IN THE SUPREME COURT OF FLORIDA

TIMOTHY ALEXANDER ROBINSON,

Appellant,

vs. CASE NO. 74,945

THE STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

The following references shall be used in referring to the Record on Appeal and to the parties: Record on Appeal shall be referred to as (R-page number of record); Defendant, TIMOTHY ALEXANDER ROBINSON, shall be referred to as Appellant; the State shall be referred to as Appellee.

This Appeal is filed by the Defendant/Appellant, TIMOTHY ALEXANDER ROBINSON, from the Judgment and Sentence and denial of the Defendant's Motion for New Trial. Appellant was found guilty of four counts of first degree murder; one count of attempted first degree murder; six counts of kidnapping with a firearm; two counts of sexual battery with a firearm; one count of conspiracy to traffic in more than 400 grams of cocaine; one count of burglary of a dwelling with assault with a firearm; and two counts of robbery with a firearm. (R-2431) Upon conviction, the Defendant was sentenced to death on four counts each consecutive to the other, as well as 10 life sentences, and an additional 90 years incarceration. (R-2568) From the Judgment, Sentence and Order Denying Motion for New Trial, Appellant filed his Notice of Appeal on October 24, 1989. (R-2648)

STATEMENT OF THE FACTS

Testimony was presented at trial to the effect that an organization known as the "Miami Boys", headquartered in Miami, Florida, operated a drug distribution organization throughout the State of Florida, essentially distributing crack cocaine to a series of lieutenants and workers living in different parts of the state. The organization was headed by RONALD WILLIAMS. This testimony was presented at trial by several workers for the organization. (R-613, 641, 766, 1597) The supervisor of the Pensacola drug distribution area was BRUCE FRAZIER. BRUCE FRAZIER had an apartment in Pensacola where he resided and where the crack cocaine and proceeds from the sale therefrom were kept. (R-649, 721, 727) Upon receipt of a shipment of crack cocaine, BRUCE FRAZIER would distribute the drug through several sellers from the Truman Arms apartment complex located in Pensacola. (R-649 through 650) Upon sale, the money was returned to BRUCE FRAZIER who kept it in a safe at his apartment at the Beauclair apartment complex. (R-650, 682)

In August, 1988, RONALD WILLIAMS, head of the Miami Boys, drove to Jacksonville, Florida, with a number of other individuals. WILLIAMS met Appellant in Jacksonville, where WILLIAMS revealed that he was in possession of a large quantity of cocaine. (R-646) This group of individuals went to Pensacola, Florida, the next day, where the cocaine was

left with BRUCE FRAZIER for distribution. (R-648) Upon sale, the money was deposited in BRUCE FRAZIER'S safe. (R-682)

BRUCE FRAZIER'S girlfriend, RENEE GRANDISON, lived at Truman Arms, which complex was a major distribution point for BRUCE FRAZIER'S cocaine. (R-738) Immediately prior to September 20, 1988, RENEE GRANDISON and BRUCE FRAZIER argued, at which time GRANDISON threatened to notify the police of BRUCE FRAZIER'S drug involvement. (R-743) As a result, BRUCE FRAZIER directed that the safe containing the crack cocaine and the money be moved from his apartment to the apartment of MICHAEL McCORMICK. McCORMICK was a worker for the organization and occupied a duplex apartment with MILDRED BAKER. The other side of the duplex was rented by DEREK HILL and MORRIS ALPHONSO DOUGLAS.

Shortly after the safe was relocated to McCORMICK'S apartment it was stolen by DEREK HILL and MORRIS ALPHONSO DOUGLAS who took the safe to the home of DARLENE CRENSHAW, also known as TINA CRENSHAW. (R-1179) Present at the time the two men forced open the safe, in addition to TINA CRENSHAW, was one AMANDA MERRILL. (R-1181) Upon opening the safe, several thousand dollars in cash and a quantity of crack cocaine was discovered. (R-1182, 1183, 1214) CRENSHAW took the money, placed it in a pillowcase and hid it in a closet in her home. (R-1183) She was also given the cocaine, which she placed in a duffle bag and hid in her car. (R-1184) HILL and DOUGLAS left CRENSHAW'S home, but returned a few hours

later, at which time they gave some money to MERRILL and CRENSHAW and then the four went to the dog track in Pensacola. (R-1184)

The four parties eventually returned to DEREK HILL'S apartment to eat dinner. (R-1185) In response to a knock on the door DEREK HILL opened the door and MICHAEL McCORMICK, who had originally been given the safe for safekeeping, was pushed inside by three men later identified as Appellant, MICHAEL COLEMAN, and BRUCE FRAZIER, all of whom were carrying guns. (R-1186) McCORMICK, who was talking loudly, told DEREK HILL "these people want their stuff, and they're not playing." (R-1294) DEREK HILL pretended not to know to what McCORMICK was referring. (R-1294) Appellant told everyone to sit down and shut up as everyone was excited. (R-1294) Appellant made everyone take off their clothes, and searched the area for weapons. (R-1295) During this period of time, Appellant took a ring from AMANDA MERRILL (R-1305) and some jewelry from TINA CRENSHAW. (R-1192, 1193)

Appellant hit McCORMICK with his gun several times and then pointed the gun in everyone's face, stating "somebody better start talking and start talking fast." Appellant then struck DEREK HILL, subsequently stabbing HILL with a knife obtained from the kitchen. (R-1297) TINA CRENSHAW raised her hand and stated that she knew where the safe was located, at which point Appellant removed her to a bedroom. (R-1297) BRUCE FRAZIER accompanied Appellant, returning shortly to the

other room to inquire as to where TINA CRENSHAW'S clothes were located and then took the clothes back into the bedroom. (R-1297)

At approximately the same time DARRELL FRAZIER came to the apartment accompanied by MILDRED BAKER. (R-1298) MILDRED BAKER was also directed to remove her clothing, and was left at the apartment, tied up, with DEREK HILL, MORRIS ALPHONSO DOUGLAS, MICHAEL McCORMICK, and AMANDA MERRILL. (R-1299 through 1300) BRUCE FRAZIER and DARRELL FRAZIER left the apartment with TINA CRENSHAW and drove her to her house to retrieve the safe.

