IN THE SUPREME COURT OF FLORIDA

MICHAEL COLEMAN,

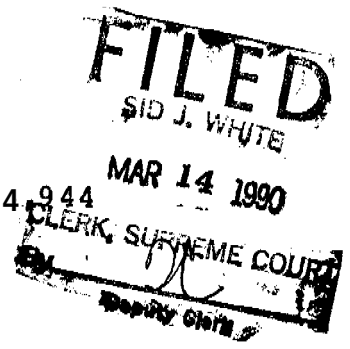
Appellant,

-v-

STATE OF FLORIDA,

Appellee.

CASE NO. 74,944



APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATTIONS

STATEMENT OF THE CASED OF THE FACTS

The evidence at trial established that an organization headed by Ronald "Trick" Williams and known as the "Miami Boys" sold crack cocaine and had its headquarters in Miami. The organization had lieutenants in charge of supervising workers who sold crack in various metropolitan areas throughout the state. The lieutenant in charge of the Pensacola area was Bruce "Jit" Frazier, the brother of co-defendant, Darrell "Yoge" Frazier. Some of the workers who testified at trial are Lamar Eady, (C-613), Clarence Oliver, Jr., (R-641), Sheldon Henry, (R-766) and James Edward Wheeler (R-1597).

Bruce Frazier had an apartment at the Beauclerc apartment in Pensacola where the crack cocaine and money belonging to the organization were kept. He also had a girlfriend named Renee Grandison (R-738) who lived in Truman Arms apartments in Pensacola. Just prior to September 20, 1988, Renee Grandison became upset at Bruce Frazier and threatened to call the law and tell them about his drug dealings.

Because of his concern that she would carry out her threats, Bruce Frazier caused the safe containing the crack and the money to be moved to the apartment of Michael "Gas"

McCormick located on Gulf Beach Highway in the Pleasant Grove Community. McCormick had worked for the organization and occupied that duplex apartment with Mildred Baker. The adjacent apartment was inhabited by Derek "Dog" Hill and Morris Alphonso Douglas, also known as "Bo".

Soon after the safe was moved to the McCormick apartment, it came into the possession of Derek Hill and Morris Alphonso Douglas who took the safe to the home of Tina Crenshaw, also known as Darlene Lutley. While at the Crenshaw home, they borrowed Tina Crenshaw's father's tools and were able to open the safe and display its contents to Tina Crenshaw and her friend, Amanda Merrell. They counted out 23 zip-lock bags of crack and a large sum of money (R-1182-1183).

The party of Hill, Douglas, Crenshaw and Merrell then attended the dog track and stopped at Foster's Barbeque before retiring to Hill's duplex apartment to eat the barbeque and watch video tapes. Shortly after their arrival, Derek Hill opened the door to find McCormick accompanied by three other black males who had guns. Another black man later brought Mildred Baker from the apartment next door at gunpoint. One of the individuals known as "Red" and later identified as

Timothy Robinson, made everybody strip, sit down and shut up. (R-1295) He "beat down" McCormick and told Darrell Frazier to tie them all up tight with electrical cords snatched from appliances. "Red" then pointed his gun in everybody's face and stabbed Derek Hill with a knife. (R-1296-1297).

At that point, Tina Crenshaw told them she knew where to find the "stuff" they were looking for and "Red" took her into another room to interrogate her. She then left the premises with Darrell and Bruce Frazier after being allowed to dress.

Tina Crenshaw was taken home to retrieve the crack and money which Hill and Douglas left with her. (R-1189) Upon providing the same to Darrell Frazier, she was left unharmed and spent the remainder of the evening riding around without calling the law. (R-1215).

While the Fraziers and Tina Crenshaw were gone, Amanda Merrell and Mildred Baker had sex with "Red" and an individual known as "Max". "Max" was identified at trial as Appellant Michael Coleman. (R-1300-1301) DNA examination established that Timothy "Red" Robinson was involved in sexual activity with both women, but did not support the presence of Appellant Michael Coleman's DNA. (R-1055)

Upon the Fraziers return, Amanda Merrell heard one of

them tell "Red", "we got what we want, come on, let's go". "Red" responded, "no, I am going to do this". "Max" then cut Merrell's throat and was standing in the doorway cleaning his knife when Amanda heard Mildred Baker beg "Red" not to shoot her. She then heard a gunshot. (R-1303-1304) The individuals left, Amanda Merrell discovered the bodies and called 911. She further testified that "Max" had a knife, not a gun and did not shoot anyone. (R-1376-1377)

Appellant was charged in a seventeen count indictment (R-2106) with four counts of First Degree Murder, one count each of attempted murder, burglary and trafficking in cocaine; two counts of robbery; two counts of sexual battery and six counts of kidnapping. The jury returned guilty verdicts on all counts.

