IN THE SUPREME COURT OF FLORIDA

RALPH KERMIT ELLIS,

Appellant,

v. CASE NO. 75,813

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
OF THE FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS (cont'd)

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On June 15, 1989, a Duval County Grand Jury returned three separate indictments charging Ralph Kermit Ellis with the following: the first degree murder of Willie James Evans, allegedly occurring on March 20th or 21st of 1978; the first degree murder of Howard Mincey, allegedly occurring on March 24th or 25th of 1978; and the attempted murder of Allen Reddick, allegedly occurring on July 7, 1978 (R 40-44). Ellis pleaded not guilty to all three indictments. The state moved to consolidate the three indictments for trial, and the court granted the motion over Ellis' objections (R 85, TR 236-274). The jury found Ellis guilty as charged on all three counts on December 8, 1989 (R 208-210). The penalty phase was conducted on December 15, 1989, and after hearing additional evidence, the jury recommended death sentences for both murders (R 217-218, TR 1670-1792). The trial judge, Michael R. Weatherby, adjudged Ellis guilty of two counts of first-degree murder and one count of attempted murder on March 20, 1990 (R 224-277). The court sentenced Ellis to death for the two murders (R 226-241, 244-259). For the attempted murder, the court sentenced Ellis to 30 years imprisonment (R 262-261). In support of the death sentences, the court found the following aggravating circumstances: (1) Ellis was previously convicted of another capital felony or felony involving violence based upon the contemporaneous convictions for the murders and the attempted murder; (2) the homicides were committed while Ellis was

engaged in the commission of a robbery and kidnapping; (3) the homicides were committed in an especially heinous, atrocious, or cruel manner; (4) the homicide was cold, calculated, and premeditated (R 236-238). In mitigation, the court found one statutory mitigating circumstance that Ellis had no significant history of prior criminal activity (R 238-239). The court specifically rejected the other statutory mitigating circumstances (R 238-240). The sentencing order did not discuss the nonstatutory mitigating circumstances (R 238-240).

Ellis filed his notice of appeal to this court on March 30, 1990 (R 283).

Facts -- The Prosecution's Case

On March 21, 1978, Durell Crews was driving to work some time after 7:00 a.m. along Plummer Road (TR 694-696). Plummer Road is a rough, paved road which ends at the Duval County line on the north side of Jacksonville where it becomes a dirt road into Nassau County (TR 696, 702). As Crews and his brother drove their truck toward the dirt section of the road, they observed a black male lying in the ditch (TR 697). Crews backed up and looked at the body without getting out of his truck (TR 697). He backed up to a Mr. Mobley's house where he telephoned the sheriff's department (TR 697-698). Crews and his brother returned to the scene where the body was located and waited for a police officer (TR 698-700). Officer Malcom Adams of the Jacksonville Sheriff's Office responded to the scene at the 9100 block of Plummer Road (TR 704-705). He saw

the body of a black male in the ditch (TR 705). The body was fully clothed and there was a area of blood around the body (TR 705, 708). Adams observed a large wound on the top of the victim's head (TR 708). Later, Charles Albertie identified the body as that of his brother-in-law, Willie Evans (TR 747-748). Albertie testified that Evans lived on Richardson Road in Jacksonville and was 18 years old at the time of his death. He believed that Evans attended Paxon High School (TR 750-751).

Doctor Bonifacio Floro, medical examiner for Duval County, examined the body at the scene (TR 1151-1158). He performed an autopsy around 10:30 a.m. (TR 1163). The examination revealed several injuries (TR 1165). There were lacerations to the forehead and three circle-shaped wounds near the hair line which were very close to one another (TR 1165). Near the outside of the eyebrow, on each side of the face, were lacerations (TR 1165). There was a stab wound to the left side of the neck, which damaged the jugular vein (TR 1165-1166). A superficial incised wound across the neck was also present (TR 1166). The medical examiner found a single stab wound to the inside and back of the side of the chest which damaged the right lung (TR 1166). To the left back he found two stab wounds, one on top of the other, which damaged the left lung (TR 1166). In the lower back, there was a stab wound going into the liver causing hemorrhaging (TR 1166). Floro found no drugs or alcohol in the victim's system (TR 1167). Since he found a great deal of hemorrhaging inside the neck, Floro concluded that Evans was alive when stabbed (TR 1178-1179).

Floro concluded that cause of death was caused by multiple blunt injuries to the head and multiple stab wounds to the neck and chest (TR 1180).

On March 24, 1978, Lonzo Friendly, Jr., was driving down Imeson Road around 11:30 p.m. (TR 724-727). Imeson Road was a dirt road with some houses and farms (TR 726). As he drove around a curve, he and his girlfriend saw the body of a black man lying on the right hand side of the road (TR 727). Friendly stated that they did not get out of the car but drove down to the nearest house and had someone call the police (TR 727-728). He testified that it took about five minutes to find the house and a few more minutes to call the police (TR 728-729).

Officer Daniel Brown of the Jacksonville Sheriff's Office arrived on the scene at approximately 12:30 a.m. on March 25, 1978 (TR 734-736). He observed the body lying in the roadway in an isolated area (TR 736). A large pool of blood, which had not yet completely coagulated, was around the body (TR 737). Brown secured the scene and waited for homicide detectives (TR 738-740). Later, Carl Sparks identified the victim as Howard Mincey, his sister's husband (TR 846-849). Mincey in his thirties at the time of his death (TR 849-850).

Dr. Floro performed an autopsy on Howard Mincey at approximately 10:00 a.m. on March 25, 1978 (TR 1181). He suffered multiple impacts to the head and there was a large wound to the front of his head (TR 1181). There were lacerations on the right forehead, on the right side of the head, the back of the

left side of the head, all without any injury to the underlying bone structure (TR 1182). A slash wound went from side to side on the neck, severing the trachea along with major blood vessels in the neck and the muscles of the neck (TR 1182-1183). There was no injury to the chest or abdomen or any of the extremities (TR 1183). Mincey had a blood alcohol level of .30 at the time of his death (TR 1183). Floro concluded that Mincey died as a result of the incised wound to the neck and the resulting massive hemorrhaging (TR 1202). Floro concluded that the .30 blood alcohol level meant that Mincey was intoxicated at the time of the homicide (TR 1208-1209). Floro concluded there was nothing unusual about the kinds of wounds that Evans and Mincey suffered (TR 1209-1210).

On July 7, 1978, Allen Lamont Reddick left his home on Patterson Street and walked to a lounge called Poncho's located on US-1 (TR 760-761). Reddick was 20 years old at the time and worked as a dishwasher (TR 760). Reddick had to cross the street near a Banner Food Store (TR 761-762). He saw two white males in a dark green pickup truck parked in the parking lot of the food store (TR 761-762). Reddick said the truck was a four-wheel drive, had big tires on it and white rims (TR 762). The truck looked new (TR 762). The driver of the truck called Reddick to the truck (TR 762). He asked Reddick if he knew where they could find marijuana and Reddick said that he did (TR 763). Reddick walked to the passenger's side of the truck and got inside to take them to obtain marijuana (TR 763). He also intended to smoke marijuana with them (TR 763). The

passenger of the truck got out and allowed Reddick to enter the truck to sit in the middle position on the seat (TR 763). The driver said he needed to go by his Uncle's house to get some money, and they proceeded down Moncrief Road (TR 764). At one point, Reddick looked over to his right side and saw that the passenger had a knife in his hand (TR 764). The passenger shoved Reddick's head back, told him to shut up, and tried to cut his throat (TR 764). Reddick grabbed the knife with his left hand and began tussling with the passenger (TR 764). The passenger began to stab Reddick with the knife (TR 765). Reddick was stabbed in the temple, the back of his neck, and the tussling continued (TR 765). Reddick was finally able to grab the passenger's arm and ram the knife toward the driver, sticking it into the upper part of the driver's right arm (TR 765). The driver yelled to the passenger to "let him go because he stabbed me." The driver also said, "He's going to kill his damn self anyway so let him go." (TR 765). The driver continued to drive slowly during the tussle between Reddick and the passenger (TR 765-766). After Reddick managed to pull the knife over to stab the driver in the arm, Reddick began to pull himself out of the passenger side window of the truck (TR 766). The passenger stabbed Reddick three or four more times in the knees as he was getting out of the cab of the truck (TR 766-767). Reddick said he felt the speed of the truck pick up, and knew that the only way he could save himself was to flip off the truck (TR 767). He said he flipped backwards out of the truck and hit the pavement on the road (TR 767). He got up

and began walking, although he was afraid they would turn around and come back to get him (TR 767). The truck never turned around (TR 767). Reddick managed to get out of the truck on top of the 295 overpass (TR 767). An ambulance arrived at the scene and took him to the hospital (TR 767). Reddick testified that he remained at University Hospital for five days (TR 767-768). He said the passenger had the knife during the incident and the driver did most of the talking (TR 770-771). Reddick described the passenger as a slender white male with blond hair (TR 771). He described the driver as the huskier of the two with dark hair and a facial beard (TR 771-772). On cross-examination, Reddick stated that he recalled being interviewed by Detective Fran Japour on July 11, 1978 (TR 778). He said he did not remember what description of the driver and passenger he gave at that time (TR 779-780). He did recall stating that the passenger was not wearing a shirt (TR 781-782). He stated that the passenger appeared to be about 5'7", and the driver appeared to be about 25-years-old (TR 782-783).

Reddick denied that Detective Meyer attempted to influence him concerning his testimony (TR 786). He denied that Meyer tried to show him pictures of homicide victims in this case to influence his testimony (TR 789). However, in a deposition taken on October 5, 1979, Reddick recalled being shown photographs of the victims and Meyers saying that he felt the guys should pay what they have done (TR 790-791). Reddick also said he had a dog with him that night and that he put the dog

in the back of the truck before he got into the truck (TR 791-792).

Clyde Crawley testified that he observed the truck and the struggle Reddick was involved in on July 7, 1978 (TR 852-854, 856-859). He saw a pickup truck parked at the Banner Food Store located at the intersection of Moncrief and US-1 (TR 854). The truck caught his attention because he sold new and used trucks at Duval County Motors (TR 853-855). The truck was a nice looking and a fairly new model (TR 854, 860-861). The truck was dark colored with silver and had a chrome bumper (TR 873-874). It also had a whip antenna and a sliding glass door on the back window (TR 859-860). He identified it as a four-wheel drive truck because he could see the distinctive hubs on the front wheels (TR 860-861). The truck had a roll bar and KC lights on the top (TR 860). He also remembered about six decals on the bumper of the truck (TR 872). Although the truck was nice looking, Crawley said it was not an unusual truck (TR 879-880- When Crawley passed the parked truck a black man was standing outside talking to the two white male occupants of the truck (TR 855-856). A short time later, as he was driving down Old Kings Road, Crawley saw the same truck (TR 856). At that time, he noticed a struggle going on inside the cab of the truck (TR 857). The man in the middle passenger position of the truck was trying to protect himself, and the person on the passenger side appeared to be slapping at him (TR 857). The passenger in the middle was black (TR 857). The driver and the other passenger were white (TR 857). Carl noticed that the

black man was attempting to climb out of the truck (TR 858). He was able to do so and hit the ground (TR 859). Crawley and his wife stopped and rendered assistance to the black man (TR 859). He described the driver as a husky man wearing either a beard or long side burns on the side of his face (TR 861-862). Crawley described the passenger as slimmer (TR 862).

Officer Elliot Van Dyke responded to an injured person call at 10:30 p.m at the 8000 block of Old Kings Road (TR 830-832) He arrived around 8:00 a.m. (TR 841). He found Reddick injured at the scene (TR 842). Reddick described the suspects as follows: the driver as a white male, heavy built, black hair with a mustache and a red shirt. The second suspect, the passenger, as a white male, blond hair and wearing no shirt (TR 844-845).

Dr. Marshall Horowitz was chief of orthopedic surgery at University Hospital in July of 1978 (TR 887-890). He testified that his staff treated Allen Reddick during the week of July 7th to July 14th of 1978. (TR 890-892). Based on records, he was able to testify about the treatment (TR 892-891). Reddick had friction burns to his right forearm and his right elbow and left hand, as well as his cheek and forehead (TR 892-893). He also had stab wounds to the left knee, which penetrated the left knee (TR 894). Three stab wounds were located to the inner aspect of the left knee (TR 894). These wounds required surgery (TR 895). There were no wounds to the buttocks or the back of the thighs (TR 897).

Cecil Phillips attended Paxon Senior High School with Ralph Ellis in 1977 and 1978 (TR 904-907). He said that Ralph was average height, stockily built, dark colored hair, which he wore collar length with noticeable sideburns (TR 907-908). Phillips testified that on three different occasions Ralph Ellis told him about attacking three different black men (TR 908-927). These statements allegedly occurred in 1978 around the time of the attacks. However, Phillips did not contact law enforcement with this information for eleven years (TR 930-931). He contacted the FBI with the information in February or March of 1989 (TR 930).

