IN THE SUPREME COURT OF FLORIDA

MIGUEL HERNANDEZ,

Appellant,

CASE NO: 75,127

vs.

STATE OF FLORIDA,

Appellee.

_____________________________/

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ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Defendant in the trial court, Miguel Hernandez, will hereinafter be referred to as Appellant. The prosecution below is the state of Florida and will be referred to as the state or as Appellee.

References to the record on appeal will be referred to by use of the symbol R, followed by the appropriate page numbers.

References to the supplemental record on appeal will be referred to by use of "Supp.R", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellant was indicted for the crimes of first degree murder, burglary while armed with a firearm, burglary while armed with a firearm, grand theft, possession of a firearm during the commission of a felony and possession of a firearm by a convicted felon. The indictment was filed on July 25, 1988. (R-2223-5).

Appellant argued numerous motions to declare Florida Statutes 782.84 and 921.141 unconstitutional. All said motions were denied. (R-27-47).

Jury selection commenced on May 8, 1989.

A prospective juror, Mr. Kutlik, was questioned by the state and indicated that he would not be able to recommend the death penalty. Counsel for Appellant requested an opportunity to question Mr. Kutlik. The trial court denied that request, and excused Mr. Kutlik for cause at the state's request. (R-462-4).

The first witness called by the state was Detective Kenneth Mark Lewis of the Palm Beach County Sheriff's Office. He responded to the Farmer's Market at approximately 3:23 AM on June 18, 1988. (R-695). He testified that the main entrance of the Farmer's Market had broken-out glass in one of its doors, and a Coke canister was located nearby. (R-699). He further testified that the point of entry for the burglary at the Farmer's Market was on top of the roof at a window. (R-701). Detective Lewis indicated that latent fingerprints were lifted from the point of entry. (R-710-3).

Detective Lewis also testified that the Gold Junction jewelry

store appeared to have been ransacked throughout the store, and some jewelry was found near the store on the floor. (R-726-7). He said, in his opinion as a crime scene analyst, some of the gunshots came from the guard and some of the gunshots came from inside the Gold Junction store. (R-746). He also testified that there were two bullet holes in a music shop curtain which appeared to have come from outside the music shop, perhaps from the Gold Junction store. (R-747-9). Detective Lewis did not observe any blood within the Gold Junction store. (R-753). In Detective Lewis' opinion, the point of exit from the burglary was at the door where the glass was broken out and the Coke canister was located directly outside the door. (R-762). He indicated that there was no evidence that any other store within the Farmer's Market had been burglarized at that time. (R-769). The witness also testified that a pattern in one of the mesh curtains was made by small BBs or lead pellets. (R-789-90). He also stated that this pattern of incoming shots to the Gold Junction began about forty inches off the ground and that the Gold Junction counter was approximately thirty-two inches off the ground. (R-790-1).

On cross-examination, Detective Lewis testified that the pattern of pellets fired by the guard into the Gold Junction would be at the level of approximately the knee area on the leg of a man who was six feet, three inches tall and standing on top of the counter in the store. (R-793-4). On re-direct examination, he indicated that no blood was found inside of the Gold Junction store. (R-795).

The next state witness was Gerald Styers, a forensic firearms examiner in the Palm Beach County Sheriff's Office Crime Laboratory. Mr. Styers examined the crime scene at the Farmer's Market. He testified that he examined the east wall of the Chains by the Inch jewelry shop, which was a curtain that had at least four bullet holes in it. He also stated that there were approximately one hundred thirty-five shot pellet entry holes in the curtain . (R-815-6). Mr. Styers testified that the pattern of pellets or BBs in the mesh curtain was twenty-three inches wide by twenty inches high and consisted of approximately one hundred thirty-five pellet marks. (R-823-4).

Mr. Styers indicated that he found a .38 caliber projectile embedded in a two-by-four in the music shop of the Farmer's Market. He also found a fragment of a projectile on the floor in the music shop. He determined that both projectiles had been discharged from the same firearm. (R-882). He indicated that a bullet recovered in the waterbed shed had also been fired from the same firearm as the other two and that these three projectiles, or fragments thereof, represented three separate shots. (R-883-4). The witness indicated that he saw two bullet holes in the curtain of the music shop. He also testified that the bullet identified as state's exhibit 39 had been discharged from the same firearm as those three bullets previously mentioned (state's exhibits 42, 44 and 45). (R-887-8). Also, the witness indicated that the two large fragments of copper-jacket bullet material contained in state's exhibit 34 had been discharged from the same firearm as the other bullets.

(R-889). He testified that at the southwest corner of a store called Marion's, adjacent to a jewelry shop, there was a disturbance in a two-by-four indicating that it had been struck by a projectile.

Mr. Styers testified that he found evidence of three shots being fired into the music shop from a .38 special caliber or .357 Magnum firearm. (R-892). He further testified that five shots had come out of the Gold Junction jewelry store. (R-892). He also indicated that at least two projectiles and at least two of the shot-type cartridges were fired into the Gold Junction. (R-893). Mr. Styers indicated there were five shots which went outward from the Gold Junction store and at least four shots that went inward toward the Gold Junction store. (R-896). The witness further indicated that there was very little likelihood of any significant ricochet in the shots that were fired by the security guard. (R-903).

Mr. Styers also indicated that he examined all projectiles and projectile fragments which came into the possession of the Sheriff's Office and that at least four came from the security guard's gun, and all other projectiles and projectile fragments came from one other gun. In other words, according to Mr. Styers, there was no evidence of more than two guns being involved in the shooting incident; one of those being the security guard's gun. (R-908). He also indicated that a person standing within the Gold Junction near the southeast corner of that store could have produced every single outgoing shot. (R-910). On re-cross-

examination, Mr. Styers indicated that if an individual were hit by a number of pellets, rather than just one, it would be indicative of that person being hit by direct fire rather than a ricochet. (R-912-3).

The next state witness was Jeannie Martin. She testified that she was the owner of the Farmer's Market and in charge of operations. (R-914-5). She was called to the Farmer's Market in regard to the shooting incident on June 18th at approximately 2:50 AM. She testified that one of the doors to the Farmer's Market was broken out when she saw it that morning. (R-918).

During the recess, one of the jurors saw Appellant in custody being taken by the sheriff's deputies into the holding cell at the courthouse. Counsel for Appellant called it to the trial court's attention and moved to strike that juror from the panel. That motion was denied. Counsel for Appellant thereupon moved for a mistrial, which was also denied. (R-924-5). Ms. Martin testified that she did not give anyone permission to enter the Farmer's Market after the closing hours on June 17, 1988 or during the early morning hours of June 18, 1988 prior to 3:10 AM. (R-960).

The next witness called by the state was Deputy Sheriff Jim Warring, a latent fingerprint examiner for the Palm Beach County Sheriff's Office. Deputy Warring testified that a partial right palm print found on a five gallon Coke canister which was found at the Farmer's Market at the time police responded to the indications of a break-in on the date of the shooting matched the right palm print of Appellant. He also testified that the fingerprints found

on state's exhibit 9 matched the fingerprints of Appellant. (R-971-88). On cross-examination, Mr. Warring stated that Appellant's fingerprints were not found in the jewelry store or anywhere else in the Farmer's Market except up on the roof by a window and down on the floor on the Coke canister. (R-988-9). The witness also testified that fingerprints belonging to the co-defendant, Tony Escalera, were found on a window frame which was the point of entry of the break-in at the Farmer's Market. (R-989).

The next state witness was Ted Lot, the owner of the Gold Junction jewelry store at the Farmer's Market. He testified that his store was burglarized in the early morning hours of June 18, 1988 and that the store was ransacked, especially at one end. (R-992-4). He further stated that approximately $975.00 worth of jewelry was stolen during the burglary. (R-1000-1).

Dorothy Gilbert testified next. She was an employee at the Farmer's Market Gold Junction on June 17 and 18, 1988. She testified that she conducted an inventory to determine what items were missing in the burglary and found a number of charms and chains were missing as well as one watch. She also testified that there were holes in the curtain at the store which had not been there the night before when she left. (R-1002-5).

The state's next witness was Mark Saxon, head of security and maintenance for the Farmer's Market. Mr. Saxon identified a photograph of the deceased and testified that he saw the deceased at work at the Farmer's Market on June 17, 1988 between 8:45 and 9:15 PM. The witness testified that the last entry made by the

security guard in a key station time clock was a little before 1:45 AM on June 18, 1988. (R-1028).

Ronald Mehaffey testified for the state. He was a delivery man for LaRosa Bakery who went to the Farmer's Market at approximately 2:30 or 2:45 during the morning hours of June 18, 1988 to deliver bread. He testified that he noticed the glass broken out of one of the doors and heard someone inside saying, "Help me, help me. I've been shot." He dialed 911, and indicated an ambulance arrived within ten to fifteen minutes. (R-1036-8).

Christopher Calloway, a deputy with the Palm Beach County Sheriff's Office, testified that he arrived at the Farmer's Market at approximately 2:30 AM on June 18, 1988. He saw that the front door of the north main entrance had been smashed out, and he saw what appeared to be blood on the floor and a stainless steel service-type revolver in the middle of the blood. (R-1040-1). He testified that the deceased, prior to his death, indicated that he had been shot. He further testified that the deceased also stated that there were two suspects involved in the shooting, but he could not give a description of either one. The deceased also indicated to the deputy that he had shot at the suspects and believed he had hit either one or both of them. (R-1050-1). On cross-examination, the deputy indicated that the deceased was found in the art store at the Farmer's Market and that the area was dimly lit. (R-1053-6).

On re-cross-examination, the witness acknowledged that he had stated at deposition: "I asked him about possible suspects or

leads that he could help us with right then, but he could not advise anything... He was just more - - he was more concerned with getting help. And my questions were like water off a duck's back to him at the time." (R-1060). On re-re-direct examination, the witness indicated that he had written in his police report that the deceased had indicated to him that there were two suspects involved in the shooting. (R-1063-5).

The next witness for the state was Dr. James A. Benz, the medical examiner who performed the autopsy of the deceased. Dr. Benz indicated that he found three gun shot wounds in the body of the deceased. The first wound had an entrance wound located in the right shoulder area which came from the deceased's right toward his left side, from the front toward the back, and was angulated slightly upward. It exited in the back on the right side of the upper back. (R-1070-1). The second gunshot wound track exhibited an entrance wound just above the hip area on the right side and went from the deceased's right toward his left side, frontward to back, and was angulated slightly downward. It exited the back. The third gunshot would track entered the body in the upper area of the right thigh from the right to the left side, front to back, and was angulated slightly upward. It exited the buttock toward the lateral aspects toward the side of the deceased.

Dr. Benz stated that he could not determine the chronological order of the shots which caused the three wounds or how rapid the shots were. (R-1074). Dr. Benz indicated that the bleeding caused by the gunshot injuries caused the deceased to bleed to the extent

where he died. (R-1077). Dr. Benz found fragments of the bullet of the second wound track in the back of the pelvic area. (R-1080). The doctor testified that he observed bruises and abrasions on the right and left knees of the deceased which were both consistent with someone falling to the ground and someone being involved in a scuffle. He also found a bruise and a laceration on the right hand of the deceased. (R-1084). He also found an area of hemorrhage on the left temporal area of the head which was consistent with the deceased being hit by a blunt object or falling and striking his head. (R-1085-6). On cross-examination, Dr. Benz stated that the abrasions and lacerations on the deceased were totally consistent with his having fallen to the ground or with crawling along the ground. He also indicated that the head bruise was consistent with the deceased falling head first into a wall and that the gunshots wounds were consistent with the deceased having fired a gun, therefore exposing his body to gunfire which was returned toward him. (R-1089-90). On re-direct examination, Dr. Benz indicated that he did not know whether the deceased received gunfire first or shot his gun first. (R-1090).

Christine Chaney next testified for the state. She indicated that she was employed as a emergency medical technician for Atlantic Ambulance and responded to the scene of the shooting. She testified that she was relatively sure that the deceased said words to the effect of "Get them," or "Get him" while being transported to the hospital in the ambulance. (R-1092-1105).

The next state witness was Melissa Constable. She testified

that she was standing in the parking lot of a bar near the Farmer's Market at approximately 1:30 or 2:00 AM on June 18, 1988 and saw two olive-skinned men with dark brown hair and brown eyes come between an alleyway and run in front of her. One of them was carrying a gun and two burlap bags. That individual was approximately six feet, two inches tall. The other one was shorter. One said something to the other one in Spanish or some type of foreign language, and they both took off running. She notified the bartender in the bar and went down to the police station the next day. There she looked at photographs but was unable to pick out either of the individuals. She further indicated that neither one of them were wearing shirts. One was wearing long red shorts and the other one some type of shorts. (R-1105-14).

Detective William Fuess of the Palm Beach County Sheriff's Office testified next. He was one of the lead investigators on the case. He testified that he observed the crime scene, including a suspected point of entry into the Gold Junction store, which was an area where mesh curtains could be crawled under and metal tubing connected to the mesh curtains was bent. (R-1129-30). He further testified that state's exhibits 39 and 87 appeared to be portions of the projectile which fell at the hospital from the pants of the deceased. (R-1130-1).

Detective David Fairabee of the Palm Beach County Sheriff's Office was then called to the witness stand. He testified that he advised Appellant of his Miranda rights on August 26, 1988 at the

time of his arrest. (R-1141-3).

Detective Fuess was then recalled to the stand. He testified that, on August 26, 1988, he questioned Appellant and told Appellant he wanted to talk to him about the Farmer's Market homicide. He stated that Appellant said he did not know where the Farmer's Market was. Detective Fuess then told Appellant, "I guess you don't know who Tony is either." He stated that Appellant responded, "Tony who?" (R-1144).

On cross-examination, the detective testified that he had come into contact with the co-defendant since the date of the shooting and observed a number of marks on one of his legs from his knee to upper thigh which were consistent with being caused by some type of projectile. He also saw something under the skin which might have been a projectile. He also testified that the shot pattern at the Gold Junction began three or four inches above the counter level of the south counter (the shot pattern of shots going into the Gold Junction from the gun of the deceased). He testified that the co-defendant is approximately six feet, three inches tall and taller than Appellant. On re-direct examination, the detective indicated that he did not believe the number of pellets in the co-defendant's leg would be consistent with the number of pellets that had entered the curtain if that was the direct line of fire. However, he also indicated that if the markings on his leg were from being shot by the deceased, the markings would be consistent with the location observed within the Gold Junction store. (R-1145-55).

The state then rested. (R-1156). The state also entered a

nolle prosse as to the possession of a firearm by a convicted felon charge, Count VI of the Indictment. (R-1157).

Counsel for Appellant then moved for a judgment of acquittal as to the remaining five counts. The motion was denied. (R-1157-62).

Appellant called Detective Lewis who had been called by the state previously. He testified that he transported the co-defendant to a hospital were a metal fragment was removed from his leg. The co-defendant had what appeared to be numerous bubbles on the inside of the left thigh of his leg. He identified defense exhibit 1 as being a pellet fragment removed from the leg of the co-defendant. (R-1174-6). He stated that the fragment appeared to be a metal fragment from a shot shell-type cartridge. (R-1177).