Appellant (R-2032) and his mother, Dolly Leverson (R-2029) testified in the penalty phase. The State presented testimony from Amanda Merrell (R-2004). The jury recommended against imposition of the death penalty and gratuitously wrote on the verdict form that their vote was six to six. (R-2447) Appellant filed a Motion for New Trial (R-2470) which was denied. The Court overrode the recommendation of the jury and imposed the death penalty for the four counts of First Degree Murder after considering arguments and a memorandum in opposition thereto (R-2615).

SUMMARY OF ARGUMENT

The trial court erred in denying Appellant's Motion to Sever and the frequent renewals thereof where the highlight of the trial was a drug conspiracy and Appellant was not established to be a part thereof. Appellant was prejudiced by frequent references to a co-defendant's brother and the alibi defense employed by the other co-defendant. The jury confused the evidence concerning DNA results of the co-defendants resulting in a great miscarriage of justice.

When the jury sent the trial court a question in an attempt to clear up that confusion, the court refused to answer the question, did not read them essential testimony and denied a motion for mistrial.

The trial court further erred in allowing the State to peremptorily challenge two black jurors without an adequate race-neutral explanation, relying upon a numbers game instead of focusing on whether any juror was improperly excused on the basis *of* race.

The trial court improperly denied Appellant's Motion to Suppress In Court Identification and allowed three State witnesses *to* testify even though the evidence indicated a substantial likelihood of misidentification.

The trial court again erred in overriding the jury's recommendation that Appellant be sentenced to life imprisonment. The trial judge imposed the death penalty even though statutory and non-statutory mitigating circumstances existed which could have formed the basis for the jury recommendation. Appellant was not the "triggerman" and the death penalty for this felony murder is a disproportionate sentence.

ARGUMENT

ISSUE I: DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SEVER AND THE RENEWALS THEREOF?

Appellant filed a Motion to Sever (R-2273) which was denied pretrial by the Court (T-26). It was first renewed after the State's opening statement established that it would concentrate on the drug conspiracy aspect of the case. The Court denied the motion (R-602).

As referenced in U.S. -v- Castro, 829 F.2d 1038 (11th Cir. 1987), the State attempted to establish what is referred to as a "wheel" conspiracy. It sought to establish that either Ronald "Trick" Williams or Bruce "Jit" Frazier was the "hub" of the wheel and that witnesses such as Lamar Eady, Gwen Cochran, James Wheeler, Clarence Oliver, Sheldon Henry and the Defendant's were the "spokes".

Although there was testimony establishing that Defendants Darrell Frazier and Timothy Robinson were involved in transporting cocaine from Miami to Pensacola and their fingerprints were found in Bruce Frazier's Beauclerc apartment, there was no evidence to establish that Michael Coleman was in any way involved in a drug trafficking conspiracy which became

the highlight of the trial with resulting prejudice to the appellant.

Gwen Cochran (R-733) testified that Appellant, known to her as Mac George, did not work for Ronald "Trick" Williams and that she had only seen him on the streets of Miami with "Trick". She further stated that Appellant was not in Pensacola motels along with Frazier and Robinson.

Therefore, the wheel referred to in Castro is not only missing the "rim" required by that case, but there is no evidence that Appellant was one of the "spokes". Appellant is not tied by a "common thread" to the other participants in the conspiracy as set out as the litmus test in United States v. Weinstein, 762 F. 2d 1522 (11th Cir. 1985).

In United States v. McLain, 823 F.2d 1457 (11th Cir. 1987) the Eleventh Circuit said:

> The Defendant is still entitled to a severance if he can show specific and compelling prejudice due to the counts being joined, i.e., by showing that the jury could not keep the evidence against each defendant separate.