Once at CRENSHAW'S home, DARRELL FRAZIER told her all he wanted was to get this "stuff" back. (R-1189) CRENSHAW told DARRELL FRAZIER that the duffle bag with the cocaine was in her car, which he retrieved and put in his own car. (R-1190) DARRELL FRAZIER was admitted to CRENSHAW'S home by CRENSHAW'S mother, while CRENSHAW remained in DARRELL FRAZIER'S car. (R-1190) DARRELL FRAZIER began to search CRENSHAW'S home, and unable to find the money returned to his car. CRENSHAW was then untied and she returned to the home with DARRELL FRAZIER and retrieved the pillowcase with the cash. (R-1190, 1191) As DARRELL FRAZIER left CRENSHAW'S home CRENSHAW closed the door, shutting both of the FRAZIERS outside. (R-1192) DARRELL FRAZIER and BRUCE FRAZIER then returned to DEREK HILL and MORRIS ALPHONSO DOUGLAS' duplex. (R-1192)

While the FRAZIERS and TINA CRENSHAW were gone, Appellant and MICHAEL COLEMAN had each engaged in involuntary sexual relations with MILDRED BAKER and AMANDA MERRILL. (R-1300, 1301) Appellee presented testimony at trial to the effect that a DNA sample taken established that Appellant had engaged in sexual activity with both AMANDA MERRILL and MILDRED BAKER. (R-1040, 1044)

AMANDA MERRILL, who had been moved to a bedroom, testified she heard someone enter the apartment, supposedly one of the FRAZIERS, and state that they had obtained their "stuff". (R-1303) That individual stated, "We got what we want, come on, let's go". (R-1303) Appellant stated, "No, I am going to do this." (R-1303) AMANDA MERRILL then testified that she heard a gunshot in the other room. (R-1303) At approximately the same time MICHAEL COLEMAN entered the bedroom and cut AMANDA MERRILL'S neck with a knife. (R-1303) MERRILL then heard additional shots, and MICHAEL COLEMAN again returned to the bedroom and cut her neck a second and then a third time. (R-1303, 1304) MERRILL then testified that she heard MILDRED BAKER telling the occupants of the other room that she would tell them what she knew, after which MERRILL heard additional gunshots. (R-1304) Someone then returned to MERRILL'S room, and shot her. (R-1304)

After the men had left the apartment AMANDA MERRILL untied herself, left the apartment, and called 911. (R-1305)

The four other individuals who had been left at the apartment, HILL, McCORMICK, BAKER, and DOUGLAS, died.

POINTS ON APPEAL

I

THE TRIAL COURT IMPROPERLY IMPOSED THE DEATH PENALTY THEREBY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE WHEN THE JURY HAD A REASONABLE BASIS FOR ITS RECOMMENDATION.

II

THE TRIAL COURT IMPROPERLY ADMITTED THE RESULTS OF DNA TESTING.

III

THE TRIAL COURT ERRED IN REQUIRING THAT APPELLANT BE SHACKLED DURING HIS TRIAL.

IV

APPELLANT WAS DENIED A FUNDAMENTALLY FAIR TRIAL PURSUANT TO HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE TRIAL COURT REPEATEDLY DENIED APPELLANT'S REQUEST FOR A CONTINUANCE OF HIS TRIAL.

V

THE TRIAL COURT IMPROPERLY ALLOWED APPELLEE TO PLACE BLOODY KNIVES ON THE JURY BOX BAR THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL.

VI

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO SEVER HIS CASE FROM THAT OF THE CODEFENDANTS.

VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CONSPIRACY COUNT AS THERE WAS INSUFFICIENT EVIDENCE OF THAT CONSPIRACY.

SUMMARY OF ARGUMENT

Appellant asserts that the Trial Court improperly imposed the death penalty after the jury recommended life sentences for the four murders. This recommendation was made on a 6-6 vote. This votes indicates that reasonable men could differ as to the appropriate sentence. The jury had a reasonable basis upon which to make their recommendation and such recommendation should not have been overridden by the Trial Court. The jury could have easily considered testimony relative to Appellant's upbringing, family ties, health, intellect, personality, education, emotional development, lack of prior felony convictions for crimes of violence, as well as the background of the victims.

Appellant asserts that the Trial Court improperly admitted the results of DNA testing allegedly linking Appellant to the charged offenses. The Trial Court failed to conduct an evidentiary hearing prior to admission of the evidence to determine the reliability of that evidence, although Appellant requested such a hearing. The Trial Court failed to consider whether the evidence is generally accepted as reliable in the relevant scientific field, whether existing techniques are capable of producing reliable results, and whether those procedures were properly employed in analyzing the samples in Appellant's case. Additionally, Appellant did not receive the results of the DNA testing, the

expert's notes or report until immediately prior to trial. Although allowed to take a telephonic deposition approximately 12 days prior to trial, no written material or reports were available at the time the deposition was taken. Appellant was denied a reasonable opportunity to prepare a defense to the DNA testing, as the Trial Court refused to grant Appellant a continuance.

Appellant asserts that the Trial Court erred in requiring that Appellant be shackled throughout his trial. Such shackling is fundamentally prejudicial. The Trial Court provided no explanation for the shackling. Although an attempt was made to conceal with a piece of cardboard the fact that Appellant was shackled, the cardboard was obvious to the jury and at one point during the trial fell over although defense counsel attempted to replace the cardboard with his foot. This situation prejudiced Appellant's position and interfered with his presumption of innocence.

Appellant asserts that he was denied a fundamentally fair trial because of the Trial Court's repeated denials of his Motions for Continuance. Appellant alleged that the preparation of his defense was incomplete for a variety of reasons, including the fact that Appellee furnished the names of witnesses immediately up to the time of trial, all of the witnesses had not been deposed, transcripts of the depositions had not been received, the results of the DNA testing were received immediately prior to

trial, and Appellee amended the Indictment on the morning of trial.

Appellant was denied a fundamentally fair trial because the prosecutor was allowed to place bloody knives on the jury box which action was done solely for the purpose of inflaming the jury. In light of the other problems surrounding Appellant's case, this err was not harmless.

The Trial Court improperly denied Appellant's Motion to sever his case from that of the Codefendants as Appellant could not obtain a fair trial without severance. The testimony presented concerning Appellant's involvement with "the Miami Boys" as well as drug dealing was tenuous, whereas the testimony concerning the Codefendants showed substantially more involvement. The lack of severance apparently confused the jury, as evidenced by their question concerning the DNA evidence. The jury's confusion impaired Appellant's right to a fair trial.

