic] these aggravating circumstances which set aside a casein which the capital sentence, death sentence is appropriate from all those other first-degree murder cases . . . . And the Court's going to

> instruct you on these three aggravating circumstances in this case: the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel; . . . and, thirdly, that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R1886-88)

The jury's recommendation is further unreliable due to improper prosecutorial argument, which implored the jury to recommend a death sentence based on unconstitutional reasons. As set forth on pages 19-23 of this brief, because this argument renders the death sentence unreliable under the Eighth Amendment, no contemporaneous objection is needed to preserve the error for appellate review. The prosecutor argued that "the death sentence is presumed to be the appropriate sentence if you find that one of the aggravating factors exists." (R1889) This statement and/or principle of law violates the Eighth and Fourteenth Amendments. The error was exacerbated by the prosecutor's definition of what constitutes a mitigating circumstance, and its effect on the proceedings. The prosecutor stated, "Any 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 for 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." (R1890-91) The prosecutor's argument reasonably misled the jury as to what constitutes valid mitigation and it, too, rendered the death recommendation by the jury unreliable under the Eighth and Fourteenth Amendments.

The prosecutor argued facts not in evidence. He argued, "If John Henry Jones did not cross paths with this defendant, John Henry Jones would not have killed anyone." (R1894) Portions of this record not seen by the jury establish that the prosecutor's statement is inaccurate. The prosecutor argued that the guilt phase instruction on principals made Omelus responsible for all of John Henry Jones' actions in the context of application of the heinous, atrocious and cruel factor. (R1898-99) As addressed on pages 25-30, unless it can be shown (and it was not) that Omelus intended that John Henry Jones murdered Willie Mitchell in a manner that was especially heinous, atrocious and cruel, the application of that factor is a mere fortuity; it is based on caprice rather than reason, and as such it violates the Eighth and Fourteenth Amendments to the United States Constitution.

The prosecutor argued that the testimony concerning Omelus' deprived childhood failed to outweigh the aggravating circumstances proved in this case, and continued, "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) This improper argument clearly asked the jury to consider factors of the victim, which is an unconstitutional consideration under the dictates of Booth v. Maryland, 482 U.S. 496 (1987). These improper considerations require no objection because they rendered the death penalty recommendation unreliable under the Eighth amendment. See pages 19-23 of this brief. Because the death penalty recommendation is unreliable, it should have been afforded no weight by the sentencer and it should be afforded no weight by this Court. The circumstances of this case establish that imposition of the death penalty is disproportionate. Accordingly, this Court is asked to reverse the sentence and to remand for imposition of a sentence of life imprisonment.

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CONCLUSION

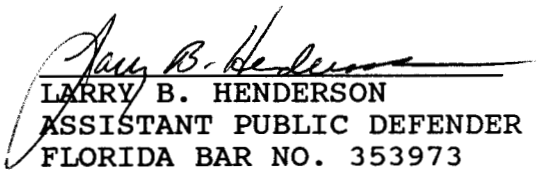
Based on the foregoing cases, argument and authorities, set forth in this brief and the Initial Brief of Appellant, this Court is respectfully asked for the following relief:

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,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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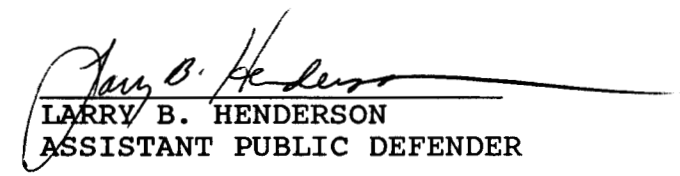
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Ulreck Omelus, #115678, P.O. Box 747, Starke, Fla. 32091 on this 21st day of February.



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