Appellant then called Gerald Styers to the stand, who had also been called by the state. Mr. Styers demonstrated how bird shot, such as the type fired from the gun of the deceased at the time of the shooting, would easily flatten when it hit an object. (R-1183-5). He also testified that the energy of a projectile would decrease when it becomes deformed after hitting an object and that ricochet requires energy. (R-1191-2).

The next defense witness was the Appellant. Appellant testified that he, Tony Escalera and Mike LaPierre went to the Farmer's Market in the early morning hours of June 18, 1988. He stated that he and Tony Escalera entered the building. Appellant stated that he immediately went toward a jewelry store and heard some noise in a hallway and saw the security guard. (R-1247-9).

Appellant then stated he got nervous and ran and hid. He stated that he then noticed that the security guard saw him, so he grabbed a Coke canister and threw it against the window, left the Farmer's Market and ran. (R-1249). He stated that he brought nothing with him to the Farmer's Market and that Tony Escalera brought a pillow case with things wrapped up in it - he did not know what was in it. (R-1250). Appellant stated that he ran along North Congress Avenue to Southern Boulevard and got a ride home from someone at a Stop-n-Go store at that location. (R-1251).

Appellant stated that the next morning he saw Tony Escalera who said to him "Miguel, you left me by myself and the guard shot me and I had to kill him." (R-1251-2). On cross-examination, Appellant testified that Tony Escalera had made the plan to commit the burglary. (R-1258). He also stated that Mike LaPierre was about five feet, four inches or five feet, five inches tall and weighed about one hundred forty pounds. (R-1259). He testified that he did not have a gun that night and never saw a gun. (R-1263). Appellant also stated that the jewelry store to which he was going was Jerry's Jewelry. (R-1270).

During the charge conference regarding jury instructions, the following instruction was requested by Appellant:

> If you find that the death of John Giblan was solely caused by the independent act of Anthony Escalera or any other person, that such act was not in furtherance of a common design with Anthony Escalera, or have a reasonable doubt about it, you must find that Miguel Hernandez is not guilty of first degree murder or any other degree of homicide.

The trial court refused to give that requested instruction. (R-

1318).

The state requested an instruction on flight, and the court gave said instruction. (R-1319).

The trial court agreed to instruct the jury on the defense of withdrawal, including a portion which indicated that the defendant had to communicate his renunciation to his accomplice. Said portion was given over Appellant's objection. (R-1325).

Appellant also objected to the trial court's instruction on felony murder. (R-1329-30).

Appellant then called Dr. James D. Goodwin, a physician specializing in emergency medicine. The doctor testified that he treated Anthony Escalera and removed a flattened metallic pellet from just under his skin which appeared to be shotgun pellet. The doctor further testified that, if the pellet did not hit any vessel, it would not bleed if the shot was a hot cauterized wound. The pellet he removed was less than an inch from the surface of the skin. (R-1331-5).

Counsel for Appellant stated that he wished to call Lisa Stubbs Timmerman to testify. He proffered her testimony (which was presented during the penalty phase). That testimony was that the co-defendant had told her that he was the one that shot the deceased. The trial court ruled that Appellant could not call Lisa Stubbs Timmerman to elicit this testimony unless he first called the co-defendant and asked the co-defendant whether or not he in fact made that statement. The trial court also indicated, at one point, that he would not allow counsel for Appellant to impeach the

co-defendant with the statement made to Lisa Stubbs Timmerman. Later, the trial court indicated that it would permit counsel for Appellant to call the co-defendant as a witness. The trial court did not indicate whether or not he would permit the impeachment of said witness. Counsel for Appellant, after having been prohibited by the trial court from calling Lisa Stubbs Timmerman, decided not to call the co-defendant due to the anticipated testimony of the co-defendant that Appellant shot the deceased. This anticipated testimony was revealed in a statement made to the Office of the State Attorney on January 28, 1989. (Supp.R-6-103). (R-1214-40); (R-1335-40).

Following his testimony, the defense rested and renewed its motions for judgments of acquittal, which were denied. (R-1340-2).

On September 25, 1989, penalty phase proceedings were begun. Appellant moved in limine to prevent the state from making any reference to Appellant's convictions other than those for violent felonies and capital crimes. Counsel for Appellant stated that he did not intend to rely upon lack of a significant criminal history as a mitigating factor. The state stipulated that they were not going to present evidence of Appellant's convictions other than those for violent felonies. (R-1555).

Appellant renewed his motions to declare the Florida death penalty statute unconstitutional, and the court indicated it would again deny said motions. (R-1561).

The state's first witness was Detective Jim Warring, a latent

fingerprint examiner for the Palm Beach County Sheriff's Office who had testified during the trial. Detective Warring testified that the same individual who had contributed the fingerprints found on state's exhibit 78 contributed the fingerprints found on state's penalty hearing exhibits 2 and 3. He indicated that that person was Appellant. (R-1567-70).

The state's next witness was Vincent Picciolo, a deputy sheriff with the Palm Beach County Sheriff's Office. Deputy Picciolo testified that he had been involved with an investigation into an aggravated battery on an individual by the name of Lori Arce in 1987 in which Appellant was the alleged perpetrator. Over Appellant's objection, Deputy Picciolo testified that Ms. Arce had told him that Appellant had beaten her. (R-1575). He further testified that he observed her with her face covered with blood and a swollen eye. He saw contusions, abrasions and lacerations. He also indicated that her nose was broken. (R-1576). Deputy Picciolo also indicated that Appellant had been found guilty of aggravated battery in regard to that incident. (R-1582). On cross-examination, he testified that Appellant and Ms. Arce were boyfriend and girlfriend at the time. (R-1582).

Appellant moved for a mistrial based upon the admission of Deputy Picciolo's testimony in that it went beyond the mere fact of conviction for the violent felony and that much of it was hearsay. The court denied the motion. (R-1587). Over Appellant's objection, the trial court then allowed the state to read to the jury portions of two depositions. The first deposition was from

Freddie Vaez. The witness indicated in the deposition that the witness knew Miguel Hernandez and that one time Miguel Hernandez went by his house with Tony. The witness then indicated in the deposition that Tony was looking at his leg and the witness asked what happened to the leg. Then Appellant allegedly said that Tony had jumped a fence. In the deposition, the witness went on to state that Appellant had asked the witness if the witness wanted to buy some jewelry. (R-1592-4).

The second deposition read into the record was one given by Gigi Homminy. She had testified at deposition that she lived with William Hernandez, the brother of Appellant. She further indicated that Appellant came by their house the afternoon of the alleged crimes and wanted to borrow money from William. She stated that William wouldn't let him because he wouldn't pay William back. Testimony in her deposition indicated further that when William would not give Appellant the money, Appellant stated "I'll kill you." Appellant further stated: "Don't worry; I'll get you back for this." (R-1595-8).

The state then rested as to the penalty proceedings.

Appellant's first witness for the penalty proceedings was Gloria DeJesus. She testified that her daughter, Maria DeJesus, and Appellant had two children together. Mrs. DeJesus testified that Appellant was a good father to his two daughters. (R-1611). She also testified that Appellant was a good provider of money and support for his children. (R-1612-3). Mrs. DeJesus also testified regarding a strange incident in which she had been with Appellant.

Appellant offered to clean her yard and began to do so. She then looked out the window and saw Appellant hugging a tree. She called to Appellant, who did not appear to hear her and did not answer her. After a while, Appellant simply said that he wanted to go home. (R-1613-5). Mrs. DeJesus also indicated that Appellant's father did not appear to care about Appellant. (R-1618-9). She also indicated that there were times when she had conversations with Appellant where he would abruptly change the subject as if he had not heard what she had been discussing and would indicate to her, upon being questioned by her, that he did not remember discussing the topic which she had been discussing. (R-1620-1).

The next witness was Angelica Hernandez, sister of the Appellant. She testified that Appellant had thirteen siblings. (R-1634). Ms. Hernandez stated that she left home when she was eleven years old and didn't return because of abusive behavior by her mother. (R-1635). She indicated that Appellant, when he was younger, would go up on cliffs and throw himself down to the river. She indicated that he had sustained head injuries from that behavior. (R-1636). Ms. Hernandez further testified that Appellant's father was verbally abusive and did not help Appellant or the other children with solving their problems. (R-1637). She also stated that Appellant was "...kind of a crazy kid." (R-1643).

Maria DeJesus was the next witness. She testified that she had two daughters, Joanna and Tana, and that Appellant was the father of both girls. (R-1645-6). Ms. DeJesus stated that Appellant supported the children through working at construction

jobs, landscaping, and at a hotel. She further testified that Appellant's father screamed a great deal. Ms. DeJesus also identified defendant's exhibit 2 which was the translation of a letter written by Appellant to his daughters. (R-1647-59).

The next witness called by Appellant was Lori Arce. She testified that, although she was the victim in the aggravated battery case dealing with Appellant, she still cared for Appellant a lot. (R-1669-70).

Appellant's next witness was Christopher A. Nicely, a sergeant for the Palm Beach County Sheriff's Office who was working as a supervisor of classifications at the Palm Beach County Jail. Mr. Nicely testified that Appellant had adjusted well to life in the Palm Beach County Jail and in thirteen months had only had one incident with a potential problem which was documented. He further testified that Appellant had not been involved with any incidents of violence while incarcerated in the Palm Beach County Jail. (R-1703-7).

Three tape recorded interviews were then played for the jurors on behalf of Appellant. All three were audio tapes. The first tape was of Doris DeJesus, a sister of Maria DeJesus. She described Appellant as a caring, loving and tender father who was pretty much preoccupied with his daughters. She further indicated that Appellant had been a good provider for the children. (R-1716). She further testified that Appellant had always been very helpful toward her mother in terms of helping at her mother's house and that Appellant had excellent artistic talent. (R-1717-9). The

second tape recording was of Gloria Clas, another sister of Maria DeJesus. She stated that Appellant had been a good father to his two daughters and had done his best to provide financial support for them. She also indicated that Appellant had a good and loving relationship with his two children and had been a good father to them. She further stated that Miguel appeared to love and care about his own mother. (R-1719-23). The third tape was of Jose DeJesus, the father of Maria DeJesus. Mr. DeJesus testified that Appellant had been a good provider for his two daughters and was a good father who loved them very much. (R-1723-8).

Counsel for Appellant then requested to proffer testimony from criminal defense attorney Donnie Murrell. The testimony to be proffered concerned the fact that the co-defendant in the instant case, Tony Escalera, had been permitted by the state to plead guilty to the reduced charge of second degree murder without a firearm and received a forty year sentence. Mr. Murrell would have testified that, under the current gain time rules in the Florida Department of Corrections, the co-defendant would have served somewhere between ten and twenty years of that forty year sentence. The court prohibited the testimony and prohibited the proffer by Mr. Murrell. Counsel for Appellant was forced to make the proffer himself. (R-1736-8). Counsel for Appellant then indicated that he intended to call two deputy sheriffs to indicate that Appellant was well behaved in terms of his adjustment to jail throughout the period of the trial. The state objected to said testimony, and the trial court sustained the objection. (R-1741-2).

The trial court then instructed the jury that they could consider as evidence the fact that the co-defendant was originally charged with the crimes of first degree murder; burglary while armed with a firearm; a second count of burglary with a firearm; grand theft; and possession of a firearm during the commission of a felony. The court further told the jury that the co-defendant was permitted to plead guilty to a lesser included offense of second degree murder and was sentenced to forty years in the Department of Corrections. The court also indicated that the co-defendant could receive gain time and that it was possible for a person to do a forty year sentence in less than twenty-five years. The court refused to indicate to the jury that the three year mandatory minimum required for a firearm charge had been dropped by the state and that all charges except the second degree murder charge had been nolle prossed by the state. (R-1742-4).

Appellant next called Mark Rodrigues, a deputy sheriff for Palm Beach County. His testimony was to be that Appellant had conducted himself well throughout the course of the trial while in custody. The state's objection to said testimony was sustained by the court. (R-1745-6).

The next witness was Dr. John A. Perry, a specialist in conducting neuropsychological testing. Dr. Perry testified that he had a PhD in clinical psychology from the University of Cincinnati, Ohio. Dr. Perry was declared to be an expert in the field of psychology and in the field of neuropsychology. Dr. Perry stated that, based upon his interviews and testing of Appellant, it was

his opinion that Appellant suffered from brain damage. (R-1758-9). Dr. Perry further indicated that he did not feel Appellant was malingering or faking during the testing procedures. (R-1770-1).

Dr. Perry went on to testify that the brain damage affected Appellant's behavior in a number of ways. He indicated that his judgment was bad, and he would tend to react on impulse and to act out. He also mentioned Appellant acted immaturely due to the brain damage and would tend to misinterpret social situations or act inappropriately in social situations. Dr. Perry testified that the brain damage caused Appellant to have difficulty with planning and evaluating behavior and in making decisions and using judgment. He also indicated Appellant would have trouble stopping an unwanted response or wrong response even though he might know that response was wrong. (R-1770-3).

Finally, Dr. Perry testified that, in his expert opinion, Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time of the offense was substantially imxaired. (R-1778).

On cross-examination, over defense objection, the state was permitted to cross-examine Dr. Perry regarding the results of an MRI test, allegedly given to Appellant, which indicated a normal finding in regard to Appellant's brain. The state was permitted, over Appellant's objection, to refer to the test results from this document even though defense counsel argued that it was work product and it was not in evidence. (R-1847-55).

Appellant's next witness was Lisa Stubbs Solinski. She had been know as Lisa Timmerman prior to her most recent marriage. Ms. Solinski testified that the co-defendant, Tony Escalera, told her he had killed a security guard at the Farmer's Market. (R-1864). On cross-examination, the witness testified that she had been with the co-defendant for approximately seven hours on the night that he made the admission of shooting the security guard, and she did not call the police during that time. She indicated that she didn't call the police until approximately one month before Appellant's trial. (R-1883-4). On re-direct examination, she indicated that she did not know Appellant and had no reason to lie. (R-1884).

Appellant next called Susan LeFehr-Hession, who was licensed as a mental health counselor in the state of Florida and a clinical psychologist in the state of Michigan. Ms. LeFehr-Hession has a master's degree in psychology. Ms. LeFehr-Hession testified that she had examined approximately thirty-two individuals for the purpose of penalty phase hearings in first degree murder cases and had only found significant mitigating circumstances about which to testify on two or three occasions, including the occasion of her examination of Appellant. (R-1896-7). She further indicated that she had testified on behalf of the State of Florida on a number of occasions as well as on behalf of defendants. (R-1898). The trial court declared Ms. LeFehr-Hession to be an expert in the field of psychology. (R-1899).

Ms. LeFehr-Hession testified that she met with Appellant on three occasions for a total of over five hours and reviewed

voluminous records, including police reports and Appellant's prison records. She also indicated that she met with members of Appellant's family. Ms. LeFehr-Hession indicated that she requested a psychiatrist, Dr. Villalobos, to examine Appellant. She testified that he did so and that he told her that he believed that Appellant was organically brain damaged. (R-1903-4).