The Trial Court erred in denying Appellant's Motion for Change of Venue in that pretrial publicity precluded Appellant from obtaining a fair and impartial jury. Some of the information elicited from prospective jurors indicated that they had received information in the media which would make it difficult to be fair and impartial, and pretrial publicity was so extensive as to preclude Appellant receiving a fair trial in Pensacola.

Appellant alleges there was insufficient evidence to convict him of Count 14 of the Amended Indictment charging him with conspiring to traffick in cocaine. At most, Appellee proved mere presence on the part of Appellant at the time others possessed cocaine. No evidence was presented concerning an expressed or implied agreement between Appellant and others to traffic in cocaine.

ARGUMENT

I

THE TRIAL COURT IMPROPERLY IMPOSED THE DEATH PENALTY THEREBY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE WHEN THE JURY HAD A REASONABLE BASIS FOR ITS RECOMMENDATION.

Upon conviction, and at the conclusion of the penalty phase, the jury recommended that the Trial Court sentence Appellant to life in prison for the four first degree murder counts. (R-2449) This recommendation was made on a 6-6 vote. The Trial Court chose to disregard this recommendation, and sentenced Appellant to four consecutive sentences of death. (R-2568) The Trial Court abused its discretion by so doing, as the jury had several reasonable bases upon which it could have relied in making its recommendation of life, and further because the Trial Court supplied an insufficient basis in its Sentencing Order. (R-2582)

This Court in Tedder v. State, 322 So.2d 908 (Fla. 1975), established a standard by which Trial Courts are to be guided in determining an appropriate sentence in homicide cases. This Court held that under the death penalty statute a jury recommendation should be given great weight, and that the Legislature intended something especially heinous, atrocious or cruel when it authorized the death penalty for first degree murder. The Court further found 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. Tedder at 910. This Court further noted that it is apparent that all killings are atrocious, and that the Defendant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. However, the Court indicated that the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder.

To override a jury recommendation of life the Trial Court must present sufficient reasons as to which all reasonable men would agree that death was the appropriate sentence. It was incumbent upon the Trial Court to search the record to determine if there is any reasonable basis for the jury's life recommendation, and if so a sentence of life should have been imposed.

The jury, having been instructed on the applicable law concerning the imposition of the death penalty, theoretically made its recommendation after weighing the aggravating and mitigating factors presented as well as any conflicts in the testimony. Having duly considered both the aggravating and mitigating factors presented, the jurors made their recommendation of life as the result of a proper

analysis. The Trial Court is consequently presented with the proposition that the jurors held that a reasonable basis existed for a life recommendation sufficiently strong to outweigh the applicability of any aggravating factors. The Trial Court should have imposed the jury's recommended sentence of life even though the Trial Court obviously disagreed with the jury's analysis of the aggravating and mitigating factors. The Court should have resolved all conflicts in the evidence in a light most favorable to the conclusion reached by the jury.

In Ferry v. State, 507 So.2d 1373 (Fla. 1987), the Defendant's sentence of death over the jury's recommendation of life imprisonment was vacated by this Court after a finding that the jury's recommendation could not be overridden by the Trial Court reweighing relevant aggravating and mitigating circumstances where the jury could reasonably have based their recommendation on proven mitigating factors that the Defendant was under the influence of extreme mental and emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In Ferry, the State argued that the Trial Court's override was proper because the Trial Court Judge is the ultimate sentencer and his Sentencing Order represented a reasonable weighing of the relevant aggravating and mitigating circumstances. The State asserted that this Court should view a Trial Court's

Sentencing Order with a presumption of correctness and, when the Order is reasonable, this Court should uphold the Trial Court's sentence of death. This Court specifically rejected the State's theory in Ferry. This Court noted that under the State's theory there would be little or no need for a jury's advisory recommendation, since the Supreme Court would need to focus only on whether the sentence imposed by the Trial Court was reasonable, and this is not the law. The Court noted that the fact that reasonable people could differ on what penalty should be imposed renders the override improper.

In Harmon v. State, 527 So.2d 182 (Fla. 1988), this Court again vacated a sentence of death based upon a jury override. This Court held that the Trial Court erred in sentencing the Defendant to death because reasonable people could have concluded that the mitigating factors presented outweighed any proven aggravating factors. The Court held that because the facts are not so clear and convincing that no reasonable person could differ that death was the appropriate penalty, the Trial Court erred in overriding the jury recommendation of life, citing Amazon v. State, 487 So.2d 8 (Fla. 1986). In Amazon this Court found that the jury could have found the crime sufficiently serious to warrant first degree murder convictions but that the combination of a "depraved mind" defense and the possible mitigating factors presented mitigated against a recommendation of death. Consequently, the facts were not so

clear and convincing that no reasonable person could differ that death was the appropriate penalty.

Pursuant to Barclay v. Florida, 463 U.S. 939, 962-963, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), once the Trial Court has examined the record for evidence supporting the jury's life recommendation and finds no such basis, the Court can then conduct its own examination of the evidence presented as well as the specifics concerning the Defendant's individual character. In Barclay, supra, the United States Supreme Court upheld Florida's death penalty statute on the basis that the class of offenders for whom a sentence of death is appropriate is clearly defined by the statute's procedure. In the case at bar, the Trial Court failed to examine the record to determine whether or not the jury had a reasonable basis for making its recommendation of life.

The Court noted that it had considered assorted testimony relative to Appellant's upbringing, family ties, health, intellect, personality, education and emotional development. The Court stated that he had also considered the victims' backgrounds. The Court made a factual finding that the evidence establishes that Appellant has maintained close family ties throughout his young life and has been supportive of his mother. (R-2586) The jury too no doubt considered the many factors mentioned by the Court in its Order. The Court's finding that Appellant "has maintained close family ties throughout his young life and has been

supportive of his mother" in and of itself would be a sufficient basis for the jury to make its recommendation of life. In Washington v. State, 432 So.2d 44 (Fla. 1983), this Court vacated a sentence of death on a finding that the jury's recommendation could have been based not only on the two statutory mitigating factors found by the Trial Judge but also on the nonstatutory mitigating factor of the Defendant's character as testified to by members of his family. This Court further found that the remaining aggravating circumstances were not of such a grave nature that virtually no reasonable person could differ as to their outweighing the cited mitigating circumstances.