That prejudice could not be more clearly indicated than by the jury question (T-1963) indicating confusion as to whether Appellant's blood matched DNA samples taken from vaginal swabs taken from the sexual battery victims. Expert testimony had established a positive match for defendant Robinson, but not for

Coleman. The Court's refusal to instruct them further on that issue coupled with the jury's obvious confusion due to the misjoinder of the Defendants demonstrates obvious prejudice with relation to the most critical evidence in the trial.

Rule 3.152 of the Florida Rules of Criminal Procedure mandates a severance of defendants herein and as this Court said in Kritzman -v- State, 520 So. 2d 570, "The fundamental right to a fair trial can never be overridden by the convenience and expendiency that a joint trial may produce". It is obvious from the record that Appellant's Motions to Sever were denied because the State and the Court would have been inconvenienced by presenting and hearing witnesses who were held in jail with their sentences withheld to encourage their testimony against appellant.

The record demonstrates that Appellant's alibi defense was antagonistic to the defense of Darrell Frazier who did not testify and denigrated by the defense of Timothy Robinson who tried to establish he was in New Jersey in the face of overwhelming DNA evidence of his presence at the crime scene,

The misjoinder with Darrell Frazier, the brother of Bruce "Jit" Frazier who was much nearer the "hub" than other participants accentuated the prejudice where the State concentrated on the activities of "Jit" and his relationship to Darrell.

ISSUE II

DID THE TRIAL COURT ERR IN FAILING TO ANSWER JURY QUESTION, READ THEM TESTIMONY OR GRANT MISTRIAL?

The jury interrupted their deliberations to present the Court with a written question (R-1963) asking whether the vaginal swabs taken from Mildred Baker and Amanda Merrell matched the blood taken from Appellant. Despite Appellant's counsel's request that the jury be instructed that the samples did not match, the Court denied that request and told the jury they must rely on their own recollection of the evidence.

Appellant immediately moved for a mistrial on the basis that if the jury was confused on such a critical matter of evidence, it was incapable of deciding guilt or innocence. The Court denied the motion, stating that only one juror had signed below that question, presuming that only one juror was so confused. That remark of the Court, standing alone should be sufficient to require a reversal herein. It is elementary that a conviction in a criminal case requires a unanimous verdict and if even one juror is sufficiently confused or uninformed, the verdict is a nullity.

Dr. Lisa Forman, the DNA expert testified (R-1053) that "the

blood of Michael Coleman did not match with the DNA taken from the vaginal swabs and the anal swabs. that were presented", and "that we did not find any DNA associated with a blood standard provided for Michael Coleman in any of the evidence that we were provided with."

The Court should minimumly have read that testimony to the jury to absolve the confusion on a material and crucial issue as required by the Court in La Monte -v- State, 145 So. 2d 889, quoting from Penton -v- State, 106 So. 2d 577, (1958):

> We realize that the question is a close one but we also realize that there was considerable doubt in the jury's mind concerning the very testimony which they wished read to them and this testimony was material to the case. The testimony was taken down and the failure of the court to have it read back to the jury at their request was error, and by the very nature of the testimony, the error was not harmless.

Coupled with the Court's denial of Appellant's Motion to Sever which caused the confusion with Co-Defendant Robinson's positive DNA results, the error is compounded and requires reversal.

ISSUE III

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO PEREMPTORILY CHALLENGE A BLACK JUROR WITHOUT AN ADEQUATE RACE-NEUTRAL EXPLANATION?

Appellant and his co-defendants are black (R-445). Th State exercised two peremptory challenges of black jurors without an adequate Lace-neutral explanantion although the Court found the explanation to be sufficient.

Black jurors Velma Horne and Carolyn Freeman were challenged by the State with peremptory challenges. Appellant's counsel (R-442) asked that the State show cause why they were stricken for reasons other than their race and objected to their being excused. (R-444)

The State responded that Ms. Freeman was challenged because she opposed the death penalty (R-444), but acknowledged that under close questioning, she said she could follow the Court's instructions.

The State explained its challenge to Ms. Borne by saying that she knew Jocelyn Moultrie who was alleged to be a participant in the conspiracy. (R-443) However, Jocelyn Moultrie was not a witness at trial and the State did not establish whether Ms. Horne had a favorable opinion of Ms. Moultrie so as to prejudice the State in any manner.

The Court accepted the State's explanation (R-445) noting that one of the defendants had struck a black juror for cause (R-446) and later (R-516) noted that Appellant struck prospective black juror, Clanford Williams.