Phillips testified about a conversation he had with Ralph at Ralph's house in 1978 (TR 908). He said Ralph was outside washing blood off the side of his truck (TR 908-909). His truck was an older model Ford truck painted with gray primer (TR 909). The blood was sprayed on the side of the truck, and Ralph was using a rag and mineral spirits to clean it off (TR 909-910). Ralph told Phillips that he and Johnny Boehm had killed a black man and that was blood was on his truck (TR 910). Ellis allegedly said it was an older black male whom he did not know (TR 910). Ellis said that he and Johnny picked up the man on the pretense of smoking marijuana with him (TR 910). Ellis said he was driving his truck, the one he was then cleaning (TR 911). Ellis stated that the had the man ride between him and Johnny in the cab of the truck (TR 911). Ellis said they rode out on the west side of town with the intentions of beating him up (TR 911). While riding, Johnny pulled a

knife and put it to the man throat (TR 911). Ellis allegedly said that they had the man put his hands on the dash of the truck and, while riding, Johnny said they were not be able to let him go; they would have to kill him (TR 911). They stopped the truck on the west side of town (TR 911-912). Ellis said he got out of the truck, reached into the bed of the truck and pulled out a tire checker (TR 911). Phillips described a tire checker as a piece of wood about 18 inches long with a metal tip about an inch to an inch and a half in diameter used for checking inflation of truck tires (TR 914). Ralph said he hit the man, Johnny then grabbed him and started stabbing him, and the man tried to run (TR 911). They chased him down and hit him some more (TR 912). Ellis said the incident happened off Imeson Road (TR 913). Phillips said that later in the day, he heard over the radio about a man's body being found on Imeson Road (TR 913). Phillips admitted he did nothing about this information (TR 913). Phillips said that Ellis acted very excited, kind of giddy, when he told about the incident (TR 920-921). Phillips said no one else was present when Ralph told him about this murder (TR 921).

On another occasion, Phillips testified that Ellis told him about a second murder of a black male (TR 921). This homicide, according to Phillips, occurred after the first one Ellis allegedly told him about on Imeson Road (TR 921-961). According to Phillips, Ellis said this homicide occurred much like the first one (TR 922). They picked up a younger black male on the pretense of smoking marijuana (TR 921-922). Johnny

pulled a knife, put it to the man's throat, and they killed him in the same manner as the first one (TR 922). Ellis allegedly said that he knew this victim from school (TR 922). They were again in Ralph's truck (TR 922). Phillips said that Ralph showed him a wallet that he took from the victim (TR 922-923). It contained four photographs in a column of a young black male wearing a striped shirt (TR 923). Ellis said he took the wallet from the victim (TR 923). Phillips said that he believed Ellis when he told him, however, he did not pass the information on to anyone (TR 924).

Finally, Phillips testified about a third incident Ellis allegedly told him about in July of 1978 (TR 925). Ellis told Phillips that he and Johnny Boehm were near US-1 where they picked up a black man (TR 925). They had him ride in the middle seat position of the truck (TR 925). Johnny pulled a knife, put it to the man's throat, and the man began fighting in the cab of the truck (TR 925). During the fight, Johnny stabbed the man in the temple (TR 925). Ralph said he was beating the man while Johnny was cutting him (TR 925). At one point, Ralph said Johnny missed and cut Ralph's arm (TR 925). The man climbed out the window of the truck with his legs pinned inside (TR 925-926). Johnny was stabbing him the legs and dragging the knife (TR 926). They turned the man loose and he tumbled off the truck onto the road (TR 926). Ellis said he did not know whether the victim lived or died (TR 926). He said this man was more muscular then the other two (TR 926). Ellis said they got him into the truck under the pretense of

using marijuana (TR 926). Ellis said he obtained medical treatment for the cut on his arm, using the excuse that it was cut on a glass door or window (TR 926-927).

Randy Lawrence Mallaly also knew Ralph Ellis in high school (TR 1026-1027). Ralph was short, stockily built, had hair just over his ears, and generally wore a beard and facial hair (TR 1028). Mallaly also knew Johnny Boehm, primarily through his relationship with Ralph (TR 1028-1029). Boehm was taller then Ralph, slim built, wore his blonde hair short and was light-complexted (TR 1029). Boehm did not have facial hair (TR 1029). Over defense objections, Mallaly testified about an incident where Ellis and Boehm threatened to kill a black man (TR 1029-1030). According to Mallaly, this occurred sometime in 1978 (TR 1030). He was with Ralph and Johnny at Ralph's house and the three went off for the evening (TR 1030). They parked in a big parking lot near a bar (TR 1030). Mallaly asked Ralph where they were going and Ralph allegedly said, "We're going to kill a nigger." Mallaly said he didn't take Ralph seriously until later when he stopped the truck and pulled a sawed-off shotgun out from underneath the seat (TR 1030-1031). Ralph handed the gun to Johnny and basically asked if Mallaly wanted to be a part of it (TR 1031). Mallaly said he did not, but he still did not take Ralph seriously (TR 1031). Mallaly said there was a black man in the parking lot at the location where Ralph pulled the gun from underneath the truck seat (TR 1031). Mallaly had Ralph take him back to Ralph's house to get his car, but Mallaly spent the evening

with a friend who lived next door (TR 1031-1032). Later, Mallaly went to Ralph's house to get his car, and looked inside Ralph's truck which was parked near the driveway (TR 1032). He saw what appeared to be blood near the center of the truck seat (TR 1032). Ralph was inside the garage wiping what appeared to be blood off a dark colored instrument with a rag (TR 1032). The instrument was a stick of some kind about a foot and a half to two feet long (TR 1041). Mallaly asked Ralph if that was blood he was wiping off the stick (TR 1042-1043). Ralph said that he and Johnny had picked up a man under the pretext of smoking marijuana, Johnny pulled a knife and stabbed him inside the truck, and they took him out of the truck beat him (TR 1043). Ralph said he was driving the truck and Johnny was in the outside passenger position (TR 1043-1044). Mallaly testified that Ralph seemed exhilarated as he told about the incident (TR 1044-1045). Ellis did not identify a geographic location where this crime allegedly occurred (TR 1044).

Mallaly also testified to alleged statements Ellis made about a second murder (TR 1046). Mallaly said that on another occasion Ellis told him about another murder (TR 1046). Ellis said the body would be found on the north side of town on Imeson Road or Briarwood Road (TR 1046). Mallaly later heard over on the news about the discovery of a body of a black male in that location (TR 1046).

Finally, Ellis allegedly told Mallaly about a third incident (TR 1047). Ellis said that he and Johnny picked up another black male under the pretext of smoking marijuana (TR

1047). Johnny attempted to stab the man with the knife, a fight ensued, and Ellis was cut with the knife (TR 1047). Mallaly said he saw the bandage on Ralph's arm (TR 1047). It was on his right arm (TR 1047). Ellis told Mallaly that the man escaped through the passenger side of the truck, and Johnny stabbed him with a knife on the way out (TR 1047-1048). Ellis allegedly told him it was on the I-295 overpass where the incident occurred (TR 1048). Mallaly said that Ellis had two different trucks in 1978 (TR 1048). One was an older model Ford pickup truck and the second was a newer Ford pickup truck. The newer one was green with a roll bar, four-wheel drive, and a sliding rear glass window in the back (TR 1049).

On cross-examination, Mallaly admitted that he had lied to the detective about his involvement in the exhibition of the shotgun incident (TR 1050, 1063-1066). He also lied to the detective about seeing blood on the side of the truck (TR 1052). He admitted that a lot of people at Paxon High School were talking about the incidents (TR 1053-1054). Mallaly said that he and Cecil Phillips did not take Ralph seriously because they believed Ralph was trying to impress people (TR 1054-1057). Mallaly said he took Ralph seriously when Ralph told him where the next body would be found (TR 1057). Mallaly said to the best ofh is recollection, Ralph told him this at school (TR 1057-1058). He did not recall the specific date (TR 1059). Ralph told him the second body would be found on a certain road, Briarwood or Imeson (TR 1061). He admitted on deposition that he was told that it was on the north side of

town (TR 1062). Mallaly said he recalled the sawed off shotgun incident to be at the very beginning of the first incident (TR 1063-1064). He also recalled when Ralph sawed the shotgun off earlier (TR 1064), and had fired the gun hurting his hands (TR 1064-1065). This occurred before the comment about using the gun to shoot black people (TR 1065). Mallaly does not remember if Ralph had a beard at the time he told him about the murders (TR 1071). He also knew Ralph to wear a baseball type cap and never recalled Ralph wearing a Pannama-style leather hat (TR 1071). Mallaly reiterated that there was a lot of conversation about these crimes at Paxon High School (TR 1072). He said Ralph's beard was not a full beard, but was long sideburns growing around to his neck (TR 1076).

Richard Feagle was called as the court's witness over counsel's objections (TR 981-998). The prosecutor wanted to impeach and cross-examine him with his prior sworn testimony. Defense objected because Feagle was not established to be an adverse or an eye witness to the offense (TR 981-998).

Richard Feagle was a very good friend of Ralph Ellis' and Johnny Beohm's (TR 998, 1001). The prosecutor asked Feagle a series of questions, then proceeded to introduce the questions and answers from his prior sworn statement to the prosecutor. When asked if Ellis told him how he received the cut on his arm, Feagle responded that there had been talk around school (TR 1001-1002). He denied that Ellis ever told him how he received the cut on his arm (TR 1002). The prosecutor then referred to a sworn statement in which he said he remembered

Ralph having a severe cut on his arm in 1978 and that Ralph told him it was done while he and Boehm were "wrestling with the nigger." (TR 1002-1003). Feagle said he remembered that question and answer under oath, but testified that he could not honestly say that Ralph was the one who told him that information (TR 1003). The prosecutor then asked if he remembered Ralph telling him about killing a black man on Plummer Road (TR 1003). Feagle denied Ellis told him that (TR 1003). The prosecutor, again referring to the sworn statement, asked if he recalled making such a statement previously (TR 1003). Feagle admitted that he did recall making that statement (TR 1004). The prosecutor asked if he remembered Ralph telling him about killing another black male on Imeson Road, and Feagle responded that he did not remember (TR 1004). However, Feagle again he remembered giving a different answer under oath in June of 1978 (TR 1004) and he making the statement, "Well, don't be dumping him that close to our neighborhood and polluting our neighborhood." (TR 1004). When asked if Ralph told him about using a knife on both victims, Feagle responded that he could not recall (TR 1004). He recalls making a sworn statement to the effect that Ralph told him that he and Johnny had stabbed the two murder victims (TR 1005). He denied being told that they tried to kill a third black man (TR 1005). When asked if he had made a statement regarding a third incident and how it happened in the sworn statement in June, Feagle responded that was the story going around school at the time (TR 1006-1008) Feagle admitted he made the prior sworn statement that Ralph

would pick up the victims on the pretext of using drugs (TR 1007-1008). Feagle could not recall that Ralph Ellis indicated to him that the victims would be seated inside the cab of his truck (TR 1008). He did recall giving a different answer to the prosecutor earlier in a sworn statement (TR 1008). Feagle testified that he did not recall that Ralph told him that Johnny was the one with the knife used to cut the victims (TR 1009). Feagle also said he did not recall Ellis indicating that he had to go to the hospital with his cut arm (TR 1009). Feagle also testified that he did not recall that Ralph told him he lied to people at the hospital about how his arm was cut (TR 1009). Feagle admitted giving different answers to these questions on a sworn statement to the prosecutor (TR 1009-1010). When asked why he difficulty remembering at trial what he had stated in June, Feagle responded that with time to think about it, he knew that could not remember Ralph or Johnny telling him anything directly (TR 1010). Feagle also testified that Johnny Boehm was his school mate in high school, but is now his stepfather (TR 1010).

On cross-examination, Feagle explained that there was a great deal of hard feelings toward Johnny because he married his mother (TR 1011). In fact, Feagle's father had told him not to associate or speak to Johnny Boehm again (TR 1011-1012). There had been a situation where Boehm was caught with Feagle's mother and divorce ensued (TR 1012). Feagle testified that he was no longer upset with Johnny Boehm about the situation (TR 1012-1013). Feagle also explained that after giving these

sworn statements, he realized that most of his information he had given to the prosecutor came from the newspaper or school gossip (TR 1013). At Paxon High School, the homicides were the subject of great deal of discussion (TR 1013-1014). Feagle said he could not separate in his mind what he heard from gossip, read in the newspaper, or heard from whom (TR 1014). Feagle said he knew nothing about this case except what he had heard from somebody or read (TR 1014). He also said that before he gave the sworn statement to the prosecutor, the prosecutor, Cheryl Peek, threatened him (TR 1019-1020). He stated he was threatened until the trial date by Tommy Broward, an investigator from the State Attorney's Office (TR 1020). He was threatened with perjury, and prison (TR 1020). He also testified that Cheryl Peek threatened to arrest his mother for tampering with a State witness (TR 1020).

After Feagle's testimony, defense counsel moved for a mistrial on the grounds that Feagle should not have been called as a court witness and that the prior statement should not be made part of the record. The court denied the motions and introduced the sworn statement given by Mr. Feagle in June, 1989, as court's exhibit no. 1, and also introduced the statement given in December, 1989, a deposition, as court's exhibit no. 2. (TR 1022-1024)

Dr. Ensor R. Dunsford testified about treating Ralph Ellis for a cut on his right arm on July 7, 1978 (TR 1092-1115). The doctor testified that the patient came in for treatment at 11:22 p.m. and told him that the injury had occurred at 10:30

on the same evening (TR 1115-1116). Ellis had a clean incised wound of the upper arm (TR 1117). Dunsford said the wound was deep and he had to close it with buried sutures, meaning the wound had to be sutured in layers (TR 1118). He said it was a cleanly incised wound, meaning the wound was perpendicular and both sides are equal (TR 1118). This contrasts with a bevelled cut when one side is broader and angles and the other side wrinkles and requires trimming before it can be sutured (TR 1118-1119). Dunsford testified that, based on his experience, the wound was made with a sharp instrument such as a knife (TR 1119-1120). He testified that this type of injury is not usually seen as the result of a wound from broken glass (TR 1121) However, he said it was not impossible for broken glass to cause such a cut, usually a glass cut was not so deep into the muscle (TR 1121). On cross-examination, the doctor admitted that he could not say exactly what type of instrument caused the wound (TR 1132-1133). He also testified that he could not saw with any reasonable degree of medical probability that the wound could not have been made by broken glass (TR 1132-1133). The report given about the injury was that Ellis had run around the corner of the house and snagged his arm (TR 1134).