In the case at bar, in addition to the above-noted facts found by the Trial Court, the jury could also have considered the testimony of Appellant's mother to the effect that Appellant had been raised in a crime-ridden area of Liberty City Miami, that Appellant had no relationship with his father as the father had left the family, that Appellant had witnessed the father beat his mother repeatedly over the years, and that Appellant had been affected by the death of his brother immediately prior to the offenses for which Appellant was convicted. (R-2012 through 2019) Further, the jury could very well have considered the testimony of DR. JAMES LARSON, who tested and examined Appellant after his arrest. LARSON testified that Appellant had been born in a ghetto environment in Miami, Florida, had difficulties in

school, and had been evaluated by different psychologists. (R-1997, 1998) LARSON testified that Appellant falls in the borderline range of intellectual development, (R-1999) and that he got the overall impression of a chaotic early childhood environment for Appellant. (R-2000)

In Brown v. State, 526 So.2d 903 (Fla. 1988), this Court held that it was err for the Trial Court to override the jury's life recommendation in a capital murder case as the jury's recommendation could have been based not only on the Defendant's youth but also on his mental and emotional handicap and impoverished background. The Court noted that mitigating evidence in a capital murder case is not limited to the facts surrounding the crime but can be anything in the life of the Defendant which might weigh against appropriateness of the death penalty for that particular Defendant. The Court in Brown noted that there had been expert testimony to the effect that the Appellant had an IQ of 70 to 75, which was classified as borderline defective or just above the level for mild mental retardation. The Defendant at age 10 had been placed in a school for emotionally handicapped children, and although chronologically 18 years of age he had the emotional maturity of a preschool child. In the case at bar, several of the same factors are present, i.e. the Defendant's limited intellectual capacity, the fact that he was placed in

"special classes" for either learning or psychological problems, and his impoverished background. (R-1998, 2001)

The jury could very well have considered other mitigating factors present, such as the Defendant's age, which was 22 at the time of the offenses. The Trial Court specifically found that the Defendant's age was not a factor, and further made a finding that "the Defendant was clearly the ringleader and the person who directed the other participants". (R-2586) This finding is not substantiated by the evidence as there was no evidence to establish that Appellant was the actual perpetrator of the murders. TINA CRENSHAW'S testimony was to the effect that she was in the bedroom at the time she heard shots fired, and although she testified as to conversation between the participants in the other room she could often not distinguish who made what statements, nor could she identify the person that came to the bedroom and shot her. (R-1304) Testimony was presented from a firearm expert to the effect that the victims were all shot with a nine millimeter pistol, and that the fatal bullets could not have been fired from a Mac 10-type automatic weapon. (R-1273) The surviving eyewitnesses at trial testified that Appellant possessed an automatic-type Mac 10 weapon and that the remaining Defendants all possessed nine millimeter pistols. (R-1294) Consequently, there is no evidence to establish that Appellant was the actual

perpetrator of the murders or that Appellant knew that the victims were going to be murdered and not later released.

In Pentecost v. State, 545 So.2d 861 (Fla. 1989), this Court in reversing a death penalty imposed over a jury's recommendation of life imprisonment found that the testimony could have raised in the juror's minds the question of who actually stabbed or killed the victim, that the jury had heard considerable testimony as to the Defendant's alcohol and drug use, and that the Defendant had no history of violence. Here, Appellant had no prior felony convictions for crimes of violence, having been previously convicted of burglary of an automobile and theft of a pocketbook. (R-1569) Nevertheless, the Court found in its Order that Appellant "had a significant history of prior criminal activity even though he has not previously been convicted of a violent crime." (R-2585)

The Court also made a factual finding that Appellant had committed the murders for the purpose of preventing or avoiding lawful arrest. (R-26, 29) This finding is unsubstantiated by the facts of the case. Florida Statutes, Section 921.141, was directed toward the murder of law enforcement officers. White v. State, 403 So.2d 331 (Fla. 1981). In order to apply this factor to non-law enforcement individuals a finding must be made that the dominant motive for the killing was to avoid arrest. Menendez v. State, 368 So.2d 1278 (Fla. 1979). Further, in

Riley v. State, 366 So.2d 19 (Fla. 1979), this Court held that the proof of the killer's intent to avoid or prevent a lawful arrest must be very strong. The fact that the victim is dead or that the murder was without reason or unprovoked does not sufficiently show that the murder was committed for the purpose of preventing or avoiding lawful arrest.

It is noted that the victims' bodies were not removed from their home or in any manner secreted. If they had been, the intent to hide the crime and prevent arrest would have been obvious. Adams v. State, 412 So.2d 850 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982).

In Rembert v. State, 445 So.2d 337 (Fla. 1984), the Defendant fled the scene prior to the victim dying, at the time knowing that the victim was still alive. The Court found that the Defendant did not commit the murder to avoid lawful arrest as, knowing the victim was alive, the Defendant would have eliminated the witness if the purpose of the murder was to prevent the Defendant's arrest.

In the case at bar, because of the circumstances surrounding theft of the cocaine and money, Appellant must have known that whatever occurred at the duplex on the night of the offenses charged would not be reported to the police. Additionally, according to the testimony of AMANDA MERRILL, there was no conversation between Appellant, COLEMAN and whichever FRAZIER returned to the duplex concerning whether or not TINA CRENSHAW was still alive. Both the FRAZIERS

obviously knew that she was alive as they had left her at her home. Upon leaving the duplex, ROBINSON and COLEMAN would have been told that CRENSHAW was still alive and if their motive was to prevent lawful arrest they would have returned to CRENSHAW'S home to silence her as a witness. There is insufficient evidence to sustain the Trial Court's finding that the murders were committed for the purpose of preventing or avoiding lawful arrest.

A valid consideration for this Court to make, as was also apparently made by the Trial Court, is the background of the victims as well as their participation in the events that led to the instant charges. DEREK HILL and MORRIS ALPHONSO DOUGLAS stole a safe containing a large quantity of cocaine as well as several thousand dollars in cash. The money and cocaine was hidden at the home of TINA CRENSHAW, with the assistance of AMANDA MERRILL. HILL and DOUGLAS must reasonably have known that whoever owned the safe would be extremely upset at its theft and would take extraordinary measures to recover both the cash and cocaine. AMANDA MERRILL and TINA CRENSHAW must also have reasonably known the danger of the situation when they assisted in covering up the theft and continued their association with HILL and DOUGLAS on the evening they stole the property. Although clearly none of the actions of HILL, DOUGLAS, MERRILL, or CRENSHAW justified their deaths, their actions can serve in mitigation of Appellant's sentence and was very

likely considered by the jury in making its recommendation of life. The Trial Court in its Sentencing Order rejects the victims' participation as a statutory mitigating factor outright, without discussion. See Chambers v. State, 339 So.2d 204 (Fla. 1976) and Christian v. State, 550 So.2d 450 (Fla. 1989)

The jury could have considered any of the mitigating factors mentioned above, most importantly the question as to who actually killed the victims, the fact that Appellant has no history of violence, Appellant's borderline IQ of 79, and Appellant's prior psychological evaluations and special schooling. Appellant strongly urges this Court to consider the fact that the jury's recommendation of life imprisonment was made on a 6-6 vote. Consequently, reasonable men can obviously differ as to the appropriate sanction to be imposed. This Court should vacate the Trial Court's imposition of the death penalty and remand this cause for imposition of four life sentences in conformance with the jury's recommendation.