Ms. LeFehr-Hession testified that Appellant had a full-scale I.Q. of 73, meaning that he falls into the borderline range of intelligence. She testified that Appellant was almost in the mildly retarded range and that ninety-three percent of the world's population has a higher intelligence level than Appellant. (R-1911-3). She further testified that the borderline range is an overestimate and that children within that range are better off being placed in classes for mildly retarded children. (R-1913-4). She further testified that Appellant suffers from brain damage and, because of that brain damage, has little or no impulse control. (R-1914). She also indicated that Appellant's capacity for effective living is very limited, and his adjustment to the world and to living is moderate or minimal at best. (R-1916).

Ms. LeFehr-Hession indicated that, from interviewing Appellant and his family, she determined that Appellant came from a large family of fourteen children and received little nurturing growing up. The family moved fifteen times in the fifteen years in which Appellant was growing up in Puerto Rico. She stated that Appellant's standard of living as he grew up was very sparse and limited. (R-1916-21). Ms. LeFehr-Hession also indicated that

Appellant had several head injuries and other severe injuries which the family remembered as when he was a child and that he had fluid on his brain in 1987 and had to have surgery to have that drained. She concluded that the series of injuries resulted in brain damage. (R-1921-3). She also indicated that, in her opinion, Appellant's father was very violent and very punitive and that all the children, even today, seemed to be afraid of him. (R-1923). She indicated that all the children, including Appellant, received severe beatings and ran away. (R-1923).

Ms. LeFehr-Hession indicated that she did not believe that Appellant was malingering or faking during any of the tests in which she gave him and that she had reviewed his prison record in which his I.Q. score was 64, some nine points below the score that she obtained. (R-1926-7). She further testified that Appellant had a clean prison record and had not had any trouble in prison and that persons with brain damage difficulties do very well in highly structured settings such as prison. (R-1927-8).

Ms. LeFehr-Hession testified that Appellant was a man of limited intelligence with brain damage. She indicated that the brain damage interfered with his ability to control himself; to think about things; and to stop himself, once he gets going. (R-1930). Finally, Ms. LeFehr-Hession indicated that, in her opinion, Appellant's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crimes in the instant case. (R-1932).

On cross-examination, Ms. LeFehr-Hession testified that

Appellant was more cooperative with her in her evaluation of him after his conviction. (R-1946-47).

During a bench conference, counsel for Appellant indicated that the trial court had incorrectly advised the jury as to the plea bargain received by the co-defendant, indicating that the trial court had erroneously told the jury that the co-defendant plead guilty to all counts with which he was charged. In fact, all charges except the homicide charge were dropped against the co-defendant. It was pointed out that the court also did not indicate what the mandatory minimum sentence was for the co-defendant. (R-2013-5).

Counsel for Appellant then requested that the jury be permitted to hear that the state had offered a plea bargain to Appellant of 45 years in prison in exchange for a plea of guilty to a reduced charge of second degree murder. The trial court refused to permit that evidence to be heard by the jury. (R-2015-6).

The trial court corrected its statement to the jury regarding the plea bargain given to the co-defendant. (R-2017).

The defense then rested. (R-2017).

In rebuttal, the state called Attorney Michael Celeste, Jr. who had been the original prosecutor on the case involving Appellant and his co-defendant. Over Appellant's objection, Mr. Celeste was permitted to testify that it was his opinion that the co-defendant had looked up to Appellant as an idol or hero and that the co-defendant had been led by Appellant. Mr. Celeste was also permitted to testify that Appellant had a history of violence,

whereas the co-defendant did not. Mr. Celeste went on to testify, over objections by Appellant, that, in Mr. Celeste's opinion, the co-defendant was not capable of being the trigger man (or "gunman") in the instant case. (R-2020). Although the trial court sustained the objection to that testimony and instructed the jury to disregard it (R-2021), Appellant's motion for a mistrial was denied. (R-2054).

On cross-examination, it was revealed that the co-defendant had a violent record as a juvenile, including convictions for battery and assault. (R-2022-3).

The trial court refused to allow Appellant's counsel to elicit testimony on cross-examination of Mr. Celeste that the co-defendant had not been required to plead to second degree murder with a firearm, which would have required a three year mandatory minimum sentence without gain time during that period of time. (R-2025). Appellant's counsel was also prohibited from eliciting testimony from Mr. Celeste on cross-examination that the co-defendant would actually serve considerably less that 40 years in prison even though his sentence was for a period of 40 years. (R-2026).

The final state rebuttal witness was Joanne Leznoff, a probation officer for the Department of Corrections and Probation and Parole Service. Ms. Leznoff, over Appellant's objection (R-2046-9), was permitted to testify that Appellant violated his probation upon which he had been placed for attempted sexual battery with slight force. (R-2050-1). Ms. Leznoff had not been listed by the state as a witness. The court denied a Richardson

hearing requested by the defense. (R-2049). Over Appellant's objection, Ms. Leznoff testified that, while on probation, Appellant was arrested for a new charge of attempted sexual battery and additional charges of trespassing and obstructing a police officer. Ms. Leznoff indicated that the sexual battery charge was reduced to the charge of simple battery, and Appellant was sentenced to a year in the county jail for that offense and five years in the Department of Corrections for the violation of probation. (R-2051).

The trial court denied Appellant's motion for a mistrial based upon Ms. Leznoff's testimony. (R-2054).

There was no further evidence before the jury at the sentencing phase of the trial.

The trial court denied the defense's request to instruct the jury that it was improper to "double up" regarding the aggravated factors of committing a capital felony for pecuniary gain and committing a capital felony while being engaged in, or being an accomplice, or being in the commission of, or during flight after committing, a burglary. (R-2060-1). This was Appellant's requested jury instruction number six.

The court denied Appellant's request to instruct the jury that they could consider the defendant's age at the time of the crime as a possible mitigating circumstance. (R-2086-2087).

During the state's closing argument for the sentencing phase, the prosecutor misstated the law regarding aggravating circumstances and mitigating circumstances. The prosecutor stated

as follows:

> These are the statutory circumstances that our Legislature has provided for, that if you find proof of these aggravating circumstances beyond a reasonable doubt, you weigh them, and you weigh them against -- first of all, if you find no mitigating circumstances, you weigh them and you decide: A. Are these weighty? And if they are, then the result is you recommend the death penalty...
>
> The next step that you do is you look to mitigating circumstances. If you find that mitigating circumstances exist, you weigh those, as well, and you weigh them against the aggravating circumstances, and if the aggravating circumstances are more weighty, then your recommendation is that of the death penalty.
>
> If you find that the mitigating circumstances are more weighty, then your recommendation to this Court is life sentence.

Appellant objected to those statements as being misstatements of the law, and the court overruled the objections. (R-2104-5).

The prosecutor again misstated the law during her closing argument by stating as follows:

> It is pretty obvious why you would kill a security guard, but to avoid being arrested. And, ladies and gentlemen, this is another aggravating factor which is proven beyond a reasonable doubt that the State of Florida says if you consider this and you find it, and you find it weighty, the proper sentence is the death penalty.

Appellant objected to this misstatement of the law. The objection was overruled by the court. (R-2110).

The prosecutor further argued that Appellant liked to dominate people. Appellant objected to said argument, but the court overruled his objection. (R-2113).

The prosecutor argued that Appellant had a history of violence and that a trail of violence followed the Appellant through his life. Appellant objected this line of argument as being outside the scope of the statutory aggravating factors. The objection was overruled. (R-2131-2). The prosecutor also argued that the deceased was in horrible pain from a shot he had sustained to his hip and that he struggled as he was crawling along losing his glasses. Appellant objected to this argument as being inflammatory and outside the scope of the statutory aggravating factors. This objection was overruled. (R-2132-3). The prosecutor also referred to the deceased as "gasping for air, that he lost so much blood that he was like a fish out of water gasping for air." Appellant's objection to this line of argument was also overruled. (R-2135).

During closing argument for the sentencing phase by Appellant's counsel, Appellant's counsel attempted to argue that the court could sentence Appellant to consecutive sentences for the other crimes for which he was convicted. The court sustained the state's objection to that line of argument and refused to permit it. The court further instructed the jury to disregard that portion of the argument that had been begun by Appellant's counsel. (R-2144).

Following closing arguments, the court instructed the jury as to the law regarding its advisory sentence. (R-2174-9).

Appellant then moved for a mistrial based upon improper argument by the state. Appellant further renewed all other motions for mistrial which were made previously and renewed its objections

to the jury instructions as given by the court. (R-2179-82).

Thereupon the jury retired to consider its verdict. The jury returned with an advisory sentence which recommended the imposition of death upon Appellant by a vote of 8 to 4. (R-2185-9).

On November 3, 1989, a sentencing hearing was held before the court. Over defense objection, Deputy Sheriff Alfred Musko was permitted to testify that he conducted an investigation and was supplied information that Appellant was supplying or had supplied marijuana to fellow inmates while incarcerated in the Palm Beach County Jail. He further testified that Appellant was found with two packs of cigarettes containing marijuana on October 17, 1989. (R-2194-2200).

The court then reviewed twenty-six letters from family and friends of Appellant which urged the court to impose a sentence of life imprisonment. (R-2200-10).

On November 3, 1989 the court sentenced Appellant. Appellant was sentenced to death for the crime of first degree murder. Appellant was sentenced to life imprisonment for the crime of burglary while armed with a firearm, to run consecutively to the death sentence. Appellant was sentenced to life imprisonment, to run consecutively to the sentence for burglary for Count III, burglary while armed with a firearm. Appellant was sentenced to thirty years for the crime of grand theft, Count IV. That sentence was to run consecutively to the other sentences imposed. (R-2216). The defendant was not sentenced on Count V, possession of a firearm during the commission of a felony.

At the time of the sentencing, the court did not file written findings in support of its sentence of death. In regard to the death sentence, the court merely stated the following:

> Miguel, I've heard it all. I think I've told this to your jurors. I think I said it in every capital case in which we have selected a jury and talked about capital punishment.
>
> If it were up to me, there would be no capital punishment, but it is the law. I think if any case deserves capital punishment, it is this one.
>
> I am going to sentence you to death on Count I.

On November 15, 1989, twelve days following the sentencing hearing, an order setting forth written findings regarding the death sentence was filed.

A notice of appeal was timely filed, and this appeal follows.

POINT I

THE TRIAL COURT ERRED IN EXCUSING A JUROR FOR CAUSE WHILE PROHIBITING DEFENSE COUNSEL FROM QUESTIONING THE JUROR.

During jury selection, a juror (Mr. Kutlik) was questioned by the prosecutor as follows:

> MS. ROTHMAN: Mr. Kutlik.
>
> MR. KUTLIK: I have lived about twenty years. I have never been on a jury before.
>
> Now that I have thought about it, the question you asked me about believing in capital punishment, I don't.
>
> MS. ROTHMAN: So you feel like if you had to make that decision, you couldn't do it?
>
> MR. KUTLIK: I couldn't.
>
> MS. ROTHMAN: Thank you for being honest with me.

(R-457-8). When the state moved to excuse Mr. Kutlik for cause because he could not recommend the death penalty, the following exchange took place:

> THE COURT: What about this guy? He changed his mind. He said he couldn't do it.
>
> MR. DUHL: I would like the opportunity to question him. He's saying he couldn't do it, but people were asked earlier and they said they couldn't do it and when they were questioned further -- we have tons of people left.
>
> MS. ROTHMAN: He was pretty adamant about it.
>
> THE COURT: He might have figured out the

right answer to get excused. It seems to me like --

MR. DUHL: I would like a shot at him.

THE COURT: OK. I'm going to get rid of him.

The juror was then excused. (R-462-3).

Florida Rule of Criminal Procedure 3.300(b) reads as follows:

> The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both state and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror may be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved.

In Francis v. State, 579 So.2d 286 (Fla. 3rd DCA 1991), the Court held as follows:

> During voir dire examination of prospective jurors, the trial court denied defense counsel an opportunity to question jurors individually. Florida Rule of Criminal Procedure 3.300(b) permits "[t]he court [to] examine each prospective juror individually or [to] examine the prospective jurors collectively." However, the rule also states that "[t]he right of the parties to conduct an examination of each juror orally shall be preserved." In Gosha v. State, 534 So.2d 912 (Fla. 3rd DCA 1988), this Court held that imposition of severe time constraints on counsel's voir dire examination of each prospective juror is, as a matter of law, unreasonable and an abuse of discretion. That holding compels reversal where, as here, the trial court totally precludes individually examination of jurors. See Peneda v. State, 571 So.2d 105 (Fla. 3rd DCA 1990). Accordingly, we reverse and remand for a new trial.

In the instant case, the trial court precluded defense counsel

from the individual examination of this juror <u>after</u> permitting the state to question the juror.

Therefore, Appellant's conviction should be reversed.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENTS OF ACQUITTAL.

Counsel for Appellant moved for judgments of acquittal as to all counts at the close of the state's case. Said motions were denied. (R-1157-62).

The state's evidence against Appellant was circumstantial in nature. Appellant's fingerprints were found by the point of entrance at a window on the roof of the Farmer's Market and on a Coca-Cola canister which was inside the Farmer's Market but not inside any individual store. The only other evidence presented by the state linking Appellant to the crimes was Melissa Constable's testimony regarding two individuals she saw running in the early morning hours, one with a gun, near the Farmer's Market. However, she could make no identification of Appellant as one of those individuals. Such evidence, however, does not exclude all reasonable hypotheses of innocence as is required by the law. <u>Smith v. State</u>, 568 So.2d 965 (Fla. 1st DCA 1990); <u>Byrd v. State</u>, 574 So.2d 233 (Fla. 4th DCA 1991). A reasonable hypothesis of innocence would be that Appellant's fingerprints were placed at the two locations in question at a time other than the time of the crimes. In fact, in <u>Dixon v. State</u>, 216 So.2d 85 (Fla. 2d DCA 1968) it was held that, in order to sustain a conviction based upon fingerprint evidence alone, where fingerprints are found in a place

open to the public, the circumstances must be such that the print could have been made only at the time the crime was committed. No evidence was presented by the state linking Appellant to jewelry taken from the Gold Junction store. No evidence was presented that Appellant was armed with a firearm. Therefore, Appellant's motions for judgments of acquittal at the close of the state's case should have been granted as to all counts of the Indictment. At the close of all the evidence, Appellant renewed his motions for judgments of acquittal. (R-1157-62) Appellant testified that he did commit the burglary of the Farmer's Market, but withdrew prior to any shooting and prior to any theft. No rebuttal evidence was presented by the state to contradict Appellant's testimony. Therefore, the trial court, which denied Appellant's motions for judgments of acquittal made at the close of all the evidence, should have granted said motions except for Count II. Count II should have been granted in part and reduced to burglary of a structure without possessing a firearm or dangerous weapon.

Therefore, Appellant's convictions should be vacated, and Appellant should be discharged.

POINT III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON "FLIGHT."