Although the Court attempted to comply with this Court's opinions in State -v- Slappy, 522 So. 2d 18 (Fla. 1988) and State -v- Neil, 457 So. 2d 481 (Fla. 1984), it did not have the benefit of later cases condemning the methodology used by the honorable trial judge.

The trial judge in Williams -v- State, 14 FLW 2462 (Oct. 1989)(1DCA) noted that the Defendant had struck a black juror, but the First District reversed, saying that "the trial court's comments suggest a concern with whether any blacks would be available in the venire to serve on the jury rather than whether any particular juror was improperly excused solely on the basis of race, contrary to the Supreme Court's admonition in Slappy".

The Fourth District in Mayes -v- State, 14 FLW 2382 (4 DCA) (Oct. 1989) likewise stated:

> The state contends before us that two members of the sworn jury panel were black and that the exclusion of only one black juror foreclosed a pattern of systematic elimination inspired by race. The mere fact, however, that one or more members of the minority group had been seated

> does not establish the absence of racial discrimination. The issue is not whether several jurors have been excused because of their race, but whether any juror has been excused, independent of any other.

Any doubt as to whether the state has met its burden to rebut the likelihood of the presence of racial discrimination must be resolved in the defendant's favor. The explanation provided in this case falls short of that burden and is not salvaged by the numbers game indulged in by the trial court.

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS IN COURT IDENTIFICATION?

The State sought to introduce the testimony of Amanda Merrell, Tina Crenshaw a/k/a/ Darlene Lutley and Arabella Washington at trial for the purpose of identifying Appellant as a perpetrator of the crimes.

The Appellant filed motions to suppress such testimony and a pre-trial hearing was conducted thereon. (R-59)

The First District Court of Appeal in Pugh -v- State, 463 So. 2d 582 (Fla. 1 DCA 1985) best states the rule of law set out by this Court in Grant -v- State, 390 So. 2d 341 (Fla. 1980) and the United States Supreme Court in Neil -v- Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 4401 (1972) as a two-fold inquiry to include:

(1) Did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification;

(2) If so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreprarable misidentification.

The factors to be considerd in determining whether a likelihood of misidentification exists include:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

It is therefore necessary to examine the identifications of Arabella Washington, Tina Crenshaw and Amanda Merrell individually with regard to the above standard.

Arabella Washington testified (R-178-196) that on September 2, 1988 the date of the alleged crimes, that a person she knew as Bruce Frazier's brother, Darrell Frazier, came to her home in Jacksonville early in the morning. Two other individuals were in the car with Darrell Frazier. She did not know them previously and they did not exit the car at her home. The car they occupied had darkened windows and she did not see the other two individuals until she followed them to a mall where two individuals she identified as Darrell *(Yoge)* Frazier and a slightly taller, darker man left the car and went into a Zayre's Department store. When they returned from the store, the darker man who she identified as the Appellant got into the back seat of her car with a red-skinned man with gold teeth. She transported them to the airport and left them.

The trip to the airport took approximately fifteen minutes and her only view of Appellant was in her rear-view

mirror. She saw the person identified as the Appellant walk into the store with Darrell Frazier and said Appellant was just a little taller than Frazier, who she estimated to be 5'11". She believed Appellant to be 5'11" or 6' tall.

Upon examination, Arabella Washington admitted that she really didn't pay much attention to any of the guys and didn't pay any attention when the two individuals were walking into the store. (R-195).

Arabella Washington was shown a picture lineup some six and one-half months after the incident. The lineup consisted of between seven and ten pictures. She previously knew three of the individuals to be James Wheeler, Bruce Frazier and Darrell Frazier, people she associated with the drug business. Two of the remaining pictures were of Appellant and co-defendant Timothy Robinson.

When initially shown the picture lineup, Ms. Washington could not identify any of the individuals, She was subsequently charged with perjury and told that she would be placed in jail with a $100,000.00 bond, whereupon she changed her testimony and identified Appellant's picture and the perjury charges were dismissed (R-155).

The suggestiveness of the procedure utilized is apparent on the record from the content of the picture lineup and the perjury charge.

The witness had no valid opportunity to view the alleged criminal because of her view in the mirror, the darkened glass in the car and acknowledgment that she paid no degree of attention.