II

THE TRIAL COURT IMPROPERLY ADMITTED THE RESULTS OF DNA TESTING.

Appellant objected to the introduction of the results of certain DNA testing conducted on the basis that the results of the testing were not provided to Appellant sufficiently prior to trial to adequately respond or defend against those results and that the Trial Court therefore erred in failing to grant a continuance of the trial to allow the Appellant that opportunity, and further on the basis that an evidentiary hearing was not conducted prior to admission of the evidence.

Counsel for Appellant was not provided with the results of the DNA typing until immediately prior to the commencement of Appellant's trial. (R-13-15) Samples of Appellant's blood were forwarded by Appellee to Cellmark Diagnostics in Germantown, Maryland, for a DNA comparison and were received by Cellmark March 15, 1989. (R-873) Appellant's blood was drawn for comparison approximately one month earlier, February 7, 1989. Results as to Appellant were determined by Cellmark April 28, 1989. (R-20) The deposition of the Cellmark technician was not able to be taken until May 9, 1989 (R-872), and no formal report was prepared or filed until May 15, 1989. (R-872) Cellmark's standard operating procedure manual was not received until

Sunday, May 21, 1989, one day prior to jury selection. (R-872)

The Trial Court ruled that DNA testing is sufficiently reliable to have gained acceptance as a basis for testimony in courts in Florida and that as a matter of law, assuming other predicate facts could be established, the testimony would be admissible. (R-875) This ruling was made without the benefit of an evidentiary hearing even though Appellant requested such a hearing. (R-12-15, 35-37, 872, 1641)

Appellee called LISA FOREMAN, an employee of Cellmark Diagnostics, as an expert witness regarding DNA testing. FOREMAN testified that the Cellmark Diagnostic standard operating procedure manual is frequently changed, and is consequently copied, numbered, and distinguished as to the protocol set forth so that the technicians can determine which protocols were currently in use when a particular case was done. (R-904) MS. FOREMAN testified that the techniques that were used to reach her conclusions are generally accepted in the scientific community as valid, (R-908) although the particular probes used by Cellmark were first developed in 1985 or 1986. (R-909) She further testified that she has never presented testimony in a court of law as to DNA testing as an expert witness, nor has she ever been qualified as an expert by any court in the State of Florida or any other Court of law. (R-911) The Trial Court itself

noted that DNA testing is a novel or new scientific area of study, and that it has not been widely accepted. (R-917)

Appellee further presented testimony from PAULA JEAN YATES, also a Cellmark Diagnostics employee, who testified that she extracted DNA from the samples presented, ultimately producing autoradiograms. (R-975) Tests were conducted on vaginal swabs taken from AMANDA MERRILL and MILDRED BAKER, as well as blood samples taken from Appellant. (R-977 through 978) FOREMAN testified that Appellant's blood and the vaginal swabs taken from both victims exhibited identical DNA banding patterns. (R-1038, 1044) FOREMAN then testified that in her opinion YATES' testing had been done correctly. (R-922-937)

In Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), the Fifth District Court of Appeal addressed the issue of admissibility of DNA evidence, holding that evidence derived from DNA print identification appeared to be based on proven scientific principles, there was testimony that the evidence had been used to exonerate those suspected of criminal activity, and the test was administered in conformity with accepted scientific procedures so as to insure to the greatest degree possible a reliable result. The Court further held that where a form of scientific expertise has no established "track record" in litigation, the Courts may look to a variety of factors that may bear on the reliability of the evidence, including the novelty of the

new technique, i.e., its relationship to more established modes of scientific analysis; the existence of specialized literature dealing with the techniques; the qualifications and professional stature of expert witnesses; and the nonjudicial uses to which the scientific technique has been put. See also Martinez v. State, 549 So.2d 694 (Fla. 5th DCA 1989), wherein the Fifth Circuit followed the Andrews case.

In both Andrews, supra, and Martinez, supra, the State presented the proffered DNA evidence after first establishing that the test samples were subjected to a five step DNA print analysis. Additionally, in Andrews, the Fifth Circuit held that the test results were sufficiently reliable based on proven scientific principles to be properly admitted in evidence at a criminal trial, and heard extensive testimony as to the precise methods used in performing the test. In the case at bar, the Trial Court simply took a proffer of LISA FOREMAN'S testimony to the effect that in her opinion the technician had followed the procedures set forth by Cellmark Diagnostics itself. (R-922-937) No evidentiary hearing was held to determine that the proffered testimony appeared to be based on proven scientific principles, that the evidence had been used to exonerate others suspected of criminal activity, or that the test was administered in conformity with accepted scientific procedures so as to insure to the greatest degree possible a reliable result.

In U.S. v. Two Bulls, CA8, No. 90-5040 (October 31, 1990) the U. S. Court of Appeal for the Eighth Circuit declared that DNA identification evidence may not be admitted at trial until a preliminary hearing has been held to determine whether proper laboratory procedures were used to obtain the proffered test results. The Court acknowledged that the techniques available to conduct such genetic analysis are generally regarded as reliable, however, it rejected the Government's assertion that results of such testing should be liberally admitted without any pretrial evaluation of their trustworthiness. In so doing, the Court cited People v. Castro, 545 NYS 2nd 985, 45 Criminal Law 2375 (New York Supreme Court, Bronx County, 1989) which sets forth a three step analysis requiring a court to consider whether such evidence is generally accepted as reliable in the relevant scientific field; whether existing techniques are capable of producing reliable results; and whether those procedures were properly employed in analyzing the samples in the particular case. The Court noted that given the relative novelty of DNA evidence and the great prejudice to an accused of admitting it at trial, it is "imperative" that the Trial Court determine beforehand that such evidence has a sufficient foundational basis.