Facts -- The Defense's Case

Sergeant Frank Japour of the Jacksonville Sheriff's Office testified about the descriptions Allen Reddick gave his alleged assailants (TR 1227-1257). Japour interviewed Reddick while

Reddick was still in the hospital (TR 1228-1229). He described two white males (TR 1232). The first appeared to him to be 25-30 years of age, between 5'8" and 5'10" in heighth, 160-170 pounds, with shoulder length hair, and a mustache (TR 1232). This person was described as the driver of the truck (TR 1232). The passenger in the truck was described as approximately 18-22 years of age, 5'11 to 6' tall, 120-132 pounds, with an undistinguishable tattoo on the left breast, he had blond hair of medium length, and no facial hair (TR 1232, 1241).

Lorraine Delores Evans was the mother of one of the homicide victims, Willie Evans (TR 1260). She testified that her son was in the tenth grade at Ribault High School (TR 1260-1261). She said that on the day he was killed, he had two photographs of himself, just pictures someone had taken of him, which he was going to give to someone (TR 1261). She said he carried nothing but those pictures with him when he left that day (TR 1261-1262). The photographs were in a folder case (TR 1262). She believes they were black and white photographs (TR 1267). She said that he usually carried a purse-like bag with him (TR 1269). She also testified that he probably had a billfold but she was not sure since she did not see a billfold on the day he left (TR 1270-1271). She said the only wallet that he owned before he was killed, a brown one, is still in her possession (TR 1272-1273). She did not know him to carry other wallets (TR 1273).

Donna Moody testified that she dated Ralph Ellis for 3 1/2 years, starting in 1975 (TR 1274-1276). She was dating him in

1978 (TR 1276). She described his physical appearance as husky, about 200 pounds, sideburns but no beard (TR 1276-1277). She never recalls seeing Ralph with a mustache (TR 1277). She said when they first started dating, he had a dark blue Ford truck, and at the time they broke up he was driving a dark green four-wheel-drive Ford truck (TR 1277). The blue truck was painted with dark blue primer (TR 1278). She also testified about the night Ralph cut his arm (TR 1278). He came to her house about 8:30 in the evening (TR 1281). He usually came by her house during this time (TR 1281-1282). She said the cut was still swollen, and they put a towel and ice on it (TR 1283). She stated that Ralph indicated he cut his arm on a piece of glass sticking out of the bed of Johnny Boehm's truck (TR 1288).

Thompson L. Moon, Donna Moody's father, also testified about the night Ralph had a cut arm. He said it was not unusual for Ralph to come by their house while he was dating Donna (TR 1301-1302). He testified that Ralph came to the house one evening with his sleeve pulled up and he noticed the cut on his arm (TR 1303). Ralph said he had cut it on a piece of plate glass in the back of a truck (TR 1303-1304). Thompson told him he should have the cut checked out at the hospital (TR 1304). Ralph said a piece of plate glass was sticking out of the truck and he hit his arm on it when he walked around the truck (TR 1305-1306). Thompson also testified that Ralph did not have any facial hair during this time (TR 1307). Ralph was driving his green four wheel drive truck (TR 1308). He said he

did not recall the truck having a roll bar or KC lights (TR 1308). He also did not recall an antenna on the truck (TR 1308).

Thompson L. Moon, Jr., Donna Moody's brother, also testified (TR 1317). He remembered the time when Ralph Ellis came to the house with a cut on his arm (TR 1318). Ralph told him and his dad that he had cut his arm on a piece of glass (TR 1319). He said that Ralph would come to their house sometimes three or four times a week in addition to the weekends (TR 1320). Therefore, it was not unusual for Ralph to be at his house (TR 1320). He remembers Ralph having two different trucks (TR 1320-1321). One was a two-wheel drive truck and the second was a green four-wheel drive Ford truck (TR 1321). He remembers that Ralph had no decals on the truck because he did not like stickers on the back of his truck (TR 1321). He did not recall a roll bar on the truck (TR 1326).

Silvia Diane Moon, Donna Moody's mother, also testified about the day Ralph came to the house with a cut on his arm (TR 1340-1343). She said that she and one of her daughters put a towel and ice on his cut because it was swollen (TR 1344). She also told Ralph that he needed to go to the hospital (TR 1344). Ralph said that he would get his aunt to take him to the hospital for treatment (TR 1344). Ralph stayed at their house approximately an hour and a half (TR 1345). She remembers that Ralph had a blue truck and then he got a green four-wheel drive truck (TR 1346-1347). She never recalls Ralph having a beard or a mustache (TR 1347-1348). While he was dating Donna, she

saw Ralph almost every day (TR 1348). The green truck that Ralph owned, to her recollection, did not have a roll bar or KC lights (TR 1352). The truck did not have a whip antenna (TR 1353). She did not remember any decals on the green truck (TR 1355).

John Thomas Wright knew Ralph Ellis growing up since they lived in the same neighborhood and went to the same schools (TR 1356-1358). Wright was a year ahead of Ralph in high school (TR 1358). He recalls driving down Old Kings Road in July of 1978, and noticing people standing around a man lying in the ditch (TR 1359-1360). The man had blood on him, but Wright did not know exactly what happened to him (TR 1360). He told everybody he came in contact with after that what he had seen on the roadway (TR 1360). As a teenager, seeing something like that was sort of exciting, and he told several people about it (TR 1361). He specifically remembers telling Ralph Ellis (TR 1364-1365). He said in 1978 that he did not remember Ralph ever wearing a beard (TR 1361). He remembers Ralph having a green Ford truck (TR 1362, 1367-1368). He did not recall the truck having a roll bar or KC lights (TR 1368-1369). Wright testified that the area of town where he and Ralph lived was called Pickettville (TR 1372). He did not refer to that area as Dinsmore (TR 1373).

Ralph Ellis testified in own defense (TR 1382-1448). He was born on January 31, 1961 and attended Paxon High School, graduating in April of 1979 (TR 1382-1383). In school, he was in a vocational program where he left the school grounds at

10:30 and worked at Southern Diesel Service (TR 1383). He has spent his entire life as a diesel mechanic (TR 1382). In 1978, Ellis testified that he was about 5'5" and weighed about 170 pounds (TR 1384). He never had a beard or a mustache (TR 1384). He said he was unable to grow one at that time (TR 1384). While in high school, he owned two different pickup trucks (TR 1384). One was a 1968 Ford two-wheel drive truck and the second was a 1976 Ford four-wheel drive truck. The 1976 truck was green, had white spoked wheels, side railings on the top of the bed, and a sliding back glass (TR 1385). He identified defense exhibit no. 1 as a photograph of the truck (TR 1385-1386). Ellis said that he never had any decals on the bumper of the green Ford truck (TR 1390-1391). He also stated that when he was stopped by the police in 1978, in reference to these offenses, the truck was in the same condition (TR 1388-1389).

After these homicides, Ralph testified there were a number of rumors around Paxon High School about him and Johnny Boehm being involved in these homicides (TR 1387). Ellis testified that he was not unhappy about the rumors because it kept him from trouble (TR 1387). In November of 1978, he was stopped by detective Warren and questioned about the homicides (TR 1388-1392). The detectives tried to get him to confess to the murders but he had not killed anybody and did not confess (TR 1392). However, he said he would help the detectives any way he could (TR 1392). Ellis also testified that he took and passed a lie detector test (TR 1392).

Ellis told the jury about the cut he received on his arm in 1978 (TR 1418-1416). He was on his way to his girlfriend's house and stopped by Johnny Boehm's house to help him work on his truck (TR 1418). Johnny had a broken sliding glass door with half of the frame off of it sticking out of the back of his truck (TR 1418-1419). At place where the truck was parked, there was little room between the truck and a utility room (TR 1419). Ralph walked by the end of the truck, not noticing the door, and cut his arm on the broken glass (TR 1419). He proceeded to his girlfriend's house, and she and her family urged him to go to the hospital for treatment (TR 1411-1412). He arrived at their house between 7:30 and 8:00 p.m. (TR 1411). Since his parents were not home, Ralph called Aunt Martha to take him to the hospital (TR 1412-1414). He said his mother was involved with his grandfather who was having a bad time in a nursing home (TR 1413-1415). Additionally, his mother became real nervous about any type of emergency treatment, and she had given her insurance card to his Aunt Martha just for this purpose (TR 1414-1415). Ralph said that his Aunt Martha died shortly before his trial began (TR 1416).

Ralph denied there was ever a time when Cecil Phillips came to his house and saw him washing blood off his truck (TR 1417). He denied ever showing Cecil Phillips a wallet with a photograph of a young black male (TR 1417-1418). He said that his father owned a tire checker but it was different then the type of tire checker the prosecution had admitted in evidence (TR 1417). He also said he did not have constant access to his

father's tire checker (TR 1416-1417). Ralph also denied ever talking to Randy Mallaly and washing blood off of an instrument or club (TR 1418). Ellis said he did not remember anything about March 20th to March 24th of 1978 (TR 1418). Ellis denied committing murders and denied attacking Allen Reddick (TR 1419).

On cross-examination, Ralph said that Tommy Wright did tell him about seeing a black man on the side of the road who was bloody from head to toe (TR 1419). He again described his physical features in 1978 including that fact his sideburns were below his ears (TR 1422-1423). He again described his green pickup truck (TR 1423-1424). The truck did not have a roll bar and did not have KC lights (TR 1423-1424). He did have an antenna on the truck, but it was not whip type antenna which is much longer than the antenna he had (TR 1424). He denied starting any trouble at Paxon High School (TR 1425). He did admit that he referred to blacks as "niggers" (TR 1425-1426). On redirect, Ralph again described his physical features and identified a photograph of himself in the high school yearbook, which was introduced as defense exhibit no. 3 (TR 1445-1447).

The defense and the prosecution stipulated that March 20 - 24 of 1978 was spring break for the Duval County school system.

Facts -- The Prosecution's Rebuttal

The State presented four witnesses to testify about Ralph Ellis' physical appearance when he was in high school (TR 1453,

1468, 1477, 1483). Frederick Robinson, who was a Jacksonville Police Officer, attended high school with Ellis (TR 1453-1455). He saw Ralph just about every day at school (TR 1455). He testified that Ralph had long hair, down to the base of his neck, usually wore jeans and a flannel shirt, and he had a full beard (TR 1455). The prosecutor asked him how he remembered that Ralph had a full beard, and Robinson responded that Ralph was a popular guy as far as having real hatred toward blacks (TR 1455-1456). Defense counsel objected to the response and moved for a mistrial (TR 1456). The court denied the motion and refused to strike the answer (TR 1456-1457). On cross-examination, Robinson admitted that it was not unusual for someone to have a full beard at Paxon High School (TR 1461). Robinson also said that Ralph had a thin mustache (TR 1456-1463). Robinson reviewed the high school yearbook for 1978 and a picture of Ralph Ellis in the eleventh grade section (TR 1464-1465). The photograph showed no beard or mustache (TR 1466-1467).

Keith Waddell, now a detective with the Jacksonville Sheriff's Office, also attended high school with Ralph Ellis (TR 1468-1469). He saw Ralph just about every day (TR 1470). He testified that Ralph had some facial hair, a little bit of a mustache, and side burns, and his hair was longer (TR 1470). His hair was over his ears a bit and down on his collar (TR 1470). The sideburns were longer (TR 1470). He said Ralph was about 5'9" or 5'10" and weighed about 200 pounds (TR 1470-1471). On cross-examination, Waddell said there was a lot

of fighting at Paxon High School during that time (TR 1472). There were frequently fights between blacks and whites in the school (TR 1472). Sometimes a black group would jump on a white person, and vice versa (TR 1472). Waddell attended Paxon High School for only half of his senior year, but during that half a year, he was involved in ten fights (TR 1473-1474). He stated that Ralph did not have a full beard and only had a slight mustache (TR 1474). The witness identified defense exhibits no. 3 and 4 as pictures that accurately reflect how Ralph looked during that time period (TR 1475). There was no indication of a beard or mustache in those photographs (TR 1475-1476).

Reginald Davis went to school with Ralph Ellis (TR 1477-1478). He described Ralph as about 5'9", 220 pounds, with a thin mustache and a beard-- long sideburns that came down underneath into a beard (TR 1478-1479). On cross-examination, Davis reviewed the photographs from the Paxon yearbook and acknowledged that they did not show a beard and mustache (TR 1481-1482).

Tony Davis, a police officer with the Jacksonville Sheriff's Department, also went to Paxon High School with Ralph Ellis (TR 1483-1484). He described Ellis as medium heighth, about 5'7", stocky, with a beard and collar-length hair (TR 1484-1485). On cross-examination, Davis reviewed the Paxon yearbook photographs and also acknowledged that they did not depict a beard or mustache (TR 1487-1488).