Her prior description of Appellant was inaccurate because she testified that he was 5'11" or 6' tall when the testimony of court security officer Scott Gulsby established that the Appellant's height is at least 6'5".(R-177) She further testified that the person with gold teeth was light-skinned contrary to the testimony of other witnesses.

The length of time between the crime and the confrontation of Ms. Washington with the photo lineup was about six months.

Darlene Crenshaw who is also referred to as Tina Crenshaw, Darlene Lutley and Tina Lutley testified (R-163-175) that she was present at the murder scene briefly before being taken home by Darrell and Bruce Frazier to retrieve some cocaine and money left at her house by Derek Hill and Alphonso Douglas.

She identified the Appellant as a tall, dark, skinny guy, 6'3", 165 pounds wearing a black jogging suit trimmed in green. According to her, Appellant had no wore that two gold teeth and was about the same height as decedent Michael McCormick.

The autopsy report concerning Michael Anthony McCormick was introduced (R-177) indicating that the deceased was 6'1", weighing 210 to 220 pounds, Security Officer Scott Gulsby testified Appellant is at least 6'5".

Special Agent Don West of the Florida Department of Law Enforcement testified that Appellant has approximately seven gold teeth and that Darlene Crenshaw was not "positive positive" of her identification.

Amanda Merrell (R-137) testified that Appellant was dressed in a multi-striped, aqua blue, short-sleeved shirt: with acid-faded jean shorts made of lightweight summer material.

Darlene Crenshaw had little opportunity to view the alleged ciminal at the time of the crime because she was preoccupied with "Red" who forced her *to* strip and took her in another room to discuss the whereabouts of the cocaine and money. She then left the scene with the Fraziers and never returned. Her attention was diverted by the actions of the co-defendants and she was only present for five to ten minutes. (R-113)

Her description has been demonstrated to be inaccurate by the autopsy, the testimony of the 6'5" Security Officer and Special Agent West. Her description *of* the clothing is

completely different from that of Amanda Merrell.

Agent West verifies that Ms. Crenshaw was not positive enough in her identkfication of Appellant to initial his picture. The length of time between the crime and the confrontation was approximately two months.

The procedure was unnecessarily suggestive because as demonstrated by the testimony of Don West (R-151), Appellant: has at least seven gold teeth; Ms. Merrell was looking for a dark individual with numerous gold teeth; and the only color photographs presented to her depicting a person with more than two gold teeth were those of Appellant and a person substantially lighter in color. (R-151)

It is readily apparent after examining the testimony of Arabella Washington, Darlene Crenshaw and Amanda Merrell in light of the prevailing case law, that none of the three should have been allowed to give an in court identification.

This case is very similar to the factual situation presented in Edwards -v- State, 533 So. 2d 440 (Fla. 1989) where this court found the courtroom identification to be improper evidence and reversed for a new trial without such evidence.

As in Edwards, the testimony of the prosecution witnesses was based on a situation where the witnesses' opportunity for

observation was insubstantial, their attention was divided, based on a bare glance and at least Ms. Washington paid no attention. As in Edwards, the witnesses' prior description may have marginally fit Appellant, but it also fit the general description of many black males,

The admission of such evidence cannot be deemed harmless because it constitued the crux of the state's case to refute the Appellant's alibi defense,

ISSUE V

DID THE TRIAL COURT ERR IN OVERRIDING THE JURY RECOMMENDATION AND IMPOSING THE DEATH PENALTY?

After the jury recommendation of life, the Appellant filed a Memorandum in Opposition to Imposition of the Death Penalty (R-2615) wherein he discussed Tedder -v- State, 332 So.2d 908 (Fla. 1975) and its progeny for the proposition that, "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ".

The trial court in its Order Stating Reasons for Imposition of Death Sentence made such a finding, but such is belied by the recommendations of six jurors for life. If those six jurors are not reasonable people, the verdict of guilt should be vacated because Appellant is entitled to be tried by reasonable men,

In overriding the jury recommendation, the trial judge likewise violated the consistent interpretation of Tedder by this Court expressed in Harmon -v- State, 527 So.2d 182 (Fla. 1988), Ferry -v- State, 507 So. 2d 1373 (Fla. 1987),

and Amazon -v- State, 487 So. 2nd 8 (Fla, 1986). The standard enunciated in those cases is:

> When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.