The Castro Court held that the District Court had erred in admitting the results performed by the FBI after hearing from only one Government expert that such testing is

reliable and without conducting any inquiry into whether the procedures used were conducted properly. In the instant case, the Trial Court conducted no evidentiary hearing and when such a hearing was requested by Appellant the Trial Court responded that a pretrial evidentiary hearing was unnecessary and could be taken up at the time the evidence was offered at trial. Counsel for Appellant responded that the hearing could take two to three hours to which the Court responded, "I don't think it will". (R-57 through 58 and 874 through 876) At the time the evidence was proffered by the State no evidentiary hearing was held. Instead, the State simply elicited testimony concerning the witness' educational background and that she had experience in DNA testing. The Court, qualifying the witness as an expert, noted that DNA had been accepted at the appellate level pursuant to Andrews v. State, supra, which apparently to the Trial Court was sufficient. Appellant asserts that the acceptance of DNA testing by a different Court in a different Circuit does not obviate the Trial Court's responsibility to insure that the proffered testimony is reliable and meets the requisite standards under Andrews. Appellant was entitled to an evidentiary hearing prior to trial as requested to make that determination.

Finally, Appellant asserts err based on the Trial Court's refusal to grant Appellant a continuance due to receipt of the information concerning the DNA evidence

immediately prior to trial. Jury selection for Appellant's trial was set for May 22, 1989. The necessary samples were sent to Cellmark Diagnostics March 15, 1989. (R-873) On May 9, 1989, pursuant to the State's supplying the name of the Cellmark technician to counsel, a telephone deposition was taken of LISA FOREMAN with Cellmark Diagnostics. (R-872) At the time the deposition was taken counsel for Appellant had not been provided with FOREMAN'S notes, test results, report, or a copy of Cellmark's operating procedure manual. (R-872) A formal report was typed on FOREMAN'S behalf May 15, 1989, but was not supplied to counsel for Appellant until Sunday, May 21, 1989, one day prior to trial. At the same time, counsel for Appellant received the standard operating procedure manual for Cellmark Diagnostics. (R-872) Based on the foregoing, Appellant repeatedly moved for a continuance to adequately evaluate and prepare to defend against entry of the DNA evidence, as well as to possibly obtain the opinion of someone other than a representative of Cellmark as to the validity of the results. The Trial Court denied Appellant's Motion. (R-12-15, 35-37, 872 and 1641)

In Hill v. State, 535 So.2d 354 (Fla. 5th DCA 1988), the Fifth District Court of Appeal reversed the Defendant's conviction and remanded for a new trial on the basis that the Defendant had not been permitted to interview and depose expert witnesses who had performed tests to determine whether a DNA match could be obtained until 5:00

p.m. on Sunday before Monday trial, and the Defendant was therefore entitled to a continuance. The Court stated that the Defendant had a due process right to have witnesses disclosed and made available to him in sufficient time to permit a reasonable investigation regarding proposed testimony. The Court stated that fairness, State and Federal constitutional due process rights and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding their proposed testimony, and that this is especially true in a case where innovative scientific evidence is the subject. In the case before this Court, Appellant received no tangible evidence concerning the results of the DNA testing until the day before trial. The samples, in the possession of Cellmark, were not available to Appellant to conduct his own testing or consult with his own expert. Although a telephonic deposition occurred approximately 12 days prior to trial, Appellant was not provided with the notes, test results, or a formal report of the witness and was therefore denied a reasonable opportunity to form a defense to the testimony or take a meaningful deposition. The Trial Court abused its discretion and denied Appellant his due process rights to a fair trial by refusing to continue Appellant's trial.

III

THE TRIAL COURT ERRED IN REQUIRING THAT APPELLANT BE SHACKLED DURING HIS TRIAL.

Appellant asserts that the Trial Court's requirement that he be shackled during his trial is a violation of his Sixth and Fourteenth Amendment rights pursuant to the United States Constitution as well as a violation of Article I, Sections 9 and 16 of the Florida Constitution.

Prior to the commencement of trial the Trial Court directed that Appellant and the other two Defendants be handcuffed and shackled. Upon objection by defense counsel, the Trial Court allowed the handcuffs to be removed, but required that leg shackles be worn by Appellant throughout the entire trial. (R-33) The Trial Court allowed a piece of cardboard to be placed in front of the legs of the Defendants while seated at counsel table, although the cardboard was very obvious and could plainly draw the notice of the jury. (R-32) The Trial Court indicated that it had in its possession certain information which would not be accessible to counsel, and that "extreme measures" were necessary and warranted. (R-214) The Court never revealed what the information was that it had justifying the shackling of Appellant.

Eventually, the cardboard barrier fell over and although one of the defense attorneys attempted to push it

back with his foot he was unable to do so. (R-1875) Consequently, in spite of defense counsel's efforts as well as the Court's attempt to hide the fact that the Defendants were shackled, it must have been clear to the jury why the cardboard was present. This situation prejudiced Appellant's position and interfered with the presumption that he was being tried as an innocent man. Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1310, 89 L.Ed.2d 525 (1986).

In Bello v. State, 547 So.2d 914 (Fla. 1989), this Court ordered a new sentencing hearing for the Defendant because he had been shackled during his trial at the request of the Sheriff. Neither the Sheriff nor the Trial Court provided a reason for the shackling. Similarly, the Trial Court in this case gave no reason for the shackling. Had the Trial Court possessed such information it could very easily have made the information a part of the record in a confidential manner.

In Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), the United States Supreme Court stated that shackling a criminal defendant is "an affront to the very dignity and decorum of judicial proceedings that the Judge is seeking to uphold." Even when a genuine need exists, a Court should rarely order shackling, particularly if there are less egregious alternatives available. In the case at bar, the Court did not seek less restrictive alternatives, but merely unilaterally decided that shackling

was appropriate without discussion or a hearing to determine the basis of the Court's decision.

There was no testimony presented or indication given by the Trial Court that the Court was in receipt of information to the effect that Appellant or any of the other Defendants would in any manner disrupt the proceedings. Likewise, the Court did not elaborate as to what security measures were in jeopardy if the Defendants were allowed to sit through their trial unshackled. Zygadlo v. State, 341 So.2d 1053 (Fla. 1977). See also Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983), wherein the Eleventh Circuit indicated that wearing shackles erodes the presumption of innocence every Defendant is afforded.