The trial court, over Appellant's objection, gave the following instruction on flight which was requested by the state:

> Flight is considered to exist when an accused departs from the vicinity of the crime under circumstances such as to indicate a sense of fear or of guilt or to avoid arrest, even before the defendant has been suspected of the

> crime. Flight is only a circumstance of guilt which you should consider and weigh if you so find evidence of flight by the defendant in connection with all the other evidence in the case and give it such weight as, in your judgment, it is fairly entitled to receive.

The facts of the instant case did not justify the giving of an instruction that the jury could infer consciousness of guilt from flight. In Whitfield v. State, 452 So.2d 548, 549 (Fla. 1984), this Court stated that an instruction on flight is permissible only "where there is significantly more evidence against the defendant than flight standing alone." That is not the case here, where the only evidence linking the defendant to the crime is fingerprints, with no testimony having been elicited as to when those fingerprints could have been placed at the scene of the crime.

This Court also stated, in Jackson v. State, 575 So.2d 181, 189 (Fla. 1991): "Departure from the scene of the crime, albeit hastily done, is not the flight to which the jury instruction refers." It was just that type of flight which constituted the flight evidence in this case.

Not only was the flight instruction inappropriate because of the facts of the instant case, but this Court has gone on to hold that the flight instruction should no longer be given. Fenelon v. State, 594 So.2d 292 (Fla. 1992). In Fenelon, the Court stated as follows:

> Evidence that a defendant was seen at the scene of a crime, leaving the scene, or fleeing from the scene, in most instances, would be relevant to the question of the defendant's guilt. Such evidence, like any other evidence offered at trial, is weighed and measured by its degree of relevance to the

> issues in the case. The flight instruction, however, treats that evidence differently from any other evidence. It provides an exception to the rule that the judge should not invade the provence of the jury by commenting on the evidence or indicating what inferences may be drawn from it.

Fenelon, supra, at 294.

The instruction on flight, as given in the instant case, was inappropriate for the evidence elicited at trial. Further, it constituted a comment on the evidence to the jury by the trial court. Therefore, Appellant's convictions should be reversed.

POINT IV

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUEST TO EXCUSE FROM THE JURY A JUROR WHO SAW APPELLANT IN THE CUSTODY OF SHERIFF'S DEPUTIES.

Following a recess taken during the presentation of the state's case during the trial, the following exchange took place on the record:

> MR. DUHL: Judge, one of the jurors saw Miguel going into the holding cell. I move that juror be stricken from the panel.
>
> THE COURT: No way.
>
> MR. DUHL: My motion having been denied, I move for a mistrial.
>
> THE COURT: Denied.

(R-924).

The trial court's ruling denied Appellant his constitutionally guaranteed right to a fair trial. The juror who saw the Appellant was clearly left with the impression that Appellant was dangerous

and therefore had to be incarcerated, or that he was guilty, or both. See Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Wherefore, Appellant's conviction should be reversed, and he should be granted a new trial.

POINT V

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUEST TO EXCUSE A JUROR WHO WAS SEEN SOCIALIZING WITH A FRIEND OF THE WIFE OF THE DECEASED.

One of the jurors, Ms. Mannos, was seen fraternizing and speaking with a woman watching the trial. It was established that this woman was a friend of the wife of the deceased, who was also watching the trial. An investigator for Appellant's counsel observed Ms. Mannos hugging this woman. Ms. Mannos, upon examination by the court, indicated that she was merely speaking to the woman whom she recognized from a restaurant. (R-681-4).

It is a clearly established principle of law that jurors must be fair and impartial to both parties in a criminal lawsuit. Obviously, this is particularly important in a capital case. This juror's association with a friend of the deceased's family violates that principle and denied Appellant his right to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the Florida Constitution. Scull v. State, 533 So.2d 1137 (Fla. 1988).

Therefore, Appellant's conviction should be reversed.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO ALLOW TESTIMONY FROM LISA STUBBS TIMMERMAN; IN REFUSING TO ALLOW APPELLANT TO CALL THE CO-DEFENDANT AS A HOSTILE OR COURT WITNESS; AND IN REFUSING TO ALLOW APPELLANT TO IMPEACH THE CO-DEFENDANT.

The testimony of Lisa Stubbs Timmerman regarding the co-defendant's statement to her should have been admitted under Florida Statute 90.804(2)(c) which defines a statement against interest; and under Florida Statute 90.803(18)(e), which defines an admission by a co-conspirator. Arguably, the co-defendant was unavailable as a witness because he had refused to testify at a proffer despite being ordered by the trial court to do so.

Counsel for Appellant was placed in a predicament by the trial court's erroneous rulings wherein he determined not to call the co-defendant to testify. Therefore, he was prohibited from calling Lisa Stubbs Timmerman to testify.

Finally, the trial court refused to permit counsel for Appellant to impeach the co-defendant. The trial court denied Appellant's request to have the co-defendant called as a hostile or court witness. That request from Appellant should have been granted. Further, the rules of evidence in Florida have now been amended so that an individual can impeach his or her own witness. That application of the rules should be applied retroactively to this situation.

Therefore, for all the reasons set forth above, and under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution,

Appellant's conviction should be reversed.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS DURING THE TRIAL.

Appellant requested several jury instructions during the guilt phase of the trial which were denied by the trial court. (R-1416-22).

Appellant requested an instruction on third degree murder. The facts were susceptible to the jury drawing a conclusion that Appellant was guilty of third degree murder, in that he had committed the capital felony under a scenario where he did not intend to cause death and had committed the crime of grand theft, rather than burglary.

Appellant also requested that the jury be instructed on and given the option of a verdict of guilt for second degree murder without a firearm and manslaughter without a firearm. (R-1433). If the jury concluded that the co-defendant was the gunman, a guilty verdict could have been returned on either of these two crimes if the jury had been instructed on them as requested by Appellant.

Appellant's special requested jury instructions two, three and four all deal with the issue of felony murder. Number two deals with the principals instruction; and numbers three and four state that the defendant must have been present at the scene of the alleged burglary when the homicide took place in order to find the defendant guilty. (R-1423). All these instructions are proper

statements of Florida law and should have been given.

Appellant requested a special verdict form as to the theory of guilt (i.e. felony murder or premeditated murder). (R-1425-6). The denial of this requested special verdict constituted a denial of Appellant's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution. Schad v. Arizona, 111 S.Ct. 2491 (1991). See also State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984).

The following special instruction (number five) was also requested and denied:

> If you find that the death of John Giblan was solely caused by the independent act of Anthony Escalera, or any other person; and that such act was not in furtherance of a common design with Anthony Escalera; or you have a reasonable doubt about it, you must find the defendant, Miguel Hernandez, not guilty of first degree murder or any other degree of homicide.

(R - 1414-15). This instruction should have been given as there was evidence from which the jury could have concluded that Appellant withdrew from the criminal enterprise prior to the death of the victim. Failure to give the instruction constitutes reversible error. Bryant v. State, 412 So.2d 347 (Fla. 1982).

Finally, over Appellant's objection, the trial court instructed the jury concerning "withdrawal" and included an instruction that stated that "...to establish the defense of withdrawal from the crime of felony murder, the defendant must establish that he abandoned and renounced his intention to participate in that burglary and that he clearly communicated his

renunciation to his accomplice in sufficient time for them to consider abandoning the criminal plan." The portion of this instruction regarding communication is a misstatement of Florida law. See Bryant v. State, supra.

Therefore, for all the reasons set forth above, Appellant's conviction should be reversed, and his death sentence vacated.

POINT VIII

THE TRIAL COURT ERRED IN PERMITTING THE CONVICTION AND SENTENCING OF APPELLANT FOR TWO COUNTS OF BURGLARY.

Appellant was charged with burglarizing the Farmer's Market in Count II of the Indictment and with burglarizing the Gold Junction in Count III of the Indictment.

The Gold Junction is a store contained within the Farmer's Market. The entry into the Farmer's Market and into the Gold Junction arose from a single act. The Indictment charging a single offense in two counts is multiplicitous and therefore violates Appellant's right not to be twice placed in jeopardy for the same offense. See Carawan v. State, 515 So.2d 161 (Fla. 1987); Brown v. State, 437 So.2d 446 (Fla. 1983).

Therefore, the conviction and sentence for Count III should be vacated.

POINT IX

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO THREE YEAR MANDATORY MINIMUM SENTENCES ON THE TWO COUNTS OF ARMED BURGLARY BECAUSE IT WAS NOT PROVEN THAT APPELLANT POSSESSED A FIREARM DURING THE BURGLARY.

The trial court sentenced Appellant to life imprisonment on

each of the two counts of armed burglary. The trial court imposed three year mandatory minimum sentences on each count. This was error inasmuch as there was no proof that Appellant possessed a firearm during the burglaries.

In order to impose such a penalty, Florida Statute Section 775.087(2) requires that a defendant must have had actual, as distinguished from vicarious, possession of a firearm during a burglary. Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984); Belcher v. State, 550 So.2d 1185 (Fla. 5th DCA 1989); Bell v. State, 589 So.2d 1374 (Fla. 1st DCA 1991).

In the instant case, there is no proof that Appellant had a firearm in his possession at the time of the burglaries. The evidence was that two individuals participated in the burglaries, Appellant and Tony Escalera. Further evidence was that John Giblan was shot by someone. Further evidence was that Melissa Constable saw one person, the taller of the two people whom she saw running, with a firearm. That testimony is consistent with Tony Escalera possessing the firearm and certainly does not constitute proof that Appellant possessed a firearm.

Therefore, the three year mandatory minimum portions of Appellant's sentences for armed burglaries should be vacated.

POINT X

THE TRIAL COURT ERRED IN SENTENCING APPELLANT ON COUNTS II, III AND IV AS AN HABITUAL OFFENDER.

At the time of sentencing, the trial court sentenced Appellant to life imprisonment for Count II, burglary of a structure while

armed with a firearm; life imprisonment on Count III, burglary of structure while armed with a firearm; and thirty years for Count IV, grand theft. The court did not indicate at sentencing that Appellant was being sentenced as an habitual offender. In the judgment and sentencing papers filed with the clerk, it was indicated that Appellant was sentenced on these three counts as an habitual offender. Said counts all ran consecutively to each other and to the sentence of death for the crime of first degree murder. Said sentences were outside the range prescribed by the sentencing guidelines.

The trial court did not conduct a proper hearing as required by Florida law or make proper oral or written findings as required by Florida law to exceed the guidelines and to sentence Appellant as an habitual offender. The court merely stated the following in its sentencing order, "The Court finds that these sentences are necessary for the protection of the public. The defendant is a habitual felony offender and the protection of society demands that it be insolated from him." This blanket statement by the court is insufficient to satisfy the requirements of Florida Statute Section 775.084. Parker v. State, 546 So.2d 727 (Fla. 1989).

Therefore, Appellant's sentences on Counts II, III and IV should be vacated and this cause remanded for re-sentencing as to those counts.

POINT XI

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT DID NOT MAKE WRITTEN FINDINGS REGARDING THE DEATH SENTENCE AT THE TIME OF SENTENCING.

The trial court sentenced the defendant to death on November 3, 1989. In regard to its reasoning for the death sentence, the court merely stated the following at the time of sentencing:

> Miguel, I've heard it all. I think I've told this to your jurors. I think I said it in every capital case in which we have selected a jury and talked about capital punishment.
>
> If it were up to me, there would be no capital punishment, but it is the law. I think if any case deserves capital punishment, it is this one.
>
> I'm going to sentence you to death on Count I.

(R-2216).

The trial court did not make any written findings regarding its death sentence until filing an order setting forth written findings on November 15, 1989. (R-2527-33). The judge's signature on the order was dated November 14, 1989.

Subsection 921.141(3) Florida Statutes (1987) provides as follows:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating

> circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment in accordance with §775.082.

The trial and sentencing in the instant case took place after this Court's opinion in Grossman v. State, 525 So.2d 833 (Fla. 1988), cert.denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), became effective. In Grossman, this Court established the rule that "all written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." Grossman, 525 So.2d at 841.

In Stewart v. State, 549 So.2d 171, 176 (Fla. 1989), cert. denied, - U.S. -, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990), this Court went further and stated that "[s]hould a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence."

In Christopher v. State, 583 So.2d 642 (Fla. 1991), this Court vacated the death sentence and imposed a sentence of life imprisonment when the trial court did not make written findings on the death sentence until two weeks after sentencing Christopher to

death. In the instant case, the facts are identical but for the difference of two days. In the instant case, the trial court did not set forth written findings regarding its death sentence until twelve days after imposing the death sentence. The trial and sentencing in the instant case occurred after the Grossman decision, just as did the trial and sentencing in the Christopher case.

In Christopher, this Court stated:

> Our holding in this respect is more than a mere technicality. The statute itself requires the imposition of a life sentence if the written findings are not made. §921.141(3), Fla.Stat. (1989). We have consistently emphasized the necessity that the weighing of aggravating and mitigating circumstances take place at sentencing. Patterson v. State, 513 So.2d 1257 (Fla. 1987); Muehleman v. State, 503 So.2d 310 Fla., cert.denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987). The preparation of written findings after the fact runs the risk that "sentence was not the result of a weighing process or the 'reasoned judgement' of the sentencing process that the statute and due process mandate." VanRoyal v. State, 497 So.2d 625, 630 (Fla. 1986) (Ehrlich, J., concurring).

Accordingly, the death sentence in the instant case must be vacated. A sentence of life imprisonment must be imposed in its stead if Appellant's conviction is not reversed by this Court.

POINT XII

THE SENTENCE OF DEATH IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989).

Death is the most severe and unique punishment, one which requires "the most aggravated, the most indefensible of crimes" in order to be imposed. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert.denied 416 U.S. 943 (1984). The purpose of proportionality review is "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each sentence to ensure that similar results are reached in similar cases." Proffit v. Florida, 428 U.S. 250, 258, 96 S.Ct. 2690, 49 L.Ed.2d 913 (1976). Proportionality review by this Court compares the death sentence "to the cases in which we have approved or disapproved a sentence of death." Garcia v. State, 492 So.2d 360, 368 (Fla. 1986), cert.denied, 479 U.S. 1022 (1986). The scope of comparison includes reductions to life sentences when a trial court ignores a reasonably based jury recommendation of life. In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), this Court described proportionality review as follows:

> After we have concluded that the judge and jury acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffit...Dixon... In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. See Malloy v. State, 382 So.2d 1190 (Fla 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).

Brown, 392 So.2d at 1331 (e.a.).

The jury recommended life sentences in all three cases - Malloy, Burch, and Jones - cited as examples of proportionality

reductions above. Comparing Appellant's case with all of those decided by this Court demonstrates that Appellant's case falls into three categories in which this Court reduces death sentences to sentences of life imprisonment.

In the instant case, the trial court found four aggravating circumstances:

> 1. The defendant was previously convicted of felonies involving the use or threat of violence to the person;
>
> 2. The capital felony was committed while the defendant was engaged, or was an accomplice, or in the commission, or flight after committing, a burglary;
>
> 3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
>
> 4. The capital felony was committed for pecuniary gain.