The trial judge apparently found mitigation in determining that "defendant has maintained close family ties through out his life and has been supportive of his mother". (R-2613) That finding alone would be sufficient for the jury *to* base its recommendation upon and abrogate a jury override under the rationale *of* Washington -v- State, 432 So. 2d 44 (Fla. 1983).

Furthermore, the jury could well have found that the Appellant's impoverished childhood in Liberty City was a mitigating factor, although discounted by the Court, Such non-statutory mitigating factors were considered to be sufficient in Brown -v- State, 526 So. 2d 303 (Fla. 1988) and Spivey -v- State, 529 So. 2d 1088 (Fla. 1988).

The United States Supreme Court in Hitchcock -v- Dugger, 107 S. Ct. 1821, 95L. Ed. 2d 1 (1387) determined that:

> Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which night militate against the appropriateness of the death penalty for that defendant.

Appellant argued that the victims were participants

in his conduct (R-2076) and since the autopsies established the presence of cocaine in nasal swabs taken from the victims, the jury may well have so concluded.

Appellant argued and the evidence established that he did not shoot anyone nor commit any acts causing the death of any of the victims. This court in Harmon and State -v- Pentecost, 545 So. 2d 861, (Fla. 1989) has recognized that to be a valid basis for a jury's recommendation for life imprisonment.

The evidence at trial established that Timothy Robinson was the "triggerman" and the trial court found that he was clearly the ringleader. (R-2586) The evidence established a valid statutory mitigating circumstance that the offense was committed by another person and Appellant's participation was relatively minor. It also establishes the mitigating circumstance that Appellant was under the substantial domination of another.

The jury may also have considered that Appellant spared the life of survivor Amanda Merrell when he was told by Robinson to kill her and because he did not have the killer instinct, he cut her throat in a manner inconsistent with the causation of death.

Because it was clearly established that Appellant was not

the "triggerman", it is necessary to look to Enmund -v- Florida, 458 U. S. 782, 102 S.Ct. 3368, 73L. Ed 2d 1140 (1982) and Tison -v- Arizona, 481 U. S. 137, 107 S. Ct. 1676, 95L. Ed. 2d 127 (1987) to determine whether death is a disproportionate punishment for this felony murder. A determination must be made as to whether Appellant was a major participant in felonies committed with a reckless indifference to human life which culminated with the victims' deaths.

Although there was evidence that Appellant: participated in sexual batteries of victim Baker and survivor Merrell, those acts were separated in time from the murders committed by Robinson. Unlike the situation in State -v- Duboise, 520 So. 2d 260 (Fla. 1988), where the victim was killed when hit by a co-defendant with a board while DuBoise raped her, the sexual batteries herein had terminated substantially prior to Robinson's infliction of Bcath upon the victims.

Other than the sexual batteries, there is no evidence that Appellant participated in other felonies which culminated in any victim's death. The evidence was that he was primarily concerned with Amanda Merrell who survived and *did* not establish that he participated in binding or cutting any of the other victims,

While this case can be distinguished from DuBoise in

applying the Enmund - Tison test, it is very similar in the rationale that became the ultimate decision in that case. In the instant case, as in DuBoise, there was a jury recommendation far life which was overridden by the trial judge.

In DuBoise, this Court found that the jury could have been influenced by the influence of one of DuBoise's companion upon his conduct. Coleman was obviously influenced by Robinson arid could not have stopped him from shooting the victims.

In DuBoise, the jury heard testimony about his deprived family background similar to that given by Appellant's mother about his childhood in Liberty City.

In summary, it is patently obvious that the trial court erred in overriding the jury recommendation. There were many mitigating factors upon which the jury could have made that recommendation. Appellant was not the "triggerman" and the death penalty is a disproportionate sentence for his participation in this felony murder.

CONCLUSION

The trial court erred in denying Appellant's Notion to Sever; in failing to properly answer a jury question; in allowing the State to peremptorily challenge black jurors; and in denying Appellant's Motion to Suppress In Court Identification. Because of those errors, Appellant is entitled to a new trial in the guilt phase,

The trial court further erred in overriding the jury's recommendation of life and imposing the death penalty. To cure that error, this Court should reverse the imposition of death and remand with instructions to resentence Appellant to a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to Robert Butterworth, Esquire, Assistant Attorney General, The capitol, Tallahassee, Florida 32301, by delivery, this 14 day of March 1990.

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