In Elledge v. Dugger, at 23 F.2d 1439 (11th Cir., modified on rehearing 833 F.2d 250 (11th Cir. 1987))
the Defendant was shackled immediately prior to the penalty phase of his trial. The Trial Court indicated that the Court was in receipt of information from a law enforcement official to the effect that the Defendant had threatened to assault a court security officer and further that the Defendant was an expert in Karate. The Court ordered the Defendant shackled without a hearing or receiving evidence concerning this information. The Eleventh Circuit reversed, holding that the shackling denied the Defendant due process because the Trial Court failed to hold a hearing concerning the information and

because the State had failed to show that less restrictive alternatives were unavailable.

In the case at bar no evidentiary hearing was held. Although the Court attempted to hide the fact that Appellant was shackled with the cardboard barrier the barrier served to draw attention to the situation as it was placed only before the defense counsel table and not the table for the State. Additionally, during the course of the proceedings the barrier fell down which would have allowed the jury the opportunity to see the leg shackles. Finally, at anytime during the trial that any one of the three Defendants attempted to move one of their six legs or brushed up against one of the four defense attorneys also seated at the table it is highly probable that the shackles would have made a unique noise unexplainable other than by the obvious fact that somebody at counsel table was wearing leg shackles.

Appellant's due process rights were violated by leg shackling during the course of his trial. Such shackling was inherently prejudicial. This Court should reverse with directions that a new trial be ordered.

IV

APPELLANT WAS DENIED A FUNDAMENTALLY FAIR TRIAL PURSUANT TO HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE TRIAL COURT REPEATEDLY DENIED APPELLANT'S REQUEST FOR A CONTINUANCE OF HIS TRIAL.

Appellant asserts that he was not given a fundamentally fair trial because of the Trial Court's repeated denials of his Motions for Continuance. Substantially prior to trial, immediately prior to trial, and during trial Appellant moved for continuances based upon the fact that the preparation of his defense was incomplete for a variety of reasons. Appellee had furnished the names of witnesses immediately up to the time of trial, all of the witnesses had not been deposed, transcripts of the depositions that had been taken had not been received, and Appellant received the results of the DNA testing immediately prior to trial. (R-7-21, 43-44, 220-224, 872, 1145-1146, 1630-1631, 1638-1640, 1983, 2302-2303) The Trial Court initially granted one continuance to Appellant, but this was during the early stage of discovery. The Trial Court erred in not granting Appellant a continuance based on the length of time available for preparation, the number of witnesses involved, the amount of evidence to be presented, the State's continual late disclosure of new evidence, and most particularly the problem with the DNA testing.

In Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988), the First District Court of Appeal stated that the standard of review is whether or not the Trial Court has abused its discretion. Denial of a Motion for Continuance will be reversed when the record demonstrates that adequate preparation of the defense is placed at risk by virtue of the denial. Smith at 480. In Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983), the First District found that the Defendant had not been afforded ample opportunity to investigate and prepare his defense, which was reversible.

In the case at bar, Appellant was charged with a 17 count Indictment including four murders, one attempted murder, and several counts that carried punishments of life. The evidence and witnesses to be presented were not all local, as witnesses were scattered not only throughout the state but also in New Jersey. (R-11-21) Much of the testimony presented was presented through the use of expert witnesses, and there were at least 168 witnesses. (R-12) Several of the witnesses had not been deposed at the time of trial. (R-12-13) On the day of trial, Appellee disclosed the name of a new witness, who was apparently in receipt of some jewelry that had been stolen at the duplex. (R-1143) This witness was not deposed by Appellant although her testimony was damaging. (R-1145-1146)

Appellant was required to file a Motion to compel police reports and other information that had not been

provided by the discovery process. (R-2119, 2145, 2244, 2256) Witnesses attended depositions without notes or final reports, (R-1640) which effectively precluded counsel for Appellant from asking probative investigatory questions that would have assisted Appellant in preparing an adequate defense. After the witnesses were in fact deposed, often transcripts of their statements were not provided until after trial had commenced. (R-1639) There was inadequate time to examine the physical evidence the State provided, conduct Appellant's own testing, or seek the assistance of Appellant's own expert. (R-1640-1642)

On the day of jury selection Appellee was allowed to once again amend the Indictment. Contrary to Florida Rule of Criminal Procedure 3.140 Appellant did not have 24 hours in which to review the Indictment prior to Arraignment. (R-215-216) The Trial Court indicated that Appellant would have approximately 30 minutes to review the Amended Indictment, at which time the Court expected Appellant to enter a plea. (R-216) Appellant's rights were substantially prejudiced by the Trial Court's inexplicable hurry in trying this case. In a capital case involving complex issues, multiple Defendants, several victims as well as witnesses and a substantial amount of expert testimony and evidence, the Trial Court should have taken extraordinary measures to insure that all Defendants had an ample opportunity to adequately prepare their defenses and complete whatever

investigation was necessary. Under the circumstances of this case, the Trial Court denied Appellant his right to a fair trial and also to the effective assistance of his counsel by forcing him to go to trial when he was clearly unprepared to do so. Appellant's situation is particularly aggravated by Appellee's introduction of the DNA evidence which was not provided to Appellant until immediately prior to trial. This Court should reverse and remand with directions for a new trial.

V

THE TRIAL COURT IMPROPERLY ALLOWED APPELLEE TO PLACE BLOODY KNIVES ON THE JURY BOX BAR THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL.

Appellee placed several knives with dried blood before the jury during closing argument. These knives were placed on the bar of the jury box within a few feet of the jurors. (R-1854) Appellee objected, which objection was overruled. (R-1855)

The Fourth District Court of Appeal in Spriggs v. State, 392 So.2d 9 (Fla. 4th DCA 1981), refused to reverse the Defendant's conviction, finding the err harmless, although the Court strongly disapproved the prosecutor's actions in placing the knife used in the robbery in a rail in front of the jury. The Fourth District noted that "it is clear that the prosecutor's acts were designed to inflame the jury." Spriggs at 10. Here, the prosecutor's actions in placing several bloody knives before the jury in closing argument could only have been done to inflame the jury in an effort to prejudice them against Appellant. As Appellee continued its closing argument, the Trial Court interrupted the prosecutor and asked him to remove the knives before continuing further. (R-1856) This action by the Trial Court probably served to draw attention to the matter even more, thereby further aggravating the situation.

Appellee's action in this regard is not harmless err given the lack of overwhelming evidence presented at trial. The prosecutor's actions could have served no purpose other than to inflame the jury and given the other testimony presented this err was not harmless. This Court should reverse for a new trial.