The court found no mitigating circumstances and stated at the time of sentencing, "I think if any case deserves capital punishment, it is this one." The jury could not have found the facts as did the trial court as it voted for death by a margin of only eight to four.

Second, legal error infected the trial court's sentencing order in the instant case. When this Court finds legal error, it looks beyond the sentencing order and decides proportionality claims based upon the facts in the record. See Nibert v. State, 574 So.2d 1059 (Fla. 1990). Numerous mitigating circumstances should have been found. They include the following:

> 1. Appellant had a good attitude, demonstrated good conduct and adjusted well to

life in prison and the jail.

> 2. Appellant has a dull-normal intelligence level.
>
> 3. Appellant has organic brain damage.
>
> 4. Appellant was an abused child.
>
> 5. Appellant suffered from a deprived childhood and a poor upbringing.
>
> 6. Appellant was a good parent and provider for his daughters.
>
> 7. Appellant is rehabilitatable.
>
> 8. Appellant is not the person who actually killed the deceased.
>
> 9. The disparate treatment of the co-defendant.
>
> 10. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 11. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
>
> 12. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> 13. The age of the defendant at the time of the crime.

The aggravating circumstances involving pecuniary gain and the fact that the killing was committed during the course of a burglary should be considered together as one factor. At the least, the aggravating factor alleging that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest was improperly found.

Third, perhaps the most compelling reason to reduce the death

sentence to a sentence of life imprisonment in this case is the extremely disparate treatment given to the co-defendant, Tony Escalera, who was equally culpable in the eyes of the law of this murder, yet received a sentence of forty years in prison with no mandatory minimum required.

The evidence presented in this case clearly demonstrates that the co-defendant, Tony Escalera, was at least as culpable as Appellant for the capital crime. Escalera's fingerprints were found at the scene of the crime. He plead guilty to second degree murder. He was shot in his leg with projectile fragments consistent with the bird shot fired by the deceased. The fact that Escalera was shot and not Appellant is consistent with the theory that Escalera was the individual who fired at the deceased. Further tending to establish Escalera as the one who killed the deceased is the testimony of Melissa Constable, who testified that the taller of the two men she saw running in the parking lot of the bar near the Farmer's Market was carrying the gun, and that individual was approximately six feet, two inches tall, the approximate height of Tony Escalera. All these factors indicate that Escalera was at least as culpable as Appellant. This is particularly true because the evidence was that only one gun was used to kill the deceased. Additionally, it is obviously significant that the co-defendant confessed to Lisa Stubbs Timmerman that he shot the deceased. (R-1864).

This Court, in numerous cases, has reduced a death sentence to one of life imprisonment based, at least in part, upon the

disparate treatment of co-defendants or accomplices. See Slater v. State, 316 So.2d 539 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980); Barfield v. State, 402 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Thompson v. State, 456 So.2d 444 (Fla. 1984); Brookings v. State, 495 So.2d 135 (Fla. 1986); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Callier v. State, 523 So.2d 158 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Fuente v. State, 549 So.2d 652 (Fla. 1989).

Trial courts often have difficulty finding and evaluating the mitigating circumstance of disparate treatment of such individuals. In many of these cases, the trial court overrode a jury recommendation of life imprisonment which this Court held was reasonably based upon the disparate treatment of a co-participant in the capital crime. The strong message from these juries is that the ultimate penalty should not be imposed when equally culpable co-participants are not sentenced to death.

Comparison of the facts in this case to others in which this Court reduced the death sentence to life imprisonment demonstrates that Appellant's offense does not demand the ultimate penalty. Some cases involved co-defendants less culpable than Tony Escalera

and a more aggravated crime than the one which occurred here. Yet, this Court reduced the sentence to life imprisonment.

In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), this Court held that the jury could reasonably base a life recommendation in part on the disposition of co-defendant cases. McCampbell had killed a security guard during the robbery of a grocery. Three co-defendants who testified against him participated in the robbery but not the killing. They all plead guilty to lesser charges. The trial court properly found three aggravating circumstances: the defendant was under sentence of imprisonment (parole); the defendant was previously convicted of violent felonies (assault with intent to murder and assault with intent to rob); and the killing occurred during the commission of a robbery. However, the disparate treatment of the co-defendants together with various positive character traits of McCampbell caused this Court to reduce the sentence to life imprisonment.

In Thompson v. State, 456 So.2d 444 (Fla. 1984), this Court reduced the sentence to life, in part based upon the disparate treatment of participants who were not even accomplices. Thompson had shot a gas station clerk during an attempted robbery. This Court found that two of the three aggravating circumstances found by the trial court were valid: the killing occurred during the commission of a felony; and the defendant was guilty of prior violent felonies. The jury could have found that six state witnesses who testified all had helped plan or carry out the robbery and could reasonably base their jury recommendation on that

circumstance. The Court specially noted the witnesses were not all accomplices and some had plead to reduced charges.

The facts of these two cases demonstrate that a sentence of life imprisonment would be proportional punishment for Appellant's offense. In McCampbell and Thompson, the co-defendants were not equally culpable with the defendants. In the instant case, Tony Escalera is at least culpable as Appellant. To approve the death sentence for Appellant would send a man to the electric chair while giving a much more lenient punishment to his equally culpable co-participant in the capital crime, where in other cases men with greater aggravating factors were spared the death penalty because their co-participants, who were not equally culpable, were treated more leniently. Death is not proportionate for Appellant.

A proper consideration of the aggravating and mitigating circumstances in this case demonstrate that this offense was simply not the most aggravated and the least mitigated of records for which the death penalty is reserved. See Dixon, 283 So.2d 1. In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court stated:

> We have in the past affirmed death sentences that were supported by only one aggravating factor,...but those cases involved either nothing or very little in mitigation.

Id. at 1011. Because Songer had significant mitigating evidence in his record and only one aggravating circumstance, this Court reduced the sentence to life.

A final argument that the death penalty is unconstitutionally disproportional punishment as applied in this case is strongly set forth by the principles set forth under Tyson v. Arizona, 481 U.S.

137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and Enmund v. Florida, 458 U.S. 782, 102 S.Ct 3368, 73 L.Ed.2d 1140 (1982).

In Enmund, the United States Supreme Court found that the death penalty was disproportional to the crime of robbery - felony murder under the circumstances of that case. In Tyson, the court held that individualized culpability is of great importance and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state in which the defendant commits the crime." Tyson, 481 U.S. at 156, 107 S.Ct. at 1687. Therefore, if the state has not proven beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death in that situation would be disproportional punishment. In both Enmund and Tyson, the United States Supreme Court stated that the death penalty is disproportional punishment for felony murder in a situation where the defendant was a minor participant in the crime and the state's evidence of mental state did not prove beyond a reasonable doubt that he actually killed, intended to kill, or attempted to kill. Mere participation in a robbery resulting in murder does not constitute sufficient culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tyson, 481 U.S. at 151, 107 S.Ct at 1684. On the other hand, death might be proportional if the evidence demonstrates that the defendant was a major participant in the

crime and that his state of mind amounted to reckless indifference to human life. Courts may consider a defendant's major participation in the crime as a factor in determining whether the culpable state of mind that existed at the time of the crime. However, that participation alone may not be enough to establish the requisite state of mind. Id., 481 U.S. at 158 n.12, 107 S.Ct. at 1688 n.12.

The principles set forth in Enmund and Tyson were applied by this Court in Jackson v. State, 575 So.2d 181 (Fla. 1991). The Court stated as follows:

> Although the evidence against Jackson shows that he was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. See Tyson, 481 U.S. at 150-51, 107 S.Ct. at 1684-85. The entire case is based on circumstantial evidence. The totality of the record shows that Jackson previously indicated his intent to rob Phillibert's store; that Jackson was seen driving in the vicinity of the store shortly before and after the crime; that Jackson had been driving with his brother, whose fingerprints were found on the cash register; that Jackson said afterward "we had to do it because he had bucked the jack"; and that Jackson asked his mother to tell his brother to say "he hadn't been nowhere around the hardware store and get rid of the gun." A reasonable inference could be drawn from the evidence in this record that either of the two robbers fired the gun, contrary to the finding of the trial judge. There was no evidence presented in this trial to show that Jackson personally possessed or fired a weapon during the robbery, or that he harmed Phillibert. There was no evidence that Jackson carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery. There

> was no real opportunity for Jackson to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance. No other innocent lives were jeopardized.
>
> Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder. Accord <u>White v. State</u>, 532 So.2d 1207, 1221-22)(Miss.1988)(<u>Enmund</u> and <u>Tyson</u> are not satisfied in murder case with multiple defendants and no eyewitnesses where all evidence is circumstantial and the actual killer is not clearly identified). To give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of <u>Enmund</u> and <u>Tyson</u>, that the constitution requires proof of culpability great enough to render the death penalty proportional punishment, and it fails to "genuinely narrow the class of persons eligible for the death penalty." <u>Zant v. Stephens</u>, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). (footnote omitted.)

Just as in <u>Jackson</u>, a reasonable inference could be drawn from the evidence in this record that either of the two burglars fired the gun, contrary to the findings of the trial judge. There is insufficient evidence in this record to establish that Appellant's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder.

The state must concede that Appellant has no more than three aggravating circumstances. Appellant submits that there are only two aggravating circumstance. When that is compared to the numerous mitigating circumstances that should be found by this

Court, including the disparate treatment of the co-defendant, this Court should reduce Appellant's death sentence to one of life imprisonment.

POINT XIII

THE TRIAL COURT FAILED TO CONSIDER AND FIND PROPOSED MITIGATING CIRCUMSTANCES SUPPORTED BY REASONABLE QUANTA OF UNCONTRADICTED EVIDENCE.

Despite an abundance of uncontradicted evidence proving recognized mitigating factors, the trial court found there to be no mitigating circumstances. The trial court's failure to properly consider the evidence and failure to find mitigating circumstances provided by said evidence requires this Court to impose a life sentence.

The trial court did not address mitigating circumstances at all when it sentenced Appellant to death. (R-2216). In its written order, filed twelve days after Appellant was sentenced to death, the trial court addressed mitigation as follows:

> The defendant argued two mitigating factors.
>
> 1. That he acted under the domination of Anthony Escalera.
>
> 2. That he is of low I.Q. and suffers from an organic brain disorder brought on by several head injuries. (R-2529).

Later in its written order, the trial court stated:

> Against these aggravating circumstances, which have been proven beyond a reasonable doubt, the Court has considered everything in mitigation offered by the defendant or that might appear in the record. The Court simply cannot find any mitigating circumstances sufficient to outweigh the aggravating circumstances that have been proven beyond a reasonable doubt.

> That Miguel Hernandez was under the domination of Anthony Escalera is patently absurd. At the time of the commission of this murder, Miguel Hernandez had been convicted of attempted sexual battery and had served a five year sentence in the Division of Corrections. He was 26 years old. Anthony Escalera was 16 years old.
>
> The jury heard considerable testimony by a psychologist, by Dr. Perry and Susan LeFehr-Hession, on the issue of Miguel Hernandez's I.Q. and brain malfunction. This testimony was considered and rejected by the jury. I did not find it persuasive either. The interpretation of the test results was highly suggestive and the defense did not offer any medical test to substantiate these opinions. The defense did, however, obtain Magnetic Resonance Imaging of Miguel Hernandez's brain. The state offered in rebuttal the report of that test that no abnormalities were evident.
>
> No mitigating circumstances as enumerated in Florida Statute 921.141, subsection (6) or otherwise were found to exist.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court set forth the standards which must be met by a sentencing court in a capital case. This Court stated the following:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and, whether, in the case of non-statutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury

> Instr. (Crim. at 81). The court then must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

The trial court in the instant case failed to address each mitigating circumstance as proposed by Appellant. As noted previously, at the time of sentencing Appellant to death, the trial court did not address any mitigating circumstances or, for that matter, any aggravating circumstances. The court merely indicated that it felt that Appellant deserved the death penalty and therefore sentenced him to death.

In its written order, the trial court addressed only two mitigating circumstances. The first was that the defendant acted under the domination of the co-defendant. It is unclear why the trial court addressed this mitigating circumstance because it was never proposed or argued by Appellant. Apparently, the trial court meant to address the mitigating circumstance referring to the defendant being an accomplice in the capital crime committed by another person and his participation being relatively minor. This addressing of the wrong issue by the trial court demonstrates that court's complete failure to carefully weigh the aggravating and

mitigating circumstances and make a reasoned judgment.

The second mitigating circumstance addressed by the trial court concerned the defendant's low I.Q. and organic brain damage. The trial court rejected this evidence even though it was uncontradicted by any testimony or substantive evidence. The only apparent contradiction was an MRI test of Appellant's brain which did not reveal abnormalities. However, Dr. John Perry, an expert in neuropsychological testing, testified that MRI tests cannot find or reflect certain types of brain damage.

This Court has previously recognized a low I.Q. as being a valid nonstatutory mitigating circumstance. In Morris v. State, 557 So.2d 27 (Fla. 1990), this Court found an I.Q. of approximately 75 to be a valid nonstatutory mitigating circumstance. In DuBoise v. State, 520 So.2d 260 (Fla. 1988), an I.Q. of 79 was found to be mitigating in nature. In the instant case, Susan LeFehr-Hession testified that Appellant had an I.Q. of 73, meaning that he falls into the borderline range of intelligence and is almost mentally retarded. (R-1911-3). Prison records presented before the jury indicated that Appellant's I.Q. had been determined to be 64 at a previous date. (R-1926-7).

Both Dr. Perry and Ms. LeFehr-Hession testified that Appellant had organic brain damage. Ms. LeFehr-Hession also indicated that Dr. Villalobos, a psychiatrist, had examined Appellant, and it was also his opinion that Appellant suffered from organic brain damage. (R-1903-4). Although the court rejected that mitigating circumstance, organic brain damage has been found by this Court to

be a nonstatutory mitigating factor. See State v. Sireci, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986).

Appellant presented evidence during the penalty phase that he had been an abused and battered child and suffered from a deprived childhood and poor upbringing. This Court has repeatedly recognized these aspects of a defendant's character to be valid nonstatutory mitigating circumstances. In Campbell v. State, supra, it was held that the trial court wrongly rejected Campbell's deprived and abusive childhood as a mitigating factor. In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court vacated the death sentence and remanded for imposition of a sentence of life imprisonment. Nibert, as did Appellant here, presented uncontroverted evidence that he had been physically and psychologically abused in his youth. This Court stated the following, at 1062:

> Nibert presented a large quantum of uncontroverted mitigating evidence. First, Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating

> circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it. See, e.g., Brown v. State, 526 So.2d 903, 908, Florida. (defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered), cert.denied 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

In Freeman v. State, 547 So.2d 125, this Court reversed a sentence of death in which a trial judge had overridden a jury's recommendation of life imprisonment. This Court stated, at 129:

> Evidence was presented in mitigation that he was twenty-two years old at the time of the crime and was of dull-normal intelligence, scoring at approximately fourth grade performance level. That, coupled with the psychologist's testimony and history of abuse during Freeman's childhood, provides sufficient mitigating evidence to support the jury's recommendation.