Penalty Phase and Sentencing

The State presented no additional evidence during the penalty phase of the trial (TR 1679). Ellis presented the testimony of several witnesses who testified about his good character and background.

Donald E. Meritt, a sergeant with the Jacksonville Sheriff's Department, testified he had known Ralph Ellis over 20 years (TR 1681). When Ralph was between 8 - 10 years-old, his family moved in next door to Meritt (TR 1681). Ralph was always a good neighbor (TR 1681), and he had a good reputation in the neighborhood (TR 1682). Meritt recalls an incident when Ralph was arrested in 1983 for battery (TR 1682). However, he said that did not change his opinion of Ralph (TR 1682-1683). On cross-examination, Meritt said he did not know of a bad reputation at Paxon High School. He said Paxon was, during those years, "a hot house" (TR 1683). On redirect examination, Meritt explained that Paxon was in a state of constant racial strife during the 70s, including 1977 through 1979 (TR 1686). He answered calls to the school himself during that period (TR 1686).

Ronald Starling grew up with Ralph Ellis and had frequent contact with him over the years (TR 1687-1688). He and Ralph saw each other once a month (TR 1688). Ralph was an honest man and a good father (TR 1688). Starling had seen Ralph with his children and the way his children responded favorably to him (TR 1688).

Ronald Jacobs had known Ralph Ellis for over ten years (TR 1690-1691). Approximately four years earlier, Ralph came to work at the business where Jacobs works (TR 1691). Ralph was one of the leading power-trained specialist and mechanics at the company (TR 1691-1692). He had a reputation for honesty and trustworthiness in the business (TR 1692). Jacobs also knew Ralph to be a fine father (TR 1692). Jacobs said that he had taken his children with Ralph his children on various trips and outings (TR 1692-1693). He also knew that Ralph's wife worked shifts with the 911 rescue in Jacksonville (TR 1693). Ralph would take care of the children while his wife worked (TR 1693).

T. G. Singletary, a correctional officer sergeant at the jail, testified he had known Ralph Ellis for over 20 years (TR 1695). In his opinion, Ralph was a hard working family man and a good friend (TR 1695-1696). Ralph was always willing to help and has a respectable reputation in the community (TR 1696). He knew of no one who disliked Ralph (TR 1696). Singletary also testified about Ralph's condition of incarceration at the jail pending trial (TR 1696-1697). He said Ralph was housed in isolation for his own protection, since the other inmates know the nature of his charges (TR 1696-1697). Singletary was aware of no disciplinary problems at the jail (TR 1697). He also described the deep racial tension in Paxon High School in 1977 and 1978 (TR 1697). He said there were a number of fights at school (TR 1697).

Jeanette Thompson testified that she knew Ralph from the neighborhood growing up for over 20 years (TR 1700-1701). She concluded that Ralph was one of the finest fathers she had ever met (TR 1701). She used to babysit for his children (TR 1701). She said the children were always anxious for him to come home and would rush to meet him (TR 1701). Ralph cared for the children while his wife worked various shift work at the police department (TR 1701-1702). She had never known Ralph to have trouble in the community or have a reputation for fighting (TR 1703).

J. Copeland, a patrolman with the Jacksonville Sheriff's Office, grew up with Ralph Ellis (TR 1705). He also coached a boys' football team upon which Ralph's son played (TR 1705-1706). Copeland said that Ralph was always a good friend and spent a lot of time with him growing up (TR 1706). As an adult, Ralph seemed to him to be a good family man (TR 1706). Ralph took an interest in his children, always came to watch his son practice ball, unlike other people who would drop their kids off and leave the coaches as babysitters (TR 1706). On cross-examination, Copeland said that he was aware that Ralph was in a number of fights in Paxon High School (TR 1707). In fact, Copeland said he witnessed most of them (TR 1708). The ones he saw, Ralph did not provoke (TR 1708). He said in high school you had to have a reputation for not backing down (TR 1708-1710). On redirect examination, Copeland related an incident when about 10 or 11 black people met him and struck

him was in the tenth grade. (TR 1710-1711) Someone hit him with a pipe and broke every bone in his nose (TR 1710).

Ralph E. Juneau worked with Ralph for about four years (TR 1712). He had known Ralph for about 7 or 8 years (TR 1712). Juneau said, in his opinion, Ralph is a compassionate person (TR 1712). At the company where they worked, about one-third of the work force is black and Ellis had no problems whatsoever working with the black personnel (TR 1713). He believed Ralph was a good family man and that caring for his family seemed to be his highest priority (TR 1713-1714).

Ralph H. Ellis, Ralph's father, testified that Ralph was just an average boy (TR 1717). He made good grades in school and cares a great deal for his family and his two sons (TR 1717). He said that Ralph had been married for 10 years (TR 1717). He explained circumstances surrounding Ralph's prior arrest (TR 1717-1718). He said his sister was having a party at her house when the man who rented the trailer next door came over using belligerent language toward his niece (TR 1718). He was asked to leave and a confrontation ensued (TR 1718). Ralph lived across the street and saw the confrontation and came over to assist (TR 1718). He also testified that Ralph had no trouble with his jobs and that the two of them continue to have a good relationship (TR 1719). He also testified that his son turned himself into the police voluntarily (TR 1734-1735).

Jackie Ellis, Ralph's wife, also testified (TR 1720-1721). She works as a dispatcher with the Jacksonville Fire Department which involves shift work (TR 1721). She said that Ralph was a

good supportive husband (TR 1722). He was a hard worker, and a loving father (TR 1722). When she worked various shifts, Ralph would take care of their two boys and take them fishing and on other outings (TR 1722). She said Ralph was always a steady worker and never had trouble finding jobs (TR 1723).

William Bastain, a sergeant for Duval County Jail, testified as a State rebuttal witness about an incident that happened while Ralph was incarcerated (TR 1736). He said that around 10:00 in the morning of June 25, 1989, inmates were returning from recreation and he heard a disturbance coming from cell 4-B (TR 1737). He investigated and discovered that Ralph was throwing urine at one of the inmates (TR 1737). Ellis was housed in 4-C which is right across from 4-B (TR 1737). There was urine on the door where the inmates were standing and these were predominately black inmates (TR 1737). Ralph was yelling obscenities and calling them niggers (TR 1737). On cross-examination by defense counsel, Bastain testified that Ellis had been moved to isolation for his own protection because other inmates had threatened him (TR 1741). Even though he was in isolation, inmates could speak to him (TR 1740). Bastain testified that Ellis told him that the incident occurred because the other inmates were spitting on him and making threats (TR 1740). He said he had had previous problems with these inmates harassing him in the past (TR 1740).

Ralph Kermit Ellis also testified about the incident (TR 1744). Ralph said black inmates threatened his life while in jail and that was the reason he was placed in an isolation cell

(TR 1744). The inmates came by and threatened him again which he ignored until they started spitting on him (TR 1744-1745). He complained to a correctional officer who said there was no need for him to continue yelling (TR 1745). The correctional officer said, "They have been known to get piss thrown on them." (TR 1745). The next time the inmates came to his cell, Ellis waited for one of them to spit on him, and when he did, he threw a milk carton full of urine (TR 1744-1745).

SUMMARY OF ARGUMENT

1. The State moved to consolidate the three indictments in this case for trial arguing that the offenses were committed in a similar manner. The trial court ordered the consolidation on the ground that the crimes were committed in similar manner and would have been admissible as similar fact evidence. The court used an erroneous legal standard to grant the motion to consolidate since similarity in the manner of commission of the crime is not enough to consolidate; the crimes must also be connected in an episodic sense. Since the offenses were not so connected here, the consolidation was improper and violated Ellis' right to due process and a fair trial.

2. The trial court improperly called Feagle as a court's witness, improperly allowed the State to impeach him with the prior sworn statement, and improperly introduced the witnesses sworn statement answers as substantive evidence. Feagle was neither an adverse witness to the State's case nor an eyewitness to the crime, which are the only circumstances which would have permitted Feagle to be called by the court and impeached by the State. Furthermore, even if properly called as a court's witness and impeached with prior statements, the sworn statement given to the prosecutor was still inadmissible as substantive evidence.

3. The State failed to prove that Ellis was the perpetrator of the Evans homicide and the trial judge should have granted a judgement of acquittal. Only the admissions Ellis allegedly made to Cecil Phillips, Randy Mallaly and Richard

Feagle implicate Ellis as the perpetrator of any offense. However, their testimonies do not link Ellis to the Evans homicide. Since the evidence was insufficient to prove Ellis committed the Evans homicide, the court erred in allowing that charge to go the jury for a decision. Ellis was deprived of his right to due process and a fair trial. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, XIV U.S. Const.

4. Over defense objections, the State introduced evidence of other crimes -- evidence that Ellis possessed a sawed-off shotgun and allegedly threatened to kill a black person. This alleged threat and collateral offense of carrying an illegal weapon was never connected to a crime charged in this case. A shotgun was never used any homicide charged. The State's witnesses could not even give a time for this incident other than sometime in 1978. The trial court should not have admitted this testimony as to the shotgun incident, since it was in irrelevant to prove any issue in the case and merely tended to prove criminal propensity and bad character. Ellis was deprived of his right to due process and a fair trial.

5. The trial judge instructed the jury on first degree felony murder with kidnapping as an underlying felony for both the Evans and Mincey murder charges. Additionally, court also instructed on robbery as a possible underlying felony for the Evans murder charge. These instructions were improper and gave the jury an invalid basis to convict because there was insufficient evidence of kidnapping or robbery to support the

instructions. Ellis was denied his rights to due process and fair trial.

6. The State called a police officer as a rebuttal witness who knew Ralph Ellis in school. His testimony concerned the issue of whether Ralph wore a beard during that time. When the prosecutor asked him how he recalled that Ellis wore a beard, the officer responded that Ellis was popular around school because of his hatred of blacks. His answer was improper reputation evidence. Ellis had not placed his character in evidence, and the State was not permitted to present evidence of bad character. Even if such evidence were admissible in this case, the State is not permitted to use the reputation testimony of a police officer.

7. Mitigating circumstances are not limited to those enumerated in Section 921.141 Florida Statutes. A trial judge in a capital case is required to consider and weigh evidence of nonstatutory mitigating circumstances in reaching its sentencing decision. Ellis presented evidence of nonstatutory mitigation. He was only 17-years-old when the crime occurred; he was a good husband and good father; he was a good employee with an exemplary work record; and he presented no difficulties while incarcerated awaiting trial. Additionally, the fact that the prosecution of Ellis' equally culpable codefendant, Johnny Boehm, was dropped should have been considered as a mitigating factor. Finally, the extreme racial tension and conflict which Ellis experienced during this time should have been weighed in mitigation. However, the judge in this case specifically

limited his consideration of mitigating circumstances to those listed in the statute. Ellis' death sentence has been imposed in an unconstitutional manner.

8. This Court has held that death can be an appropriate sentence for one who was seventeen-years-old at the time of the capital crime. LeCroy v. State, 533 So.2d 750 (Fla. 1988). The Unites States Supreme Court in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) concluded that children sixteen-years-old or older could be constitutionally sentenced to death. However, Ellis asks this Court to reconsider its holding in LeCroy and hold that a death sentence can never be imposed upon a defendant who was still under the age of eighteen at the time of the crime without violating his right to due process and right to be free from cruel or unsual punishment. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17 Fla. Const. Alternatively, Ellis asks this Court to reverse his death sentence because the trial judge failed to weigh Ellis' age at the time of the offense as a mitigating factor.

9. Ellis' alleged co-perpetrator, Johnny Boehm, who was equally or even more culpable, was not prosecuted. The trial judge did not consider this disparate treatment of Boehm in sentencing Ellis to death. Ellis was entitled to have the treatment of his codefendant factored into the sentencing equation, and the trial court's failure to do so renders Ellis' death sentence unconstitutional. Art. I, Secs. 9, 16 & 17 Fla. Const.; Amends. VIII, XIV U.S. Const.

10. Ellis' jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court instructed on the aggravating circumstance in language which merely tracked Section 921.141(5)(h), Florida Statutes. The court did not give an instruction which included the definitions for the terms "heinous", "atrocious" and "cruel" as defined in State v. Dixon, 283 So.2d 1 (Fla. 1983). The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Espinosa v. Florida, ___ U.S. ___ Case no. 91-7390 (June 29, 1992).

11. At the penalty phase of the trial, the court instructed the jury, over defense objections, on kidnapping and robbery as offenses qualifying for the aggravating circumstance of the homicides being committed during another felony. Sec. 921.141(5)(d), Fla. Stat. The trial judge also found this aggravating circumstance on the basis of a kidnapping and and a robbery. There was insufficient evidence to prove either of these crimes, and the court erred in instructing the jury and in finding such offenses supported the aggravating circumstance. Ellis' death sentence has been unconstitutionally imposed.

12. The murders in this case occurred in 1978. At that time neither the judge or a jury could consider the cold, calculated, and premeditated nature of a homicide as an aggravating circumstance because Section 921.141(5)(i), Florida

Statutes, which provides for that aggravating circumstance, did not become effective until July 1, 1979. Nevertheless, the trial court found Ellis committed the murders in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court also instructed the jury that it could consider this aggravating factor in determining what sentence to recommend to the court. This ex post facto application of the premeditation aggravating factor renders Ellis' death sentence unconstitutional. Art. I, Sec. 10 and Art. X, Sec. 9 Fla. Const.; Art. I, Sec. 9 & 10 U.S. Const.