VI

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION TO SEVER HIS CASE FROM THAT OF THE CODEFENDANTS.

Appellant filed a Motion for Severance of Offenses and for Severance of Defendants prior to trial. (R-2277) Appellant alleged, inter alia, that Appellant had been improperly charged with trafficking in cocaine for approximately seven months prior to the instant offenses. Additionally, Appellant alleged that he had been improperly joined for trial with the Codefendants, and that a fair determination of Appellant's guilt or innocence could not be made if tried with the other two Defendants. Finally, Appellant alleged that the State's evidence concerning the trafficking in cocaine offense was tenuous at best, as to Appellant, and that Appellant's rights to a fair trial would be substantially prejudiced by the State's evidence of drug conspiracy on the part of the Codefendants. The Trial Court denied Appellant's Motion. (R-35)

Rule 3.152(1)(b), Florida Rule of Criminal Procedure, provides for severance of Defendants when it is appropriate to promote a fair determination of one or more of the Defendants' guilt or innocence. As the purpose of the rule is to insure a fair trial, if the jury can reasonably understand the evidence, law, and arguments made as they relate to the Defendants individually, severance is deemed

unnecessary. McCray v. State, 416 So.2d 804 (Fla. 1982).

In Kritzman v. State, 520 So.2d 568 (Fla. 1988), this Court stated that a Trial Court abuses its discretion and violates due process when a Defendant cannot obtain a fair trial unless there is severance. The Court further held that due process requires that a Defendant be given a fair trial in the substantive sense and that where substantive due process has been violated the Court will presume prejudice.

In the case before this Court, the testimony concerning Appellant's drug involvement was tenuous, consisting only of the statement that he had been seen in Jacksonville approximately one month prior to the murders when RONALD WILLIAMS was in possession of a quantity of cocaine, and that he had then traveled with WILLIAMS to Pensacola. (R-648) AMANDA MERRILL'S testimony concerning who actually committed the murders is not dispositive, as Appellant was apparently carrying a weapon not of the type actually used to commit the murders. (R-1294) Additionally, MERRILL could testify only as to the actions of MICHAEL COLEMAN once she had been removed to the bedroom. Finally, Appellant presented an alibi to the effect that he was in New Jersey at the time of the murders. (R-1555-1556) The jury apparently had trouble distinguishing between all of the individuals involved in the alleged drug conspiracy, the physical evidence concerning the DNA as evidenced by the jury question concerning the DNA results, and the alibi testimony

presented by Appellant. The jury's confusion impaired Appellant's right to a fair trial and this Court should reverse and remand for a new trial.

VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

The pretrial publicity surrounding this case was overwhelming. During voir dire it was revealed that everyone in the entire panel with the exception of one person had either read about, heard about, watched accounts on television, or heard radio reports concerning the facts and circumstances surrounding the case. (R-301) The intensity of this publicity continued throughout the trial and penalty phase, including the fact that the Defendants would be shackled for security reasons. (R-305) Prior arrests of some of the individuals involved were mentioned, (R-305) and at least part of the panel was familiar with the notoriety of "the Miami Boys". (R-413) The Defendants moved to strike the entire panel, which Motion was denied by the Court. (R-507)

The Court noted that the fact that some members of the panel may have information about the "Miami Boys" was not dispositive as that association could simply mean they were from the Miami area. That this information could only have been obtained by prospective jurors from the media was not addressed by the Trial Court. (R-507) Because the Trial Court refused to change the location of the trial it assumed a heavy responsibility to insure that in fact the Defendants did receive a fair trial pursuant to their Motions for Change of Venue. Woods v. State, 490 So.2d 24 (Fla. 1986). Given

the many other problems with this case, including the Trial Court's refusal to continue the case to allow Appellant to adequately prepare a defense, the fact that Appellant was shackled throughout the trial, the fact that the DNA evidence was improperly admitted, further exacerbate the Trial Court's refusal to obtain a new panel, or move the case to another location outside of Pensacola.

VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CONSPIRACY COUNT AS THERE WAS INSUFFICIENT EVIDENCE OF THAT CONSPIRACY.

Appellant was charged in Court 14 of the Amended Indictment with conspiring to traffic in more than 400 grams of cocaine. The Indictment alleged that Appellant had so conspired with DARRELL FRAZIER, MICHAEL COLEMAN, and unnamed others. Appellant asserts that the evidence was insufficient to prove beyond and to the exclusion of every reasonable doubt that he conspired with any other person to traffic in cocaine.

Appellee presented testimony to the effect that Appellant had been in Jacksonville approximately 30 days prior to the charged offenses. At that time, RONALD WILLIAMS produced a quantity of cocaine in the presence of Appellant and others. (R-646) Appellant then allegedly traveled to Pensacola with WILLIAMS and others, at which time WILLIAMS' cocaine was apparently given to BRUCE FRAZIER. (R-648) The next testimony presented concerning Appellant's involvement with cocaine was the testimony of State witnesses to the effect that he was present at the duplex on the night that four individuals came to the duplex seeking the recovery of the stolen cocaine.

In order to convict Appellant of the conspiracy offense it is necessary that the State prove beyond a reasonable doubt that Appellant agreed either expressly or impliedly to traffic in cocaine, and secondly that he intended to traffic in cocaine. There must be evidence of such an agreement. Orantes v. State, 452 So.2d 68 (Fla. 1st DCA 1984). The crux of the State's evidence is circumstantial evidence surrounding the murders, and the fact that the murders were apparently motivated by RONALD WILLIAMS' and BRUCE FRAZIER'S desire to retrieve their cocaine. Circumstances presented do not exclude the possibility that Appellant was at most an aider and abettor in the drug trafficking. Simply because Appellant may have aided or abetted in the trafficking or in some other manner assisted is not tantamount to conspiring to traffic. Rimerez v. State, 371 S.2d 1063 (Fla. 3rd DCA 1979). Likewise, mere presence is insufficient to establish conspiracy absent evidence connecting Appellant to the planned agreement. Little v. State, 293 So.2d 775 (Fla. 2nd DCA 1974).

There is no showing that before the September deaths Appellant ever agreed to traffic in cocaine. There is no evidence of a prior meeting of the minds. The Trial Court therefore erred in denying Appellant's Motion for Judgment of Acquittal as to the conspiracy count.

CONCLUSION

Based on the foregoing Appellant respectfully requests that his convictions be vacated and that this cause be remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Carolyn Snurkowski, Esquire, Assistant Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 12 day of December, 1990.

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