Similar testimony was presented in Appellant's case at the penalty phase. Appellant was young at the time of the crime and was of dull-normal intelligence. Testimony from family members and psychologists indicated that Appellant had suffered from abuse and deprivation during his childhood.

Additional testimony at the penalty phase hearing from the mother of Appellant's children and her family provided uncontroverted evidence that Appellant is a good father to his two young daughters. This has been recognized by this Court as another valid nonstatutory mitigating circumstance. Fead v. State, 512 So.2d 176 (Fla. 1987). See also State v. Rogers, 511 So.2d 526 (Fla. 1987); Perry v State, 522 So.2d 817 (Fla. 1988).

Testimony at the penalty phase hearing also established that

Appellant showed a good attitude and good conduct while awaiting trial in jail and is rehabilitatable. Testimony from Chris Nicely established that Appellant had a good record in jail while awaiting trial. Prison records established that he had a good record in a previous period of incarceration. Susan LeFehr-Hession testified that a person of his mental capacity would do well in a structured environment such as prison. This Court has repeatedly recognized these factors to also be valid nonstatutory mitigating circumstances. See Menendez v. State, 419 So.2d 312 (Fla. 1982); Simmons v. State, 419 So.2d 316 (Fla. 1982).

The record supports a finding of two other mitigating circumstances. The first is that Appellant is not the person that actually killed the deceased. The second is the disparate treatment of the co-defendant. Arguments pertaining to both of these mitigating circumstances have been presented in the argument regarding the disproportionality of the death sentence in the instant case in this brief. The trial court, in both its oral sentencing of Appellant to death and its written findings filed twelve days later, failed to address four statutory mitigating circumstances.

The first such mitigating circumstance is Appellant's youthful age at the time of the crime. Appellant was 26 years old at the time. This Court has recognized ages very close to that of Appellant as being valid mitigating circumstances in capital cases. Hoy v. State, 353 So.2d 826 (Fla. 1978) (22 years old); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (22 years old); King v. State, 397

So.2d 315 (Fla. 1980) (23 years old); Randolph v. State, 463 So.2d 186 (Fla. 1984) (24 years old).

The trial court also failed to address the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both psychologists who testified during the penalty phase, Dr. John Perry and Susan LeFehr-Hession, testified that, in their expert opinions, Appellant met the criteria for this mitigating circumstance. (R-1778, 1932). The evidence clearly supports the finding of this mitigating circumstance which was ignored by the trial court.

The fact that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance was also argued by Appellant and not addressed by the trial court. The fact that this mitigating circumstance should also have been found to exist by the trial court is established by testimony of Dr. Perry and Ms. LeFehr-Hession concerning Appellant's low level of intelligence and organic brain damage.

The court also failed to address Appellant's argument that he was an accomplice in the capital felony committed by another person and his participation was relatively minor. This argument has been advanced elsewhere in this brief in the disproportionality section of the argument.

For all the reasons set forth above, it is clear that the trial court did not properly address and did not properly find

numerous mitigating circumstances. For those reasons, Appellant's death sentence should be vacated, and he should sentenced to life imprisonment for the capital crime.

POINT XIV

THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANT TO ARGUE DURING PENALTY PHASE CLOSING ARGUMENTS THAT HE COULD RECEIVE CONSECUTIVE SENTENCES FOR EACH CRIME.

During closing argument for the penalty phase by Appellant's counsel, Appellant's counsel attempted to argue that the Court could sentence Appellant to consecutive sentences for the several crimes for which he was convicted. The court sustained the state's objection to that line of argument and refused to permit it. The court further instructed the jury to disregard that portion of the argument that had been begun by Appellant's counsel. (R-2144).

Such argument was proper argument in mitigation. In Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990), this Court stated:

> ...Jones contends that the trial court improperly prevented him from arguing that he could be sentenced to consecutive minimum twenty-five-year prison terms on the murder charges should the jury recommend life sentences. The state argues that this claim was speculative because the actual sentencing decision is purely within the province of the court, not the jury.
>
> The standard for admitting evidence in mitigation was announced in Lockett v. Ohio, 438 U.S. 856, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." Id. at 604, 98 S.Ct. at 2965. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant

> evidence "that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

Based upon this improper limitation of argument during penalty phase, Appellant's death sentence should be vacated, and he should receive a sentence of life imprisonment, or, in the alternative, receive a new penalty phase hearing and sentencing.

POINT XV

THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANT TO INTRODUCE EVIDENCE AND ARGUE DURING PENALTY PHASE THE COMPLETE CIRCUMSTANCES OF THE DISPARATE TREATMENT OF THE CO-DEFENDANT.

During the penalty phase hearing, Appellant proffered evidence from criminal defense attorney Donnie Murrell which would indicate that the co-defendant would serve somewhere between ten and twenty years of his forty year sentence for second degree murder. The court prohibited the testimony and prohibited the actual proffer by Mr. Murrell. (R-1736-8). The trial court also refused to indicate to the jury that the three year mandatory minimum required for a firearm charge had been waived by the state and that all charges except the second degree murder charge had been nolle prossed by the state. (i.e. two counts of burglary while armed with a firearm; grand theft; and possession of a firearm during the commission of a felony.) (R-1742-44).

The disparate treatment of a co-defendant has repeatedly been recognized by this Court as a proper and important mitigating circumstance. Slater v. State, supra; Pentecost v. State, supra. Although the trial court did tell the jury, pursuant to Appellant's request, that the co-defendant had plead guilty to second degree murder, received a sentence of forty years, and might be released in less than twenty-five years, Appellant was absolutely entitled to present to the jury evidence of the full circumstances of the disparate treatment of the co-defendant. This included the dropping of four felony counts by the state and the waiver by the state of the three year mandatory minimum prison sentence requirement for firearm offenses. The trial court's exclusion of this evidence denied Appellant his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution.

Therefore, Appellant's death sentence should be vacated, or, in the alternative, he should receive a new penalty phase hearing and sentencing.

POINT XVI

THE TRIAL COURT ERRED IN REFUSING TO PERMIT TESTIMONY AT THE PENALTY PHASE FROM TWO DEPUTY SHERIFFS REGARDING APPELLANT'S BEHAVIOR AND ADJUSTMENT TO JAIL THROUGHOUT THE PERIOD OF HIS TRIAL.

At the penalty phase, Appellant attempted to call two deputy sheriffs to testify. Appellant's counsel offered a proffer of their testimony which was that they would each testify that Appellant was well-behaved in terms of his adjustment to jail

throughout the period of the trial. The state objected to said testimony, and the trial court sustained the objection and refused to permit the testimony. (R-1741-2).

This Court has repeatedly recognized this type of testimony to establish valid non-statutory mitigating circumstances. Menendez v. State, 419 So.2d 312 (Fla. 1982); Simmons v. State, 419 So.2d 316 (Fla. 1982).

Therefore, the trial court erred in refusing to permit said testimony at the penalty phase and Appellant's death sentence should be vacated. Appellant should receive a sentence of life imprisonment, or, in the alternative, receive a new penalty phase hearing and sentencing.

POINT XVII

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT APPELLANT'S AGE AT THE TIME OF THE CRIME COULD BE CONSIDERED AS A POSSIBLE MITIGATING CIRCUMSTANCE.

Florida Statute Section 921.141(6)(g) provides that the age of the defendant at the time of the crime may be a mitigating circumstance. Appellant was twenty-six years old at the time of the capital crime. This Court has recognized ages very close to that of Appellant to be valid mitigating circumstances in capital cases. Hoy v. State, 353 So.2d 826 (Fla. 1978) (22 years old); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (22 years old); King v. State, 397 So.2d 315 (Fla. 1980) (23 years old); Randolph v. State, 463 So.2d 186 (Fla. 1984) (24 years old).

It was error for the trial court to refuse to instruct the jury that they could consider this mitigating circumstance.

Therefore, Appellant's death sentence should be vacated, and he should receive a sentence of life imprisonment, or, in the alternative, receive a new penalty phase hearing and sentencing.

POINT XVIII

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT IMPROPERLY DOUBLED TWO AGGRAVATING CIRCUMSTANCES.

In its written order of death, the trial court found that both of the two following aggravating circumstances had been proven beyond a reasonable doubt:

1. The capital felony was committed while the defendant was engaged, or was an accomplice, or in the commission or, or flight after committing, a burglary.

2. The capital felony was committed for pecuniary gain.

This Court has repeatedly held that it is error to double up on these two aggravating factors and that they must be considered cumulative, and not individually.

In Oats v. State, 446 So.2d 90 (Fla. 1984), this Court held, at 95:

> Concerning the next aggravating factor, that of commission of the crime during a robbery, this must be looked at in tandem with the factor of the crime being committed for pecuniary gain. The State proved both of these factors but the trial court erred by doubling up on them. These two circumstances must be considered cumulative and may not considered individually when the only evidence that the crime was committed for pecuniary gain is the same evidence of the robbery underlying the capital crime. Perry v. State, 295 So.2d 170 (Fla. 1980); Provence v. State, 337 So.2d 783 (Fla. 1976), cert.denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Thus, only one aggravating factor may

be counted.

Subsequent to the decision by this Court in Oats, the identical conclusion has been reached on numerous occasions, both as to burglary and robbery. See Cherry v. State, 545 So.2d 184 (Fla. 1989); Mills v. State, 476 So.2d 172 (Fla. 1985); and Griffin v. State, 474 So.2d 777 (Fla. 1985).

In its sentencing order, the trial court stated the following:

> This Court is being careful not to "double-up" the aggravating circumstances of murder while engaged in a robbery/burglary and murder for pecuniary gain, Maggard v. State, 399 So.2d 973 (Fla. 1981). The Court has combined this factor with murder in the commission of robbery/burglary.

This blanket statement in the sentencing order is inadequate to cure the error of doubling-up these two aggravating circumstances. This is particularly obvious in the instant case where the trial court imposed the sentence of death on Appellant without making the written findings required by Florida law. Because the written findings were made twelve days after sentencing, it is clear that the trial court did not carefully weigh and evaluate the aggravating circumstances versus the mitigating circumstances as it is required to do. Therefore, the trial court's written statement that it has not doubled up on these two aggravating factors is simply an afterthought that was not considered by the court at the time of sentencing. In addition, the court's statement that it did not double-up the aggravating circumstances is contrary to the clear intent in the court's

sentencing order, wherein the court enumerates separate findings as to these two aggravating circumstances.

Therefore, the trial court misapplied F.S. 921.141 (5)(d) and (f) and improperly doubled these two aggravating circumstances. Based upon said misapplication of the law by the trial court, Appellant's death sentence must be vacated.

POINT XIX

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE PRESENTED DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE CAPITAL FELONY FOR WHICH THE APPELLANT WAS SENTENCED TO DEATH WAS COMMITTED FOR PECUNIARY GAIN.

The trial court found that the murder was committed for pecuniary gain. An examination of the record does not support that finding.

In its sentencing order, the trial court stated:

> On the day of the burglary, Miguel Hernandez asked his brother, William, for money. When William refused to give him money, he threatened to kill William. The reason for the burglary was to steal jewelry from the Gold Junction. Items of inventory were found to be missing in an inventory following the burglary and murder.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court held that the trial court improperly found that the murder was for pecuniary gain under circumstances similar to those of the instant case. After "casing two stores", Rogers and the co-defendant decided to rob a Winn-Dixie. The cashier, after being told to open the register, became nervous and could not follow the instructions given by the co-defendant. The co-defendant then told Rogers to forget it. They both went out with Rogers trailing. At the trial,

the co-defendant testified that he heard a voice say, "No, please don't." At that point, he heard the sound of a shot being fired, and then, after a slight pause, two more shots. The pathologist testified that two of the shots indicated that the deceased was face forward against a hard surface such as pavement at the time of being shot. This Court held that because the killing occurred during flight, it was not a step in furtherance of the sought-after gain. See also Simmons v. State, 419 So.2d 319 (Fla. 1982).

In the instant case, where the evidence of Appellant's guilt is totally circumstantial, the theory that the deceased was shot during flight is equally as consistent as the theory that the deceased was shot prior to flight in furtherance of the theft of the jewelry.

Therefore, the trial court erred in the instant case in finding that the capital felony was committed for pecuniary gain, and Appellant's death sentence must be vacated.

POINT XX

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial court found that the capital felony in this case was committed for the purpose of avoiding or preventing a lawful arrest. The only evidence which could possibly support that finding is that the deceased was a security guard and was on-duty at the time of his death. However, that evidence is not sufficient for the trial court to have made that finding beyond all reasonable

doubt.

In Jackson v. State, 575 So.2d 181 (Fla. 1991), this Court stated the following:

> In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the defendant's motive, Riley v. State, 366 So.2d 19 (Fla. 1987), and that it be clearly shown that the dominant or only motive for the murder was the elimination of the []witness. Bates v. State, 465 So.2d 490 (Fla. 1985); Oats v. State, 446 So.2d 90 (Fla. 1984). We have also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Riley.

Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Jackson, supra, at 190.

In the instant case, the deceased was a security guard and not a law enforcement officer. There is insufficient evidence that the dominant or only motive for the murder was the elimination of the deceased. There is also insufficient evidence as to which of the two perpetrators actually shot the deceased.

In Jackson, the victim, the owner of a hardware store, was lying face down on the ground with the cash register drawer opened above him. No one witnessed what had transpired within the store. However, two witnesses did see two black men running through an alley and away from the store. The two men then jumped into a black pick-up truck which was also seen riding by the hardware store earlier in the day. Jackson's brother's fingerprints were found on the back of the cash register. Gun powder residue tests from Jackson proved inconclusive. There was no testimony as to the

caliber of the bullet or its source, and no weapon was recovered. Other evidence came from the testimony of a jail inmate who said he overheard Jackson's conversation with his mother in which Jackson stated that "we had to do it because he bucked the jack." This statement was interpreted to mean that the store owner resisted the robbery. This Court found that, under that factual scenario, there was no evidence in the record that Jackson had any intent to kill the store owner to prevent him from identifying Jackson. The death sentence was vacated, and the case was remanded for imposition of a life sentence.

In Garron v. State, 528 So.2d 353 (Fla. 1988), this Court also found this aggravating factor to have not been proven beyond a reasonable doubt. In Garron, the defendant was at home with one of his daughters and made sexual advances toward her. The mother of the girl then drove up with the other daughter and was informed by the first daughter of the sexual advances by the defendant. The mother went inside and an argument ensued between her and the defendant. The defendant fired two shots at the mother, killing her. The other sister then ran to the phone to call the police. The defendant followed her into the room where she was and shot her, killing her. This Court held that there was no proof as to the true motive which drove the defendant to kill his daughter. The fact that she was on the telephone trying to call the police when the murder occurred did not provide proof beyond a reasonable doubt that the motive was to avoid arrest.