13. The trial court improperly instructed the jury that a contemporaneous conviction for a violent felony qualified for the aggravating circumstance of a having a previous conviction for such an offense. Additionally, the court should not have found and weighed this aggravating factor in the sentencing equation based solely on the contemporaneous convictions for violent felonies. In enacting Section 921.141(6)(a) Florida Statutes, the legislature never intended for a contemporaneous conviction to be sufficient to find this aggravating circumstance applicable.

14. Ellis requested a penalty phase jury instruction defining reasonable doubt. While the standard instructions, as given in this case, advised the jury that aggravating circumstances must be proven beyond a reasonable doubt, there was no instruction defining reasonable doubt. Since the penalty phase occurred seven days after the guilt phase, the jurors should not have been required to rely on their memory of the guilt

phase instructions for such a definition. The court's failure to grant the instruction violated Ellis' right to due process and rendered his death sentence unconstitutional.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN CONSOLIDATING THE TWO MURDER OFFENSES AND THE ATTEMPTED MURDER OFFENSE FOR TRIAL.

The State moved to consolidate the three indictments in this case for trial alleging that the three offenses were triable in the same court and were based on the same acts or transactions. (R 85) Arguing that the offenses were committed in a similar manner, the prosecutor urged the trial court to consolidate the three for a single trial. (TR 236-275) Ellis strenuously objected to the consolidation. (TR 236-275). However, the trial court ordered the consolidation on the ground that the crimes were committed in similar manner and would have been admissible as similar fact evidence. Williams v. State, 110 So.2d 654 (Fla. 1959) (TR 236-275, 1810-1811) The court used an erroneous legal standard to grant the motion to consolidate since similarity in the manner of commission of the crime is not enough to consolidate; the crimes must also be connected in an episodic sense. See, Paul v. State, 385 So.2d 1371 (Fla. 1980). Since the offenses were not so connected here, the consolidation was improper and violated Ellis' right to due process and a fair trial. Art. I, Sec. 9 Fla. Const.; Amends. V, XIV U.S. Const.

Rule 3.151(a), Florida Rules of Criminal Procedure provides:

> (a) For purposes of these Rules, two or more offenses are related offenses if they are triable in the same court and are based

> on the same act or transaction or on two or more connected acts or transactions.

In Paul v. State, 385 So.2d 1371, adopting partially the dissent in Paul v. State, 365 So.2d 1063 (Fla. 1st DCA 1979), this Court held that consolidation of offenses is improper when based on similar but separate episodes which are separated in time and connected only by similar circumstances and the accused's alleged guilt. Paul was charged with attempted sexual battery of a young woman resident of a Florida A & M dormitory early in the morning of April 9, 1977. In a separate information, Paul was charged in one count of a sexual battery on a young woman resident of a F.S.U. dormitory about 5:00 a.m. on May 14, 1977. Counts two and three of the same information charged Paul with attempted sexual battery and battery of another young woman at another F.S.U. dormitory on the same early morning. These offenses had many similarities. They occurred about the same time of day and on the same day of the week. They occurred on an upper floor of a women's dormitory. The perpetrator waited for his victim near the shower area. The actions of the perpetrator in committing the offenses were similar. However, this Court concluded that the offense occurring in April was improperly consolidated with the ones in May because five weeks separated the crimes. In contrast, the two offenses in May were deemed properly consolidated because they occurred within an hour of each other and the the same general area. This Court interpreted the connected acts or

transactions requirement of Fla.R.Crim.P. 3.151 to mean connected in the same episode of criminal behavior.

In Williams v. State, 439 So.2d 1014 (Fla. 1st DCA 1983), the First District Court of Appeal reversed eleven convictions of theft and nine convictions of burglary. Separate informations charging the defendant with burglary and theft of nine different victims and different structures on nine different dates between November 18, 1981 and December 11, 1981 were consolidated in one trial. The motion to consolidate was based on the prosecutor's assertions that the crimes were a series of transactions as part of an overall scheme, that there was a common modus operandi and that there was a commonality of time and witnesses. On the basis of Paul v. State, the court reversed all the convictions and certified to this court, as a question of great public importance, the issue of the continued viability of Paul. This court, in State v. Williams, 453 So.2d 824 (Fla. 1984), in answering the question certified by the First District Court of Appeal, stated:

> Paul continues to reflect the law in Florida. We have not receded from Paul, or amended rule 3.151 since our decision in Paul. The District Court correctly held that Paul was applicable and mandated reversal in the present case, where there was the improper consolidation of at least the seven indictments charging offenses allegedly committed on different days, not involving connected acts or transactions, but involving merely the same defendant and similar circumstances.

Williams, 453 So.2d at 825.

Recently, in Garcia v. State, 568 So.2d 896 (Fla. 1990), this Court reaffirmed Paul and reversed the defendant's murder convictions because of improper consolidation of offenses. This Court wrote,

> To summarize well-settled law, the "connected acts or transactions" requirement of rule 3.150 means that the acts joined for trial must be considered "in an episodic sense[.] [T]he rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are `connected' only by similar circumstances and the accused's alleged guilt in both or all instances." Paul, 365 So.2d at 1065-66. Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." Bundy, 455 So.2d at 345. However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence. Williams, 453 So.2d at 825.

568 so.2d at 899.

In this case, the trial court improperly consolidated for one trial three indictments charging offenses involving the same defendant and similar circumstances, but committed on different days and not involving connected acts or transactions. Paul and its progeny compel a reversal of Ellis' convictions for improper consolidation.

An analysis of the facts demonstrates that the three offenses here did not involve connected acts or transactions and that consolidation was improper. The crimes were separated by time and place. The indictment charging the murder of Willie Evans alleged that the killing occurred between March

20th and March 21st, 1978, by beating or stabbing him to death. (R 40-41). Malcolm Adams, a sergeant in the Jacksonville Sheriff's Office, testified that the body of a black male identified as Evans was found in the 9100 black of Plummer Road in Jacksonville on March 21, 1978. (TR 705). Ellis was charged in a separate indictment with first degree murder of Howard Mincey by cutting his throat on or between March 24th and March 25th, 1978. (R 42-43). Daniel L. Brown, a police officer, testified that the body of a black male, identified as Mincey, was found on March 25, 1978 in the 9800 black of Imeson Road in Jacksonville. (TR 734-736). The third indictment charged Ellis with attempted first degree murder of Allen Reddick by stabbing him with a knife on July 7th, 1978. (R 44-45). Reddick testified that while he was walking, he was offered a ride by two white men in a truck with the offer of obtaining marijuana. (TR 761-763). While riding in the truck, Reddick was stabbed by the passenger several times, but Reddick was able to escape through the window of the truck. (TR 764-767). Three to four days separated the two murder cases and the attempted murder case was separated by three and a half months from the second murder.

In determining whether two acts or transactions are connected for purposes of consolidation, this court has considered the temporal and geographical association, the nature of the crimes and the manner in which they were connected. Bundy v. State, 455 So.2d 330 (Fla. 1984). In Bundy, the Court held that joinder of two crimes were proper where the crimes

occurred within a few blocks of each other, within the space of two hours, and were similar in that they involved a person entering residences of female students in off campus housing and beating young white women with a club. This court reasoned that the criminal acts were connected by the close proximity in time and location, by their nature and by th manner in which they were perpetrated. The facts as found by this court shows that the first crimes occurred at 3:00 a.m. and the second crime occurred at 4:00 a.m. on the same morning a few blocks from each other. In contrast, in this case, the first two crimes are separated by days and the third crime is separated from the two other crimes by months. Unlike Bundy, these cases are not connected in a temporal sense.

The three cases are also not connected by location, for, although they all occurred on the northside of Jacksonville, they were not a few blocks apart as in Bundy v. State, supra. See also, McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981) (similarity in circumstances resulting from facts that five robberies all took place in Northwest quadrant of Dade County within a nine day period and that four of the five robberies involved fast food restaurants did not warrant joinder); Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981) (joinder of two criminal episodes involving taxi cab holdups five days apart at locations less than one block apart where both cab drivers were dispatched to the area by a phone call was improper); McDonald v. State, 537 So.2d 185 (Fla. 1st DCA 1989) (arson offenses should not have been consolidated when two

weeks apart); Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989) (three sexual battery cases with three different victims improperly consolidated where acts charged in each information related to a different victim and an entirely separate and factual event than that charged in each other information); Rubin v. State, 407 So.2d 961 (Fla. 4th DCA 1982)(eight sexual battery counts involving four victims on three different occasions improperly consolidated).

The State argued that the three crimes were connected because they were racially motivated and shared a common class of victims and motive. (TR 252). Assuming for argument that the three crimes were similar: that the victims were all black males; that the motive was racial prejudice in all three; that there was a similarity between the three, i.e., use of a knife and a northside of Jacksonville scene; and there was a similar ploy used to get the victims into the vehicle; these factors are not connected. No evidence exists which shows these three crimes were episodic. Although the crimes may be similar, the acts charged in each indictment related to a different victim and a different factual event. Similarity of the crimes is not sufficient to justify consolidation. Garcia, Williams, Paul.

The court in Cannady v. State, 557 So.2d 225 (Fla. 3d DCA 1990) reversed the consolidation of eighteen felony crimes for one trial where the state had contended that the defendant's six criminal episodes over a seventy-day period constituted a one man crime wave in violation of the RICO statute. While the

facts in Cannady are different from the facts of this case, the reasoning is applicable here for the court stated:

> In State v. Williams, 453 So.2d 824 (Fla. 1984), the controlling authority the Supreme Court, noting that its ruling is settled law is this state, held that where convictions were obtained on nine consolidated informations involving acts or transactions occurring over eight different days, and where the offenses were connected only by the fact that they were allegedly committed by the same defendant and were similar in nature, reversal was mandated, This case is indistinguishable.

557 So.2d at .

In Hoxter v. State, 553 So.2d 785 (Fla. 1st DCA 1989), the appellate court reversed grand theft convictions on the grounds that the offenses were improperly joined and should have been severed for trial. The five offenses charged that the defendant approached homeowners in financial trouble and through misrepresentation acquired quitclaim deeds to their property, rented the property and kept the proceeds, and never paid any funds to stop pending foreclosures. Since the same scheme was employed on each homeowner and all residences were in Jacksonville, the State asserted the offenses were sufficiently connected. Citing Paul, the district court disagreed concluding the offenses were separated over an eight-month period and involved different victims, and therefore, they not connected in an episodic sense. The similarity in motive and manner of commission of the offenses was insufficient to justify joinder.

In Garcia v. State, 568 So.2d 896, the State had charged eight counts of murder and sixteen other offenses for crimes

emerging from four episodes of double murders. As this Court noted,

> The record shows that each pair of homicides and related offenses tried in this case involve different victims at different dates and in different places stretching across a three-month period. The first pair of murders occurred about five weeks before the second, and the second pair of murders occurred two months before the final murders. There was no temporal or geographical connection to link these crimes in an episodic sense. The only clear similarity is that they were committed by the same two people, either for money, drugs, or both.

568 So.2d at 899. This Court stated that the crimes were not properly joined for trial and reversed Garcia's convictions.

The two murders and the attempted murder charges in the instant case were improperly consolidated for trial. Ellis was denied a fair trial and his right to due process. He urges this Court to reverse his convictions for new trial.

ISSUE II

THE TRIAL COURT ERRED IN CALLING RICHARD FEAGLE AS A COURT WITNESS, ALLOWING THE STATE TO IMPEACH HIM WITH A PRIOR SWORN STATEMENT GIVEN TO THE PROSECUTOR AND ALLOWING THE TESTIMONY IN THE SWORN STATEMENT TO BE USED AS SUBSTANTIVE EVIDENCE.

Before trial on June 22, 1989, the prosecutor, Cheryl Peek, took a sworn statement from Richard Feagle concerning his knowledge about Ellis' involvement in these offenses. (R 119) (Court's exhibit no. 1) In this statement, Feagle stated that Ellis told him about killing two black men and attempting to kill a third. (R 119-129) On December 1, 1989, defense counsel deposed Feagle. (R 130) (Court's exhibit no. 2) At that time, Feagle said that he did not recall Ellis making any statements to him about these offenses. (R 130-168) He admitted the content of the sworn statement to the prosecutor, but he explained that his information about the crimes came from rumors around the school and the newspapers, not directly from Ellis. (R 130-168) Feagle said that he told the prosecutor in an unrecorded interview prior to the sworn statement that his information came from such sources and he believed that would be reflected in the the sworn statement. (R 167-168) Furthermore, Feagle testified that, on the day before the defense deposition, the prosecutor threatened him with jail for a perjury charge and threatened his mother with jail for a charge of tampering with a witness. (R 142-147)

During trial, the prosecutor moved to call Feagle as a Court's witness in order to impeach him with the sworn

statement he gave her on June 22, 1989. (R 117-118, TR 981-998) The court granted the motion over defense objections. (TR 981-998) Feagle testified substantially as he did on the defense deposition that he did not recall Ellis telling him anything about the crimes and that his information came from rumors around school and the newspaper. (TR 998-1020) The prosecutor impeached him with the substance of the sworn statement given on June 22, 1989. (TR 998-1020) At the close of Feagle's testimony, defense counsel asked for a mistrial or alternatively, a an order striking the testimony since the court allowed the sworn statement to be used as substantive evidence. (TR 1021-1025) The court denied both motions. (TR 1021-1025) In her closing statement, the prosecutor argued the content of the sworn statement as substantive evidence of guilt and, in fact, actually read questions and answers from the sworn statement to the jury. (TR 1505-1507, 1597-1601) This was the only source of evidence that Ellis allegedly made a statement about a killing on Plummer Road where Evans' body was found. (TR 921-924, 1003-1004, 1044-1046) See, Issue III, infra.