In the instant case, the trial court presumes the intent of

Appellant to kill in order to avoid or prevent lawful arrest. In Rogers v. State, supra, this Court held that such a presumption of intent is improper to support this aggravating circumstance and falls short of the "clear proof" required by Riley, et al. A similar holding was reached in Scull v. State, 532 So.2d 1137 (Fla. 1988), wherein it was held that mere speculation on the part of the state that witness elimination was the dominant motive behind a first degree murder is insufficient to establish this particular aggravating circumstance.

There is no clear proof in the instant case that the dominant or only motive in killing was to avoid lawful arrest. It is equally as plausible that the killing was done in a panic or as a reaction to shots fired by the deceased, as there is no evidence indicating who fired first. There is no evidence that the deceased knew Appellant or had ever seen Appellant before the morning of the shooting. And, as stated earlier, it is unclear whether Appellant or his co-defendant shot the deceased.

In addition, the jury could not properly find this aggravating circumstance to exist because the jury instruction gives absolutely no definition of the aggravating circumstance and merely tracks the language in Florida Statute 921.141. Therefore, this instruction is unconstitutionally vague under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Florida Constitution and is improper. See Espinosa v. Florida, - U.S. -, 112 S.Ct. 2996 (1992).

In conclusion, there is no competent evidence to establish to

any degree beyond speculation, let alone beyond a reasonable doubt, that the dominant motive behind the killing was to eliminate him as a possible witness. Therefore, the trial court erred in making its finding that this aggravating circumstance had been proven. Therefore, the death sentence of Appellant must be vacated.

POINT XXI

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE DURING THE PENALTY PHASE THAT APPELLANT HAD BEEN ON PROBATION AND HAD VIOLATED SAID PROBATION.

Over Appellant's objection, the state was permitted to call as a rebuttal witness at the penalty phase a probation officer for the Florida Department of Corrections and Probation and Parole Service. The officer, Joanne Leznoff, was permitted to testify that Appellant violated his probation upon which he had been placed for attempted sexual battery with slight force. (R-2050-1). Ms. Leznoff was also permitted to testify that Appellant's probation was violated for the charge of simple battery, a misdemeanor. (R-2051).

The trial court erred in two respects in permitting Ms. Leznoff to testify. First, she should not have been permitted to testify regarding the fact that Appellant had been placed on probation and had violated that probation by being convicted of a misdemeanor. To be admissible in a penalty phase proceeding, evidence introduced by the state must relate to any of the aggravating circumstances. Trawick v. State, 473 So.2d 1235, 1240-1 (Fla. 1985), cert.denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986); Elledge v. State, 346 so.2d 998, 1001-02 (Fla.

1977); Section 921.141(1), Fla. Stat. This testimony did not relate to any of the statutory aggravating circumstances and should not have been allowed. See also Floyd v. State, 569 So.2d 1225 (Fla. 1990), in which evidence of flight was held to have been improperly admitted at the penalty phase.

The trial court also erred in admitting the testimony of a witness who had not been listed by the state and in failing to conduct a Richardson hearing as requested by Appellant. When Ms. Leznoff was called as a witness, Appellant objected, alleged a discovery violation and requested a Richardson hearing. (R-2049). Pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), an appellate court must reverse a conviction if non-compliance with the rule of procedure results in harm or prejudice to the defendant due to the state's failure to furnish the names of witnesses or material to be used at trial. A trial court's failure to conduct a Richardson inquiry is per se reversible. Brown v. State, 515 So.2d 211, 213 (Fla. 1987). This is because a reviewing court cannot make a determination whether the discovery was harmless unless the defendant is afforded an opportunity to show prejudice or harm. Smith v. State, 500 So.2d 125, 126 (Fla. 1986).

Therefore, this Court must reverse Appellant's death sentence, or in the alternative, remand for another penalty phase hearing.

POINT XXII

THE TRIAL COURT ERRED IN CONSIDERING IMPROPER EVIDENCE FOR SENTENCING.

A. THE TRIAL COURT ERRED IN PERMITTING TESTIMONY REGARDING OTHER ALLEGED CRIMES COMMITTED BY APPELLANT WHICH DID NOT CONSTITUTE AGGRAVATING CIRCUMSTANCES.

B. THE TRIAL COURT ERRED IN CONSIDERING A PRE-SENTENCE INVESTIGATION, INCLUDING A VICTIM IMPACT STATEMENT, AT SENTENCING.

At sentencing, the trial court permitted the state, over Appellant's objection, to introduce evidence that Appellant had been in possession of marijuana in the Palm Beach County Jail between the time of the verdict and sentencing in the instant case. (R-2194-2200).

The court also considered evidence from a pre-sentence investigation, including a victim impact statement.

A trial court should not consider evidence of other crimes at sentencing unless said crimes are specifically included within the statutorily enumerated aggravating factors. See Floyd v. State, 569 So.2d 1225 (Fla. 1990).

Appellant further submits that the consideration of a victim impact statement by the trial court at sentencing in a capital case is a violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Wherefore, for the above reasons, Appellant's sentence of death should be vacated, and a sentence of life imprisonment should be imposed.

POINT XXIII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE OPINION TESTIMONY FROM MICHAEL CELESTE, ESQUIRE REGARDING THE REASONS FOR THE DISPARATE TREATMENT OF THE CO-DEFENDANT PURSUANT TO PLEA AGREEMENT.

On rebuttal during the penalty phase, the state called attorney Michael Celeste, Jr., the prosecutor who had arranged a plea bargain for the co-defendant. Over Appellant's objection, Mr. Celeste was permitted to give opinion testimony as follows. He was permitted to testify that it was his opinion that the co-defendant had looked up to Appellant as an idol or hero and that the co-defendant had been led by Appellant. He was also permitted to testify that, in his opinion, the co-defendant was not capable of being the trigger man (or "gunman") in this case. (R-2020). Although the trial court sustained the objection to that last opinion and instructed the jury to disregard it, Appellant's motion for a mistrial was denied. (R-2021, 2025).

Although there is case law which permits an explanation by the prosecution for the disparate treatment of a co-defendant once the evidence of that treatment is introduced by the defendant, it is not permissible for a lay witness, such as Mr. Celeste, to give opinion testimony of the nature presented by the state. No predicate was set forth by the state establishing Mr. Celeste to be an expert in the areas in which he gave opinions. In fact, it is difficult to foresee where anyone could be declared an expert in those areas with the possible exception of a psychologist or psychiatrist.

Florida Statute Section 90.701, governing opinion testimony of lay witnesses, provides as follows:

> If a witness is not testifying as an expert, his testimony about what he perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience or training.

The testimony from Mr. Celeste clearly did not fit within the parameters of this statute. See also Scott v. Barfield, 202 So.2d 591 (Fla. 4th DCA 1967).

Therefore, Appellant's death sentence should be vacated, and he should receive a sentence of life imprisonment, or, in the alternative, receive a new penalty phase hearing and sentencing.

POINT XXIV

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL.

Appellant argued several motions to declare Florida Statute 921.141 unconstitutional. Said motions were denied.

The penalty jury instructions arising from Fla. Statue 921.141 assure arbitrariness. They simply repeat the vague words of the statute for each aggravator which is insufficient to guide discretion. See Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990); Cartwright, 486 U.S. 356, 363-4.

The jury had unbounded discretion in deciding penalty. See

Jones v. State, 569 So.2d at 1238. The aggravator instruction also allowed unchannelled discretion. Florida refuses to require trial courts to define the underlying felonies in this felony aggravator. See Hitchcock v. State, 16 F.L.W. S23, S26 (Fla. December 20, 1990). The jury was not told the definition of the felony aggravators. Such uncontrolled discretion, a result of judicial decision-making, violates due process and the prohibition against cruel and unusual punishment.

A verdict by a bare majority violates due process and prohibition against cruel and unusual punishment. This error harmed Mr. Hernandez since his jury voted for death by a vote of 8 - 4. A guilty verdict by less that a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356 (1972); Burch v. Louisiana, 441 U.S. 130 (1979); cf. Parker, 111 S.Ct. 731 (appellate review must comport with the Eight Amendment); Anders v. California, 386 U.S. 736 (1967) (although no constitutional right to appeal, appeal granted by state law must comply with due process). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority. This unreliable procedure, unique among the jurisdictions, must be struck as violating due process and the prohibition against cruel and unusual punishment.

In Proffit v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. In Parker,

111 S.Ct. 731, the Supreme Court reaffirmed this requirement. History has shown that intractable ambiguities in our statute have prevented the sort of evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Refusing to reweigh the aggravating and mitigating evidence calls into question the reliability of death sentences. See Parker, supra. This Court truncates substantive review of death sentences by refusing to examine first degree murder cases in which life is imposed and distinguishing cases based on the jury recommendation alone. This kind of review unconstitutionally injects arbitrariness into the application of the death penalty. See Pulley v. Harris, 465 U.S. 37, 54 (1983). The failure of Florida appellate review process is highlighted by the life override cases. See Cochran v. State, 547 So.2d 928, 933 (Fla. 1989) (inconsistencies abound in judging appropriateness of overriding jury recommendations for life). Since this Court declares error harmless without independent review of the record and has not enforced a requirement of complete trial court findings of mitigating circumstances until Campbell, 571 So.2d 415, the statute is also unconstitutional because it does not provide for meaningful appellate review.

The trial court below instructed the jury it must find mitigating evidence reaches a 'reasonably convincing' burden of proof before giving any consideration to it. The court refused to eliminate this unconstitutional burden of proof. If not reasonably convinced the evidence establishes the circumstance, then the evidence is ignored. Ignoring evidence not meeting the reasonably

convinced standard is the law in Florida for both juries and judges. See Fla.Std.Jury Instr. (Crim.) Penalty Proceedings - Capital Cases; Campbell, 571 So.2d 415; Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986). This Court recently equated this burden with the greater weight of the evidence test. See Campbell, supra; Nibert, supra. When there is a reasonable likelihood, a standard of certainty greater than a possibility but less than more-likely-than-not, that the finder of fact has been precluded from considering mitigating evidence, the law violates the Eighth Amendment. See Boyd v. California, 110 S.Ct. 1190, 1198 (1990). Thus, instructing the fact-finder to reject mitigating circumstances under a burden of proof more stringent than reasonable likelihood, as defined in Boyd, unconstitutionally restricts considerations of mitigating evidence. But see Walton, 110 S.Ct. at 3055) (plurality)(states may impose this burden). The Campbell burden violates this principle; the instructions given below even more so. "Convinced" means certain, not reasonably likely. See State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The instruction below led the jury in reasonable probability to reject the mitigators under an overly stringent burden of proof as defined by both Florida law and the Federal Constitution. Since the trial court presumably used the Mischler burden himself, having instructed on it, his findings are also contrary to state law and the Federal Constitution. This Court must reverse for re-sentencing before a properly instructed jury.

POINT XXV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS.

A. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS ON DOUBLING AGGRAVATING CIRCUMSTANCES.

The trial court refused to instruct the jury on Appellant's requested jury instruction number six, which read as follows:

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.

The trial court also denied Appellant's requested jury instruction number nine, which read as follows:

> A fact which you consider as the basis for finding one aggravating circumstance may not also be considered by you as the basis for finding another aggravating circumstance: you may consider the same fact in aggravation only once; and never more than once, even though it may come with the definition of more than a single aggravating circumstance which I have read to you.

In Castro v. State, 597 So.2d 259 (Fla. 1992), a similar instruction was requested at trial and denied by the trial court. This Court held, at 261:

> ...Castro argues that his death sentence is unconstitutional because the jury was permitted to consider duplicative aggravating circumstances, to wit, that the murder was committed for pecuniary gain and that murder occurred during the commission of a robbery. We have previously held that a trial court's findings of both of these circumstances constitutes improper doubling...
>
> ...when applicable, the jury may be instructed

> on "doubled" aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

The failure of the trial court to give these instructions encouraged the jurors to place improper emphasis upon two aggravating factors which the law requires be considered only as one.

B. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS TWO, THREE, FOUR, FIVE, SEVEN, EIGHT, SEVENTEEN, NINETEEN AND TWENTY DURING PENALTY PHASE.

Appellant's requested penalty phase jury instructions two, three, four, five, seven, eight, seventeen, nineteen and twenty properly state the law in Florida in regard to the burden of proof regarding aggravating circumstances and the process the jury must use in weighing aggravating and mitigating circumstances. The requested instructions, which were denied by the trial court, were as follows:

> 2. You may not consider the death penalty as a possible punishment, unless you find that this homicide is one of the most aggravated and unmitigated of all first degree murders.
>
> 3. You are to presume that life imprisonment, without the possibility of parole, for twenty-five (25) years is the appropriate penalty for first-degree murder. Death, by electrocution, is reserved for the most aggravated and unmitigated of all first-degree murders. You may not consider death, by electrocution, as a possible penalty unless the prosecution proves, beyond a reasonable doubt, sufficient aggravating circumstances to justify the death penalty. If you are

convinced, beyond a reasonable doubt, that such aggravating circumstances exist; then you must weight the mitigating evidence, against the aggravating circumstances.

4. You are to presume Miguel Hernandez innocent of each alleged aggravating circumstance. You may not consider any evidence offered in aggravation unless it convinces you of the existence of an aggravating circumstance, beyond a reasonable doubt.

5. Aggravating circumstances must be proven beyond a reasonable doubt, before you can give them any weight whatsoever. If evidence is introduced to support an aggravating circumstance; but that evidence fails to prove the aggravating circumstance beyond a reasonable doubt, you must totally disregard that evidence.

7. You are strictly limited to the aggravating circumstances which have been defined to you. You may not consider any fact or circumstance, of this case, as aggravating unless it strictly fits within the aggravating circumstances you have been instructed on.

8. I am instructing you on certain aggravating factors. There are other aggravating factors in the capital felony statute, which I have previously determined are not possibly relevant under the circumstances of this case. Although I have instructed you on several aggravating factors, this does not mean that they necessarily apply under the facts of this case. It is your job to determine which aggravating circumstances apply in this case. You must evaluate the evidence offered in aggravation and determine whether or not it proves an aggravating circumstance, beyond a reasonable doubt. Only evidence which proves an aggravating circumstance beyond a reasonable doubt, may be considered by you, in aggravation.

17. In determining whether to recommend life imprisonment, without the possibility of parole for twenty-five (25) years, or death by electrocution, for Miguel Hernandez; the procedure you are to follow is not a mere

counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death, by electrocution, and which situations can be satisfied by life imprisonment without the possibility of parole for twenty-five (25) years, in light of the totality of the circumstances present.

19. In order to render a verdict of death, by electrocution, upon Miguel Hernandez, you must be convinced beyond a reasonable doubt, that death, by electrocution, is the only justified and appropriate sentence in the circumstances. If you are not convinced beyond a reasonable doubt that death, by electrocution, is the only justified and appropriate sentence in the circumstances, you must return a verdict of life imprisonment without the possibility of parole for twenty-five (25) years.

20. Should you find that aggravating circumstances exist, you must determine whether the aggravating circumstances outweigh the mitigating circumstances beyond and to the exclusion of every reasonable doubt in reaching your decision to advise the Court whether the Defendant should be sentenced to life imprisonment, without the possibility of parole for twenty-five (25) years, or to death, by electrocution.