The trial court improperly called Feagle as a court's witness, improperly allowed the State to impeach him with the prior sworn statement, and improperly introduced the witnesses sworn statement answers as substantive evidence. Secs. 90.615, 90.801(2)(a) Fla. Stats. (1989); State v. Smith, 573 So.2d 306 (Fla. 1990); Jackson v. State, 498 So.2d 906 (Fla. 1986). Feagle was neither an adverse witness to the State's case nor

an eyewitness to the crime, which are the only circumstances which would have permitted Feagle to be called by the court and impeached by the State. Jackson; Brumbley v. State, 453 So.2d 381 (Fla. 1984). Furthermore, even if properly called as a court's witness and impeached with prior statements, the sworn statement given to the prosecutor was still inadmissible as substantive evidence. State v. Smith.

Jackson is on point. The prosecutor there had the defendant's mother called as a court's witness, even though the prosecutor anticipated she would testify consistently with a pretrial deposition that her son had not admitted the crime to her. However, the prosecutor's motive was to create the opportunity to impeach the witness with an alleged statement to a police officer that the defendant had admitted the crime to her. This Court held that the first error occurred when the mother was called as a court's witness because her trial testimony was not adverse to the State's position and she was not an eyewitness to the offense warranting her to be called in the interest of justice. 498 So.2d at 908-909. The second error occurred when the State was allowed to impeach her non-adverse testimony with the inadmissible hearsay of the the police officer. Ibid. As this Court said,

> The officer's recitation of the statement purportedly made by appellant's mother was hearsay and, therefore, inadmissible as substantive evidence. Counsel's introduction of that testimony under the guise of impeachment was little more than a thinly veiled artifice to place before the jury that which would be otherwise inadmissible. [citation omitted] We have held that such

> a sham impeachment of a non-adverse witness by introduction of that witness's prior statements "as substantive evidence through the mouth of another witness" is "nothing more than the verist hearsay, and is inadmissible." Jackson v. State, 451 So.2d 458, 462 (Fla. 1984) (quoting Adams v. State, 34 Fla. 185, 195-96, 15 So. 905, 908 (1894).

498 So.2d at 909. The prosecutor used precisely the same improper tactic in having Feagle called as a court's witness. Feagle's testimony that he did not recall Ellis making statements to him about the crimes was not adverse to the State's case. He merely failed to give the beneficial testimony the State wanted. Feagle was not an eyewitness to the offenses, and in fact, he testified that his sole source of information was rumors and newspaper accounts. The trial court erred in calling him as a court witness and permitting the prosecutor to impeach with the prior sworn statement.

Assuming for argument that Feagle was properly called as a court's witness and impeached via the sworn statement given to the prosecutor, the sworn statement was still improperly introduced as substantive evidence. Evidence of a prior inconsistent statement admitted for impeachment is inadmissible for other purposes unless admissible on other grounds. State v. Smith, 573 So.2d 306; Dudley v. State, 545 So.2d 857 (Fla. 1989). Section 90.801(2)(a) Florida Statutes allows prior inconsistent statement to be introduced in a narrow class of circumstances. The declarant must testify at trial and be subject to cross-examination and the prior inconsistent statement must have been "given under oath subject to the penalty of

perjury at a trial, hearing, or other proceeding or in a deposition." Sec. 90.801(2)(a) Fla. Stat. In State v. Smith, this Court held that a sworn statement given to a prosecutor did not qualify:

> Thus, the question in this case is whether, under the statute, the Delgado-Santos [497 So.2d 1199 (Fla. 1986)(adopting the rationale of the district court, 471 So.2d 74 (Fla. 3d DCA 1985)] rationale applies to a prosecutor's investigative interrogation. We conclude that it must.[footnote omitted] When Estes gave the statement at issue, she was brought into a room where a deputy sheriff and a prosecutor were waiting with a court reporter to interrogate the seventeen-year-old about a homicide in which she had just been involved. No counsel was present to advise her or to protect Smith's interests; no cross-examination was possible; and no judge was present or made available to lend an air of fairness or objectivity. This prosecutorial interrogation was "neither regulated nor regularized," Delgado-Santos, 471 So.2d at 78; it contained "none of the safeguards involved in an appearance before a grand jury" and did not "even remotely resemble that process," Id.; nor did it have any "quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial." Id. At bottom, prosecutorial interrogations such as the one here provide no "degree of formality, convention, structure, regularity and replicability of the process" that must be provided pursuant to the statute to allow any resulting statement to be used as substantive evidence to prove the truth of the matter asserted. Id. at 77.

573 So.2d at 315-316. Feagle's sworn statement to the prosecutor was improperly used as substantive evidence.

Feagles prior inconsistent statements were extremely damaging to Ellis' case. If accepted as true, Feagle said that

Ellis had told him about two murders, an attempted murder, and the cut on appellant's arm. In it opening argument, the State argued that appellant had confessed to his good friend, Feagle. (TR 505) In the prosecutor's closing summation, she read from the transcript of the sworn statement many of the questions and answers. (TR 1597-1600). Feagle's sworn statement was also used in an attempt to corroborate Phillips' and Mallaly's testimony. This was crucial because of the many inconsistencies in their testimonies, especially the sequence that the murders occurred (in Phillips testimony, the Mincey murder had to have occurred first and the Evans murder second, while in Mallaly's testimony, the Evans murder occurred first and the Mincey murder second). Furthermore, Feagle's sworn statement is the only admitted evidence that Ellis said anything about a homicide on Plummer Road. See, Issue III, infra.

The trial court's error in calling Feagle as a court's witness, allowing the State to impeach him with a prior sworn statement and then allowing the sworn statement answers admitted as substantive evidence denied Ellis his rights to due process and a fair trial. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, VI & XIV U.S. Const. This Court must reverse for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING A MOTION FOR JUDGEMENT OF ACQUITTAL SINCE THE EVIDENCE FAILED TO IDENTIFY ELLIS AS THE PERPETRATOR OF THE EVANS HOMICIDE.

The State failed to prove that Ellis was the perpetrator of the Evans homicide and the trial judge should have granted a judgement of acquittal. (TR 1216-1222, 1449-1452) Only the admissions Ellis allegedly made to Cecil Phillips, Randy Mallaly and Richard Feagle implicate Ellis as the perpetrator of any offense. However, their testimonies do not link Ellis to the Evans homicide. "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction." Cox v. State, 555 So.2d 352, 353 (Fla. 1989). Since the evidence was insufficient to prove Ellis committed the Evans homicide, the court erred in allowing that charge to go the jury for a decision. Ellis was deprived of his right to due process and a fair trial. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, XIV U.S. Const. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Jaramillo v. State, 417 So.2d 257 (Fla. 1982).

Willie Evans was 18-years-old when killed on March 21, 1978, and his body was located on Plummer Road on the north side of Jacksonville. (TR 694-705, 747-748) Howard Mincey was in his thirties when killed on March 24, 1978, and his body was found on Imeson Road. (TR 724-729, 846-850)

Randy Mallaly testified that Ellis told him about two murders. Mallaly did not know when in 1978 Ellis made the statements. (TR 1030) Regarding the first murder, Mallaly said Ellis told him that he and Boehm picked up a black man on the pretext of smoking marijuana, Boehm stabbed him and then they took him out of the truck and beat him. (TR 1043-1044) Ellis did not specify a geographic location for this incident. (TR 1044) Ellis also never gave any description of this victim. The second murder Ellis mentioned to Mallaly occurred on Imeson Road. (TR 1046) Mallaly gave no time relationship between the first murder and the second. Mallaly's testimony identified the second murder with Imeson Road. However, the first murder Mallaly said Ellis spoke about was not identified by name, time or place. Nothing was said to link comments about this murder to the Evans homicide. Only through an improper compounding of inferences can this evidence possibly link Ellis to the Evans homicide. See, Gustine v. State, 86 Fla. 24, 97 So. 207 (Fla. 1923); Collins v. State, 438 So.2d 1036 (Fla. 2d DCA 1983); Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978). "Where two or more inferences ... must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction." Collins, 438 So.2d at 1038. Ellis could have been talking about a completely unrelated homicide. See, Stewart v. State, 30 So.2d 489 (Fla. 1947) (defendant's statement that he shot "that man" at "that joint" insufficient to convict)

Cecil Phillips also testified that Ellis talked to him about two homicides. As to the first, Phillips said Ellis told him that he and Boehm picked up an older black man and killed him off Imeson Road. (TR 910-913) The second murder Ellis mentioned to Phillips was of a younger black man who he and Boehm killed in a similar manner to the first. (TR 921-922) Ellis showed Phillips photograghs allegedly taken from the body of the second. (TR 922-923) Phillips was sure that this homicide of the younger black man occurred second. (TR 921, 931-932) Phillips testimony likewise fails to link Ellis' statements to the Evans homicide. Since Phillips was certain that the homicide on Imeson Road occurred before the homicide of the younger man about whom Ellis spoke, the alleged comments Ellis made about the younger man's killing could not have been about Evans. The Evans homicide was proven to have occurred before Mincey's which was the one on Imeson Road.

While Ellis told Phillips about the second incident he showed Phillips a wallet and photographs allegedly taken from the man killed. The only testimony about Evans having a wallet and photographs came in during the defendant's case through the testimony of Lorraine Evans, the mother of Willie Evans. (TR 1260-1274) She testified that, to her knowledge, the only wallet Evans had was a brown wallet that was remained in her house. (TR 1272-1274). There was no evidence that Evans had a wallet with him when he left home. There was no evidence to show that the wallet of the man Phillips described in the second murder belonged to Evans. Furthermore, there was no

evidence that the photographs he saw were of Evans. However, the evidence did show that the man who Phillips described as being the young man in the second incident was murdered after Mincey. Consequently, that person could not have been Evans who was killed before Mincey.

Richard Feagle testified at trial that he had information about Ellis' alleged involvement in two homicides and an attempted homicide, but his sources was rumors around school and the newspapers. (TR 998-1020) Feagle did not recall Ellis ever making any statements to him about the crimes. The only evidence that Ellis said anything about a murder on Plummer Road where Evans body was found came from the improper impeachment of Feagle. (TR 1003) See, Issue II, supra. When asked during trial, Feagle testified that he did not recall Ellis telling him about a homicide on Plummer Road. (TR 1003) The prosecutor used a sworn statement Feagle gave to her before trial in which he said that Ellis told him about killing a black man on Plummer Road. (TR 1003) For the reasons set forth in Issue II, supra., the testimony from Feagle's sworn statement was erroneously placed in evidence. Without this improper evidence, there no evidence sufficient to tie Ellis to the Evans homicide.

The trial court should have granted a judgment of acquittal as to the Evans murder. Ellis now urges this court reverse with directions to discharge on the Evans murder charge.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING STATE WITNESS RANDY MULLALY TO TESTIFY ABOUT AN ALLEGED THREAT TO COMMIT A COLLATERAL CRIME IN VIOLATION OF ELLIS' RIGHTS TO A FAIR TRIAL AND DUE PROCESS.

Prior to trial, the State filed a notice of its intension to introduce evidence of other crimes, specifically the possession of a sawed-off shotgun and an alleged threat to kill a black person made in the presence of Randy Mallaly. (R 93) Ellis moved to exclude the evidence as irrelevant and prejudicial, but the court denied his motion. (R 108, Tr 650-654) Mallaly testified that sometime in 1978, he, Ellis and Johnny Boehm were Ellis' truck for the evening on the northside of Jacksonville off Soutel Road. (TR 1030-1031) Ellis allegedly told Mallaly "We're going to go kill a nigger." (TR 1030) Ellis stopped in a parking lot, pulled out a sawed-off shotgun and passed it to Mallaly who then passed it to Boehm. (TR 1031) Mallaly testified there was a black individual walking toward the truck in the parking lot when the shotgun was pulled. (TR 1030-1031). Ellis then asked Mallaly if he wanted to be part of "this" to which Mallaly replied "no", and they drove back to Ellis' house where Mallaly's car was located. (TR 1031) Mallaly spent the evening at a friend's house who lived near Ellis. (TR 1031-1032) The trial court should not have admitted Mallaly's testimony as to the shotgun incident, since it was in irrelevant to prove any issue in the case. See, e.g., Peek v. State, 488 So.2d 52 (Fla. 1986); Jackson v. State, 451 So.2d 458 (Fla. 1984); Drake v. State, 400 So.2d 1217 (Fla. 1981).

Ellis was deprived of his right to due process and a fair trial. Amends. V, VI, XIV U.S. Const.

This Court's decision in Jackson v. State, 451 So.2d 458 (Fla. 1984) is on point. In that case, the State presented a witness who testified that the defendant pointed a gun at him and bragged that he had been a "thoroughbred killer" when in Detroit. Ibid, at 460. Reversing for a new trial, this Court conclude the testimony was irrelevant:

> The testimony showed Jackson may have committed an assault on [the witness], but that crime was irrelevant to the case sub judice. Likewise, the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2).

Ibid, at 461. The alleged comments about which Mallaly testified was no more relevant here than the "thoroughbred killer" comment was in Jackson. The statement either referred to an unrelated killing or was a boast with no basis in fact. Either way, the statement was of no relevance other than to prove Ellis' criminal propensities. Although Mallaly testified that Ellis allegedly told him about a homicide later that night where the victim was stabbed and beaten. (TR 1032-1044) However, nothing identified this homicide as being either the Evans or Mincey murders. (TR 1032-1044) Mallaly did not even know when in 1978 this conversation occurred. (TR 1030) Consequently, the alleged shotgun incident was never related to a crime charged in this case.

The trial judge should not have admitted the collateral crimes evidence in this case. Ellis has been deprived of his right to due process and a fair trial. Art. I Secs. 9, 16 Fla. Const.; Amends. V, VI, XIV U.S. Const. He asks this Court to reverse his convictions and order a new trial.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON ROBBERY AND KIDNAPPING AS POSSIBLE UNDERLYING FELONIES TO SUPPORT THE GIVING OF THE FELONY MURDER INSTRUCTION SINCE THE EVIDENCE DID NOT SUPPORT THE EXISTENCE OF A KIDNAPPING OR ROBBERY.

The trial judge instructed the jury on first degree felony murder with kidnapping as an underlying felony for both the Evans and Mincey murder charges. (TR 1496-1502, 1612-1618) As to the Evans murder charge, the court also instructed on robbery as a possible underlying felony. (TR 1496-1502, 1612-1613) Ellis objected to the giving of these felony murder instructions on the ground that there was insufficient evidence of kidnapping or robbery. (TR 1496-1502) This objection was correct and the trial judge erred in giving the instructions. Since the jury was given an impermissible basis for convicting, Ellis was denied his rights to due process and fair trial. Art. I, Sec. 9 Fla. Const.; Amends. V, XIV U.S. Const.

The offense of kidnapping requires that the victim forcibly or by threat be confined, abducted or imprisoned against his will to facilitate the commission of a felony. Sec. 787.01 Fla. Stat. In neither the Mincey nor the Evans homicides did the State prove any confinement or abduction against the will of the victims. State witnesses testified that the victims voluntarily went with Ellis and Boehm. There was no evidence of force or threat. There was no evidence of confinement or abduction. The fact that the victims were later found murdered does not establish that a forceful confinement or abduction,

beyond that inherent in the commission of the homicide, preceded the murders. See, Faison v. State, 426 So.2d 963 (Fla. 1983); Hrindich v. State, 427 So.2d 212 (Fla. 5th DCA 1983), rev. dism., 431 So.2d 989 (Fla. 1983).

In Hrindich, the Fifth District Court was faced with facts similar to those existing here. The question was whether there had been sufficient confinement against the will of the sexual battery victim to uphold that element of the false imprisonment count. The victim had voluntarily accompanied the defendant in his automobile prior to the sexual assault. Reversing the false imprisonment conviction, the district court wrote:

> The victim in the case before us voluntarily accompanied appellant in his automobile. Until the attempted sexual battery commenced, the victim had made no attempt to leave and was not restrained. While she was confined in the front seat of the car during the course of the event, all confinement was incidental to the attempted sexual battery. See, Simpkins v. State, 395 So.2d 625 (Fla. 1st DCA 1981); Friend v. State, 385 So.2d 696 (Fla. 1st DCA 1980).

Hrindich, 427 So.2d at 213. Evans and Mincey likewise voluntarily accompanied Ellis. There was no evidence of confinement. While confinement incidental to the homicide might be inferred, that is insufficient to support the separate offense of kidnapping.

This case is distinguishable from cases such as Gore v. State, 17 FLW S249 (Fla. Apr. 16, 1992) and Sochor v. State, 580 So.2d 595 (Fla. 1991), remanded on other grounds, Sochor v. Florida, 504 U.S. ___, Case no. 91-5843 (June 8, 1992). In both of these cases the victims voluntarily accompanied the alleged

perpetrator in an automobile before the killings occurred and this Court found evidence of a kidnapping sufficient. However, there was other evidence indicating an abduction and kidnapping in these cases. In Gore, the nude body of the victim was located in a different state and her hands had been bound. In Sochor, an eyewitness testified that the defendant drove to a secluded area rather than the intended destination. There is no such evidence here.

The offense of robbery was also not proven. Although the State argued that Ellis committed a robbery of Willie Evans when he took a wallet and photographs from him, there was no evidence this occurred. First, only the testimony of Cecil Phillips even remotely suggests a robbery. He testified that Ellis showed him a black wallet and a photograph of a young black male which he allegedly took from a homicide victim. (TR 922-923, 931 956, 961) The homicide victim who was the subject of the conversation between Phillips and Ellis was never identified as Evans. Phillips said Ellis told him he had seen the victim at school -- Paxon High School. (TR 922) The later testimony of Evans' mother refutes the State's theory that this discussion and pertained to the Evans case. She said Evans attended Ribault High School, not Paxon. (TR 1260) She said Evans did carry two photographs of himself on the day of the homicide, but she testified that her son only owned one wallet, a brown one, and it remained in her possession. (TR 1261, 1272-1273)

Assuming for argument that the State did establish that Ellis took the wallet and photographs from Evans, this still did not prove a robbery. A reasonable hypothesis is that only a theft occurred. Robbery was never even suggested as a motive for the homicide. Consequently, it is reasonable to conclude that the wallet was removed from Evans body after death. Such an after death taking of property from a victim is not a robbery. Parker v. State, 458 So.2d 750, 754 (Fla. 1984); McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), quashed in part, 524 So.2d 663 (Fla. 1988).

The trial court should not have instructed the jury on felony murder with robbery and kidnapping as the underlying felonies. Ellis asks this Court to reverse his convictions for a new trial.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING A POLICE OFFICER TO TESTIFY ON REBUTTAL THAT ELLIS WAS POPULAR IN SCHOOL BECAUSE OF HIS HATRED OF BLACKS.

The State called Frederick Robinson, who was a police officer with the Jacksonville sheriff's office, as a rebuttal witness. (TR 1453) He had attended Paxon High School between 1976 and 1978 and knew Ralph Ellis in school. (TR 1454-1455) His testimony concerned the issue of whether Ralph wore a beard during that time period. (TR 1455) Officer Robinson testified that Ralph wore a full beard. (TR 1455) When the prosecutor asked him how he recalled that fact, Robinson responded that Ralph was popular around school because of his hatred of blacks. (TR 1455-1456) The questions and Robinson's answers were as follows:

> Q. Do you recall anything specifically about this defendant's face when you were in high school?
>
> A. Yes, he had a beard, a full beard.
>
> Q. How is it that you recall that, Officer Robinson?
>
> A. Well, he was a popular guy as far as having real hatred towards blacks.

(TR 1455-1456) Defense counsel objected to this testimony and moved for a mistrial which the court denied. (TR 1456-1457)

Officer Robinson's comments about Ralph being popular because he hated blacks was irrelevant, inflammatory and unresponsive the questions asked. His answer was improper reputation evidence. Ellis had not placed his character in

evidence, and the State was not permitted to present evidence of bad character in the trial of this case. Sec. 90.404(1) Fla.Stat.; Lewis v. State, 377 So.2d 640 (Fla. 1979); Dixon v. State, 426 So.2d 1258 (Fla. 2d DCA 1983); Wilt v. State, 410 So.2d 925 (Fla. 3d DCA 1982). Furthermore, even if character were admissible in this case, the State is not permitted to use the reputation testimony of a police officer. Parker v. State, 458 So.2d 750, 753-754 (Fla. 1984). Ellis has been denied his rights to due process and a fair trial. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, XIV U.S. Const. He asks this Court to reverse this case for a new trial.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING ELLIS TO DEATH WITHOUT CONSIDERING AND WEIGHING NONSTATUTORY MITIGATING CIRCUMSTANCES.

A trial judge in a capital case is required to consider and weigh evidence of nonstatutory mitigating circumstances in reaching its sentencing decision. Mitigating circumstances are not limited to those enumerated in Section 921.141 Florida Statutes. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978) However, the judge in this case specifically limited his consideration of mitigating circumstances to those listed in the statute. Ellis' death sentence has been imposed in an unconstitutional manner and must be reversed. Art. I, Secs. 9, 16, & 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.; Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma; Lockett v. Ohio.

Ellis presented witness who testified in mitigation. Their testimony established several mitigating circumstances that the court failed to consider. Ellis was only 17-years-old when the crime occurred. See, Issue VIII, infra; LeCroy v. State, 533 So.2d 750 (Fla. 1988). In the eleven years between the offenses and the trial, Ellis established himself as a good husband and good father, Fead v. State, 512 So.2d 176, 179 (Fla. 1987); Rogers v. State, 511 So.2d 526, 534 (Fla. 1987); and a good employee with an exemplary work record. Smalley v.

State, 546 So.2d 720 (Fla. 1989); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Although there was evidence of one incident in the jail which he did not provoke, Ellis presented no difficulties while incarcerated awaiting trial. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Craig v. State, 510 So.2d 871 (Fla. 1987). The fact that the prosecution of Ellis' equally culpable codefendant, Johnny Boehm, was dropped and this unequal treatment should have been considered as a mitigating factor. See, Issue IX, infra; E.g., Scott v. State, Case no. 73,240 & 76,450 (Fla. July 23, 1992); Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989). Finally, the extreme racial tension and conflict which Ellis experienced at Paxon High School during this time should have been weighed in mitigation. Dougan v. State, 595 So.2d 1 (Fla. 1992).

In his sentencing order, the trial judge acknowledged the presentation of some of this mitigating evidence in his sentencing order. (R 228-236) When evaluating the mitigating circumstances, however, the judge limited his consideration to the mitigating circumstances listed in Section 921.141 Florida Statutes. The court wrote,

> The Court now analyzes each of the mitigating circumstances specified by the Legislature in Section 921.141(6), Florida Statutes (1989).

(R 238)(emphasis added) After addressing each of the statutory mitigating circumstances and finding one to exist (Ellis had no significant criminal history) (R 238-239), the court concluded

its evaluation of mitigation circumstances. None of the nonstatutory mitigation was even noted. (R 238-240) The court either erroneously believed its consideration of mitigation was limited to the statutory list, see, Hitchcock., or the court failed in its responsibility to consider find and weigh any evidence in mitigation found in the record. See, Parker.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined the trial judge's duty to find and consider mitigating evidence:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

> 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 nonstatutory factors, it is truly of a

> mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next 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.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990).

Finally, this court in Santos v. State, 591 So.2d 160 (Fla. 1991), reaffirmed Rogers and Campbell, adding that "Mitigating evidence must at least be weighted in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." 591 So.2d at 164. More significantly, this Court, citing the mandate of the United States Supreme Court, indicated its willingness to examine the record to find mitigation the trial court had ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and

> remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

591 So.2d at 164. "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record ...." Wickham v. State, 593 So.2d 191, 194 (Fla. 1991)(citing Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Rogers v. State, 511 So.2d 526 (Fla. 1987).

The sentencing judge failed in this obligation in this case to consider and weigh nonstatutory mitigating circumstances. Ellis' death sentence must be reversed.

ISSUE VIII

THE TRIAL COURT ERRED IN SENTENCING ELLIS TO DEATH WITHOUT WEIGHING AS A MITIGATING CIRCUMSTANCE THAT HE WAS ONLY SEVENTEEN-YEARS-OLD AT THE TIME OF THE HOMICIDES.

Initially, Ellis realizes that this Court has held that death can be an appropriate sentence for one who was seventeen-years-old at the time of the capital crime. LeCroy v. State, 533 So.2d 750 (Fla. 1988). He is also aware the the Unites States Supreme Court in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) concluded that children sixteen-years-old or older could be constitutionally subjected to a death sentence. However, Ellis asks this Court to reconsider its holding in LeCroy and hold that a death sentence can never be imposed upon a defendant who was still under the age of eighteen at the time of the crime without violating his right to due process and right to be free from cruel or unusual punishment. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17 Fla. Const.

Alternatively, Ellis asks this Court to reverse his death sentence because the trial judge failed to weigh Ellis' age at the time of the offense as a mitigating factor. As this Court noted in LeCroy, "...the legislature intended that youth and its potential characteristics be considered as a factor by the jury and sentencing judge in determining whether a youthful defendant should be subject to the death penalty." 533 So.2d at 758. Because adolescents have less ability to control their impulses, they should not be punished as severely as adults.

See, Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); Eddings v. Okalahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The trial court noted Ellis' age at the time of the crime but rejected it as a mitigating factor with the following comments:

> At the time of the instant offenses the Defendant was a teenager and still attending high school. While age might be a factor in some cases, it is clearly not so in the instant case. The actions and statements of the Defendant indicate a mature, but hate-filled, mind fully cognizant of his actions and responsibilities. The age of the Defendant is not a mitigating circumstance.

(R 240) Ellis' age was not weighed as either a statutory or nonstatutory mitigating circumstance. (R 238-240) See, Issue VII, supra.

The court's finding failed to consider the normal immature judgment typical of adolescence and the extreme racial tension being experienced at Paxon High School during the time of the offenses. Several witnesses testified to the racial strife embroiling the school. (TR 1472-1474, 1683-1687, 1697, 1708-1711) Had the court taken into account these factors, Ellis' age was indeed a mitigating factor.