The jury instructions given for the penalty phase by the trial court in the instant case do not adequately explain Florida law regarding the standard of proof for establishing aggravating circumstances and the process the jury should use in weighing aggravating and mitigating circumstances. Dixon v. State, 283 So.2d 1 (Fla. 1973).

C. THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS ELEVEN, TWELVE, FIFTEEN, SIXTEEN, EIGHTEEN, TWENTY-ONE AND THIRTY REGARDING MITIGATING CIRCUMSTANCES.

Appellant requested the following jury instructions during the penalty phase, which were denied by the trial court:

> 11. Mitigating circumstances are those factors which in fairness and mercy, may be considered as extenuating or reducing the degree of blame for the offence. Mitigating circumstances also include any aspect of Miguel Hernandez's background and life which may create a reasonable doubt about the question of whether death by electrocution is the only appropriate sentence for Miguel Hernandez.
>
> 12. The mitigating circumstances which I have read for you for your consideration are factors that you may take into account as reasons for imposing a sentence of life imprisonment, without the possibility of parole, for twenty-five (25) years. You must pay careful attention to each of these factors. Any one of them, standing alone, may be sufficient to support a decision that life imprisonment, without the possibility of parole, for twenty-five (25) years is an appropriate punishment for Miguel Hernandez. However, you should not limit your consideration of mitigating circumstances to those mentioned. You may also consider any other circumstance relating to the case, or to Miguel Hernandez, as reasons for imposing a sentence of life imprisonment, without the possibility of parole for twenty-five (25) years.
>
> 15. If you have any doubt, even if that doubt is less than reasonable doubt, concerning Miguel Hernandez's guilt of first degree murder, you should consider that as a mitigating circumstance.
>
> 16. You may consider as a mitigating circumstance Miguel Hernandez's background and early life.
>
> 18. You must give independent mitigating weight to any evidence concerning any aspect of Miguel Hernandez's background and life, or the circumstances of this offence which is offered in mitigation.

> 21. Ladies and Gentlemen of the Jury, you are always free to grant mercy to Miguel Hernandez and sentence him to life imprisonment without the possibility of parole for twenty-five (25) years.
>
> You may grant mercy to Miguel Hernandez regardless of the existence of aggravating circumstances or the lack of mitigating circumstances.
>
> 30. The Defendant moves this Court to insert the following instruction as an addition to the Standard Jury Instructions at the end of the paragraph describing the weighing of aggravating and mitigating circumstances:
>
> ...found to exist. If you should find that the Defendant suffers from extreme emotional or mental disturbance, has a substantially impaired capacity to conform his conduct to the requirements of the law, and a low emotional age, then you must also find that life imprisonment without the possibility of parole for twenty-five (25) years is the appropriate punishment.

The standard jury instruction concerning mitigating circumstances, which was given in the instant case, fails to properly state the law regarding mitigating circumstances and unconstitutionally limits the jury's consideration of mitigating circumstances. Spivey v. Zant, 6061 F.2d 464, 467-472 (5th Cir. Unit B, 1981); Lockett v. Ohio, supra; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982).

D. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE INSTRUCTION NUMBER FOURTEEN REGARDING THE DISPARATE TREATMENT OF THE CO-DEFENDANT.

The trial court refused to instruct the jury on the fact that the disparate treatment of co-defendants could be found as a mitigating circumstance.

The following instruction was requested by Appellant (Appellant's requested penalty phase jury instruction number fourteen):

> In determining the appropriate sentence, you may consider, as a mitigating factor, the treatment of other participants in this incident.

The disparate treatment of a co-defendant or co-participant in the crime has repeatedly been recognized by this Court as a valid mitigating circumstance. Slater v. State, supra; Malloy v. State, supra. The trial court precluded the jury's consideration of this important mitigating factor by failing to instruct the jury on this issue as requested by Appellant.

E. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTION NUMBER THIRTEEN REGARDING THE JURY'S ROLE IN THE SENTENCING PROCESS.

Appellant requested that the jury be instructed as follows: "Your advisory sentence recommendation is extremely important. The judge is required to give a great weight to your verdict." This instruction was denied by the trial court.

This issue involves the violation of Florida law principles and the Eighth and Fourteenth Amendment principles set forth in Caldwell v. Mississippi, 105 S.Ct. 1633 (1985).

> It is constitutionally impermissible to rest a death sentence on the determination of a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell, supra, at 2639.

This is precisely what occurred in this case. By failing to

give this requested instruction, the trial court implied to the jury that the responsibility in determining the proper sentence rested with the trial court and that the jury's role was less significant than the law requires it to be. Tedder v. State, 322 So.2d 908 (Fla. 1975).

F. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTION REGARDING THE AGGRAVATING FACTOR OF THE MURDER HAVING BEEN COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

Appellant requested that the jury be instructed following the definition of the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest as follows: "...This purpose cannot be found by you unless strong proof clearly shows that the dominant or only motive for the murder was the elimination of the eyewitness." Perry v. State, 522 So.2d 817, 820 (Fla. 1988); Oats v. State, supra; Menendez v. State, supra. The trial court denied the instruction. Therefore, the jury was given an overly broad definition of this particular aggravating circumstance and was misled regarding it during its deliberations.

G. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTION NUMBER THIRTY-ONE REGARDING APPELLANT'S PRIOR CONVICTION FOR VIOLENT CRIMES.

Appellant requested the following jury instruction at penalty phase:

> You have heard evidence of other crimes committed by the Defendant. You may consider this evidence only to establish the Defendant

> has been previously convicted of another capital offense or of a felony involving the use of violence to some person but not for any other aggravating circumstances.

The refusal by the trial court to give this instruction misled the jury into believing it could consider the fact that Appellant was previously convicted of a violent felony for a broad purpose, rather than the very limited purpose which the law states it can serve.

H. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTION REGARDING APPELLANT'S CULPABILITY AND CULPABLE STATE OF MIND.

Appellant's requested penalty phase jury instruction number thirty-two read as follows:

> In order to render a verdict of death, by electrocution, upon Miguel Hernandez, you must be convinced beyond a reasonable doubt that Miguel Hernandez killed, or attempted to kill, or intended that a killing take place or that lethal force be employed. If you are not convinced beyond a reasonable doubt that Miguel Hernandez killed, or attempted to kill, or intended that a killing take place or that lethal force be employed, then you must return a verdict of life imprisonment without the possibility of parole for 25 years.

The trial court denied Appellant's request to give that instruction to the jury. Said denial was in violation of the principles set forth in Enmund, supra, and Tyson, supra, which require that an individual must have killed, or attempted to kill, or intended that a killing take place, or that lethal force be employed in order for that individual to receive the death penalty.

Therefore, for all the reasons cited above, the trial court erred in denying Appellant's requested penalty phase jury

instructions. This was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Florida Constitution and applicable Florida case law.

Appellant's death sentence should be vacated, or, in the alternative, Appellant should be given a new penalty phase and sentencing hearing.

POINT XXVI

THE TRIAL COURT ERRED IN PERMITTING EXTENSIVE TESTIMONY REGARDING APPELLANT'S PRIOR CONVICTION FOR A VIOLENT FELONY.

Over Appellant's objection, the trial court permitted extensive testimony at penalty phase from Deputy Sheriff Vincent Picciolo as to the facts of an aggravated battery committed by Appellant upon Lori Arce in 1987 wherein Appellant was found guilty of aggravated battery. Extensive testimony was permitted as to the extent of Ms. Arce's injuries, including a broken nose and her face having been covered with blood. Appellant moved for a mistrial based upon the admission of this testimony in that it went beyond the mere fact of conviction for a violent felony, was hearsay, and amounted to "overkill." The trial court denied the motion for a mistrial. (R-1575-87).

In Buenoano v. State, 527 So.2d 194 (Fla. 1988), this Court found that testimony from the attorney who prosecuted Buenoano for a first degree murder of which he was convicted in another case was extraneous and amounted to the type of "overkill" which this Court has repeatedly met with disapproval.

Therefore, Appellant's death sentence should be vacated, or,

in the alternative, this case should be remanded for a new penalty phase and sentencing hearing.

POINT XXVII

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE.

The state introduced evidence during the penalty phase hearing that Appellant had previously been convicted of the crime of sexual battery using slight force. This Court has interpreted the language in this particular aggravating circumstance (Florida Statute 921.141(5)(b)) to mean "...life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Lewis v. State, 398 So.2d 432 (Fla. 1981). A crime involving slight force is not a "life-threatening crime."

Therefore, Appellant's death sentence should be vacated, or, in the alternative, he should receive a new penalty phase hearing and sentencing.

POINT XXVIII

THE TRIAL COURT ERRED IN THE PENALTY PHASE IN PERMITTING THE STATE TO ELICIT TESTIMONY REGARDING AN EXHIBIT WHICH WAS NOT IN EVIDENCE.

During the penalty phase, over Appellant's objection, the state was allowed to cross-examine Dr. John Perry regarding the results of an MRI test, allegedly given to Appellant, which indicated a normal finding in regard to Appellant's brain. (R-1847-55). The state was permitted to elicit testimony regarding the results of this test even though the test results were not

introduced in evidence in the form of an exhibit or through testimony. No predicate was laid for the admissibility of these alleged test results. In addition, specifically, there was no testimony from the individual who gave the test or interpreted the test (or from anyone else, for that matter) as to the reliability of the test results.

The admission of this testimony was error for three reasons. First, it was clearly hearsay and therefore deprived Appellant of his confrontation rights under the Sixth Amendment to the United States Constitution and the Florida Constitution. Second, the test results were work-product and confidential in nature. They had been requested by Appellant's counsel. The test results were not listed by Appellant as an exhibit. The doctor who interpreted said results was not listed by Appellant as a witness. The state subpoenaed the results of the test without notice to Appellant. Appellant therefore had no opportunity to object until the time of Dr. Perry's testimony. Third, the state was permitted to elicit testimony from an exhibit which was not admitted into evidence.

Therefore, the testimony was improperly admitted, and Appellant's death sentence should be vacated, or, in the alternative, he should receive a new penalty phase hearing and sentencing.

POINT XXIX

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM DEPOSITIONS DURING THE PENALTY PHASE.

At the penalty phase, over Appellant's objection, the trial court allowed the state to read to the jury portions of two

depositions. The first deposition was from Freddie Vaez and indicated that Appellant said the co-defendant had hurt his leg by jumping a fence and that Appellant asked Mr. Vaez if he wanted to buy some jewelry. (R-1592-4). The second deposition was from Gigi Hommminy. Her deposition testimony was that Appellant came by her house on the afternoon of the alleged crime and wanted to borrow money from his brother William. When William refused, Appellant allegedly threatened to kill William and said that he would get him back for failing to loan Appellant the money. (R-1595-8).

The testimony admitted from these depositions is error for two reasons. First, this was hearsay. Appellant was unable to cross-examine the witnesses and did not have an opportunity to rebut the testimony from these depositions. He was therefore deprived of his constitutional right to confront the witnesses against him as guaranteed under the Sixth Amendment to the United States Constitution.

Second, the testimony as to the alleged threat by Appellant to kill his brother was evidence of another crime for which Appellant had not been convicted or even charged. Even if not considered to be evidence of another crime, the probative value of said testimony was completely outweighed by the prejudicial effect to Appellant. Trawick v. State, supra; Elledge v. State, supra; Floyd v. State, supra.

Therefore, Appellant's death sentence should be vacated, or, in the alternative, he should receive a new penalty phase hearing and sentencing.

POINT XXX

THE TRIAL COURT ERRED IN PERMITTING IMPROPER ARGUMENT BY THE STATE DURING THE PENALTY PHASE.

During the penalty phase hearing, the prosecutor misstated the law regarding the death penalty to the jury during her closing argument. At one point she told the jury that if it found aggravating circumstances to exist without mitigating circumstances and they were weighty, then they should recommend the death penalty. (R-2104-5). At another point, she stated:

> It is pretty obvious why you would kill a security guard, but to avoid being arrested. And, ladies and gentlemen, this is another aggravating factor which is proven beyond a reasonable doubt that the state of Florida says if you consider this and you find it, and you find it weighty, the proper sentence is the death penalty.

This misstatement of the law was improper and could have led the jurors to believe that they could recommend death by applying a standard less than that called for by Florida law.

During her closing argument, the prosecutor argued non-statutory aggravating factors. These included the fact that Appellant allegedly likes to dominate people (R-2113) and that he had a history of violence (R-2131-2). This was clearly improper argument. See Floyd v. State, supra. The prosecutor also argued that the deceased was in a great deal of pain, which was irrelevant to the argument because the aggravating circumstance that the capital felony was especially heinous, atrocious and cruel was not being presented to the jury for their consideration.

Appellant's motions for mistrial based upon all the above

misstatements and arguments were denied by the trial court.

Based upon these improper arguments, Appellant's death sentence should be vacated, or, in the alternative, he should receive a new penalty phase hearing and sentencing.

POINT XXXI

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY DURING THE PENALTY PHASE AS TO THE DEFINITION OF THE FELONIES BY WHICH IT WAS ALLEGED THAT AGGRAVATING CIRCUMSTANCES SET FORTH IN FLORIDA STATUTE 921.141(5)(d) WERE PRESENT.

In its instructions to the jury during the penalty phase, the trial court did not give instructions on the elements of the crime of burglary. Burglary was the underlying felony for aggravating circumstance 921.141(5)(d).

This Court held, in State v. Jones, 377 So.2d 1163 (Fla. 1979), that, at the guilt-innocence phase of the trial, failure to give any instruction on the elements of the underlying felony of robbery was fundamental error which required reversal and was not waived by the defendant's failure to object. See also Robles v. State, 188 So.2d 789 (Fla. 1966) and Franklin v. State, 403 So.2d 975 (Fla. 1981). Appellant submits that it is equally important to instruct the jury on the felony or felonies that must be established beyond a reasonable doubt if the jury is to find a particular aggravating circumstance to exist.

In Presnell v. Georgia, 439 U.S. 14, 99 S.C. 235, 58 L.Ed.2d 207 (1978), the United States Supreme Court held that in the absence of a jury finding of forceful rape, a death sentence could not be upheld on the basis that the evidence in the record

supported the conclusion that the defendant was guilty of that offense, which in turn established the element of bodily harm necessary to make kidnapping a sufficiently aggravating circumstance to justify the death sentence. The Court stated, at 236, 237:

> In Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed.644 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for a unanimous Court:
>
> > It is as much a violation of due process to send an accused to prison following conviction of a charge on which he is never tried as it would be to convict him upon a charge that was never made...
> >
> > To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. Id., at 201-202, 68 S.Ct. at 517.
>
> These fundamental principals of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.

Therefore, the trial court erred in its jury instructions during the penalty phase, and Appellant's death sentence must be vacated, or, in the alternative, he should receive a new penalty phase hearing and sentencing.

CONCLUSION

Based upon the foregoing facts and legal authority, Appellant requests this Court to reverse Appellant's convictions, remand and vacate the sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to SARA BAGGETT, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by United States Mail on this 13th day of August, 1992.

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