ISSUE IX

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE DISPARATE TREATMENT OF ELLIS' CODEFENDANT AS A MITIGATING CIRCUMSTANCE.

The State's theory of the case and evidence at trial was that Ellis and his codefendant, Johnny Bohem, acted in concert and participated equally in the commission of these crimes. However, Ellis and Bohem were not prosecuted and punished equally. While Ellis was convicted and sentenced to death, the State terminated the prosecution against Bohem alleging a lack of evidence. (R 228) The trial judge's sentencing order mentions the fact that Boehm was not prosecuted but fails to consider and weigh this in mitigation of Ellis' sentence. (R 228, 238-240)

In Slater v. State, 316 So.2d 539 (Fla. 1975), this Court said,

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

316 So.2d at 542. Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g., Scott v. State, Case no. 73,240 & 76,450 (Fla. July 23, 1992); Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989); Spivey v. State, 529 So.2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So.2d 182, 189 (Fla. 1988); Cailler v. State, 523 So.2d 158 (Fla. 1988); DuBoise v. State, 520 So.2d 260, 266 (Fla. 1988); Brookings v.

State, 495 So.2d 135, 142-143 (Fla. 1986); Malloy v. State, 382 So.2d 1190 (Fla. 1979). In the instant case, Ellis' co-perpetrator, Johnny Bohem, who was equally or even more culpable, was not prosecuted. The trial judge did not consider this disparate treatment of Bohem in sentencing Ellis to death. Ellis was entitled to have the treatment of his codefendant factored into the sentencing equation, and the trial court's failure to do so renders Ellis' death sentence unconstitutional. Art. I, Secs. 9, 16 & 17 Fla. Const.; Amends. VIII, XIV U.S. Const.

ISSUE X

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE BY GIVING AN INSTRUCTION WHICH UNCONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE WHEN EVALUATING WHETHER THE CIRCUMSTANCE WAS PROVED.

Ralph Ellis' jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court instructed on the aggravating circumstances provided for in Section 921.141 (5)(h) Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

(TR 1783) The court did not even give an instruction which included the definitions for the terms "heinous", "atrocious" and "cruel" from this Court's opinion in State v Dixon, 283 So.2d 1 (Fla. 1983). The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, ___ U.S. ___ Case no. 91-7390 (June 29, 1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

The United States Supreme Court recently held Florida's heinous, atrocious or cruel penalty phase jury instruction unconstitutional in Espinosa v. Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did

not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances.

Proper jury instructions were critical in the penalty phase of Ellis' trial. While stabbing or bludgeoning deaths frequently qualify for the HAC circumstance, e.g. Heiney v. State, 447 So.2d 210 (Fla. 1984), this would not be true where the victim lost consciousness quickly, such as after the first blow the head. See, Simmons v. State, 419 So.2d 316, 318-319 (Fla. 1982). Ellis was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the factual parameters necessary before HAC could be considered. The deficient instructions deprived Ellis of his rights as guaranteed by the Eighth and Fourteenth Amendments and Article I Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentences.

ISSUE XI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES OCCURRED DURING THE COMMISSION OF A KIDNAPPING AND ROBBERY.

During the penalty phase of the trial, the court instructed the jury, over defense objections, on kidnapping and robbery as offenses qualifying for the aggravating circumstance of the homicides being committed during another felony. (TR 1670-1671, 1782-1783) Sec. 921.141(5)(d) Fla. Stat. In his sentencing order, the trial judge also found this aggravating circumstance on the basis of a kidnapping (Evans and Mincey charges) and a robbery (Evans robbery). (R 236-237) There was insufficient evidence to prove either a kidnapping or a robbery. This argument has been developed in Issue V, supra, and Ellis incorporates the same argument here by reference. The court erred in instructing the jury on this aggravating factor and in finding and weighing this factor in the sentencing process. Ellis' death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. VIII, XIV U.S. Const. He urges this Court to reverse his death sentences.

ISSUE XII

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER SINCE THE HOMICIDES OCCURRED PRIOR TO THE ADDITION OF THIS AGGRAVATING FACTOR TO FLORIDA'S DEATH PENALTY STATUTE.

When the murders in this case occurred in 1978, neither the judge or a jury could have considered the cold, calculated, and premeditated nature of the crime as an aggravating circumstance because Section 921.141(5)(i) Florida Statutes, which provides for that aggravating circumstance, did not become effective until July 1, 1979. Nevertheless, the trial court found Ellis committed the murders in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 238) The court also instructed the jury that it could consider this aggravating factor in determining what sentence to recommend to the court. (TR 1783) This ex post facto application of the premeditation aggravating factor renders Ellis' death sentence unconstitutional. Art. I, Sec. 10 and Art. X, Sec. 9 Fla. Const.; Art. I, Sec. 9 & 10 U.S. Const. Ellis recognizes that this Court has previously rejected arguments concerning the ex post facto application of this aggravating factor, Combs v. State, 403 So.2d 418 (Fla. 1981); Smith v. State, 424 So.2d 726 (Fla. 1982); Justus v. State, 438 So.2d 358 (Fla. 1983). However, in light of subsequent federal court decisions, Ellis urges this Court to reconsider these decisions.

In Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Supreme Court established the test for determining whether a statute is ex post facto. In doing so, the Court harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 1960, 67 L.Ed.2d 17 (1981), which also involved the retroactive application of the law:

> As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it. Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial person rights," but merely changes "modes of procedure which do not affect matters of substance." Id. at 293.

Miller, supra, 101 S.Ct. at 2451.

The relevant "event" here was the crime that occurred over a year before the legislature enacted Sec. 921.141(5)(i). As Miller explained, retrospectivity concerns whether a new statute changes the "legal consequence of acts completed before its effective date." The relevant "legal consequences" include the effect legislative changes have on the defendant's sentence. Miller v. Florida, 107 S.Ct. at 2451.

In the instant case, Section 921.141(5)(i), Florida Statutes (1979) is a penal or criminal statute since it deals with the quantum of punishment that may be imposed upon a person convicted of a capital felony. Section 921.141(5)(i)

also operates retrospectively because it changes the legal consequences of acts completed before the effective date of July 1, 1979. The change in the sentencing statute allowed the trial judge to consider an additional aggravating factor that could increase the punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing aggravating and mitigating factors. Finally, the addition of new aggravating factor could readily disadvantage a capital defendant on trial for his life. Under Florida's capital sentencing scheme, the trial judge and sentencing jury must weigh and balance all aggravating and mitigating. Consequently, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court should hold that Section 921.141(5)(i), Florida Statutes (1979), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Ellis whose crimes occurred before the statute's effective date.

As an independent basis for reversal, the retroactive application of the new aggravating factor violated the Florida Constitution. Article X, Section 9 of the Florida Constitution provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

This provision, unlike the ex post facto provision of the federal constitution, does not require that the change in the law disadvantage the defendant. As this Court said in Raines v. State, 42 Fla. 141, 28 So. 57, 58 (Fla. 1900):

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness.

In Castle v. State, 330 So.2d 10 (Fla. 1977) this court denied Castle's claim that a legislative reduction of the punishment for distributing flammable substances with the intent to burn applied to him. At the time Castle committed the charged offense, the prison sentence for that crime was ten years. When he went to trial, it was five years. This court adopted the reasoning of the district court, Castle v. State, 305 So.2d 794, 797 (Fla. 4th DCA 1975), and held that the defendant remained subject to the ten-year sentence provided for by the earlier statute because criminal legislation has prospective effect only under Article X, Section 9 of the Florida Constitution. This provision of the Florida Constitution also prevents the prospective application of Section 921.141(5)(i) Florida Statutes.

In conclusion, the premeditation aggravating factor should not have been applied in Ellis' case. His death sentence has been imposed in an unconstitutional manner and must be reversed.

ISSUE XIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT ELLIS HAD A PREVIOUS CONVICTION FOR A VIOLENT FELONY BASED ON THE CONTEMPORANEOUS CONVICTIONS FOR MURDER AND ATTEMPTED MURDER.

During the jury instruction charge conference for penalty phase, the court advised that it intended to modify the standard instruction on the aggravating circumstance of the defendant having a previous conviction for a violent felony. (TR 1671-1672) The modification added "or contemporaneously" after the term "previously" so as to inform the jury that contemporaneous convictions for a violent felonies qualified. (TR 1671-1672) As read to the jury, the instruction stated:

> The defendant has been previously or contemporaneously convicted of another capital offense or of a felony involving the use of violence to some person.

(TR 1782) Additionally, the trial court found as an aggravating circumstance that Ellis had a previous conviction for a violent felony pursuant to Section 921.141(5)(b) Florida Statutes. Ellis' only convictions for violent felonies were the offenses for which he was convicted in this trial. The trial judge found the mitigating circumstance that Ellis did not have a prior criminal record. (R 238-239) Sec. 921.141 (6)(a) Fla. Stat. However, the court concluded that each homicide conviction could enhance the other and found the aggravating circumstance of a previous conviction for violent felony:

> In the instant case the Defendant was convicted of two separate murders in the first degree and one attempted murder in the first degree. Although committed in similar manners, each offense occurred on separate days at different times. The separate indictments in each of the cases were consolidated for trial thereby leading to contemporaneous convictions for two capital felonies and one felony involving the use or threat of violence to another person.

(R 236) The previous conviction for a violent felony aggravating circumstance was improperly applied where only a contemporaneous conviction for such a felony exists.

In enacting the aggravating circumstance provided for in Section 912.141(5)(b) Florida Statutes, the legislature never intended for the circumstance to be applied where a contemporaneously committed violent felony supplies the "previous conviction." The aggravating circumstance should not have been applied in Ellis' sentencing.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed the following two relevant aggravating circumstances:

> (b) The defendant was <u>previously</u> convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) <u>At the time</u> the capital felony was committed the defendant also committed another capital felony.

(Emphasis added) This language was derived directly from the <u>Model Penal Code</u>, Section 210.6(3)(b)(c). The Commentary to the Model Penal Code, from which the language of the Florida Statute was drawn, explains that the first aggravator quoted

above was intended to be limited to offenses committed prior to the instant offenses;

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggest two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

The second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous convictions;

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the Legislature subsequently eliminated paragraph (c) quoted above, it expressed its intention that the aggravator at issue only be applicable where the prior conviction was obtained in a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is a reasonable position since the legislature was focusing (a) on the issue of failed rehabilitation, i.e., the defendant was already given a second chance, and (b) the issue of propensity or future dangerousness. The

interpretation of this aggravator which has allowed its application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/propensity aggravator. In this regard, this Court's conclusion in King v. State, 390 So.2d 315, 320 (Fla. 1980), that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

for which this Court gave no authority, is contradicted by the above facts.

Recently, this Court construed the habitual offender statute concerning predicate felony convictions which contained language identical to the language found in Section 921.141(5)(b) Florida Statute. State v. Barnes, 595 So.2d 22 (Fla. 1992). Section 921.141(5)(b) Florida Statutes provides for an aggravating circumstance if the defendant "was previously convicted of a another capital felony of a felony involving the use or threat of violence to the person." The habitual offender statute in Barnes, Section 775.084(1)(a) Florida Statutes discusses the predicate felonies requirement as follows: "The defendant has previously been convicted of two or more felonies in this state." This Court held in Barnes that the predicate felony convictions required for the habitual offender statute did not require sequential convictions. However, in Barnes, the convictions did arise from separate

incidents and the holding did not remove the requirement that the predicate convictions arise from separate incidents. Justice Kogan, concurring specially wrote,

> I concur with the rationale and result reached by the majority, but only because this particular defendant's felonies arose from two separate incidents. Were this not the case, I would not concur. I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prosecutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would have enhanced the penalties for all crimes rather than resorting to a "back-door" method of increasing prison sentences.

Barnes, 595 So.2d at 32. Since the language used in the two statutes are identical, the legislature must have intended a previous conviction under Section 921.141(5)(b) to likewise arise from a separate criminal incident.

The aggravating circumstance of a previous conviction for a violent felony was improperly found and considered in sentencing Ellis to death. He asks this Court to reverse his sentence.

ISSUE XIV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AT PENALTY PHASE ON DEFINITION OF REASONABLE DOUBT.

Before the penalty phase of the trial commenced, Ellis requested a jury instruction defining reasonable doubt. (TR 1670) Although the standard instructions, as given, advised the jury that aggravating circumstances must be proven beyond a reasonable doubt, see, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), there is no instruction, as there is in the guilt phase instructions, defining reasonable doubt. (TR 1781-1787) Since the penalty phase of this case was conducted on December 15, 1989, seven days after the guilt phase, the jurors should not have been required to rely on their memory of the guilt phase instructions for such a definition. (TR 1670) The court's failure to grant the instruction violated Ellis' right to due process and rendered his death sentence unconstitutional under the Florida and United States Constitutions. Art. I, Secs. 9, 16, & 17 Fla. Const.; Amends. V, VI, VIII and XIV U.S. Const.

CONCLUSION

For the reason presented in Issue I, II, IV, V and VI, Ralph Ellis asks this Court to reverse his convictions for a new trial. In Issue III, Ellis asks this Court to reverse his conviction for the Evans homicide and discharge him on that offense. Alternatively, in Issues VII through XIV, Ellis asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Ralph Ellis, DOC #119249, N-2-N-5, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 17th day of August, 1992.

Lynn Shulman for
W. C. McLAIN