IN THE SUPREME COURT OF FLORIDA

CASE NO: 76,061

VERNON *AMOS*,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Defendant in the trial court, Vernon Amos, will hereinafter be referred to as Appellant. The prosecution below, the State of Florida, will hereinafter be referred to as Appellee.

References to the Record on Appeal will be referred to by use of the symbol "R", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal by Appellant, Vernon Amos, from two first degree murder convictions and sentence of death and six related non-capital felonies and sentences of imprisonment. (R 6559-60, 6669-90). The trial was in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida.

The relevant facts are as follows: One June 12, 1986, two males entered a Mr. Grocer convenience store located at the corner of Gun Club Road and Military Trail in West Palm Beach, Florida. One of the two men, described as the taller of two black males, walked over to the store coolers. The shorter of the two men went to the counter to purchase cigarettes. (R-4961). The store clerk, Alan McAninch, was behind the counter and an acquaintance of McAninch, Terry Howard, was also in the store, standing near the store doors. (R-4958, 61). As the shorter male, later identified as Vernon Amos, was paying for the cigarettes, the taller male, later identified as Leonard Spencer, placed a soda on the counter and walked toward the doors. (R-4962-3). At that point, Spencer grabbed Terry Howard and put a gun to Howard's side. (R-4964). Spencer told Howard to get down on the ground. (R-4965). As Howard complied, and was face down on the floor, a gunshot was fired. (R-4966). Howard did not know which of the men had fired the shot. (R-4966).

Terry Howard heard a voice say "Open the cash register". (R-4967). Howard was not certain if he heard one or two voices that

evening. **(R-4989-90).** At no point did witness Howard ever see the smaller black male with a gun. **(R-4987).** Nor did he hear any conversation between the two black men. (R-4969). One of the men went over to Terry Howard and demanded the keys to his car and his wallet and then shot striking him once in each arm. (R-4972-3).

State witness **Bobby** Helvey, Jr. was in the parking lot of the Mr. Grocer and witnessed the two black males get into a yellow Ford (R-5059). He observed the shorter of the two men enter on the driver's side and the taller man enter on the passenger side.

At approximately 12:10 AM on the same evening a second killing occurred outside of a bar called the English Pub located approximately one mile north of the Mr. Grocer's store. John Foster was the state's only witness. **(R-5144).** Foster **was a** passenger in a pickup truck which pulled into the English Pub parking lot. **(R-5147).** Upon pulling into the English Pub parking lot, Foster observed a tall black male and a white male fighting. **(R-5148).** Foster stated that they appeared to be fighting over something in their hands. **(R-5151).** The other male, the shorter of the two, was standing on the other side of the truck. (R-**5159).** While the **tall** black male and the white male were fighting, a shot was fired and the white male fell forward. **(R-5160).** Foster told detectives what he had seen but could not identify either of the black males. **(R-5167).** **The** taller **of** the males attempted to start the truck while the other got in the passenger side. The white male, Robert Bragman, was shot in the head and later **died. (R-5353).**

State's witness, Alan Sedenka, was driving north in the area of the English Pub. (R-5178). The witness had heard the report of a shooting at the English Pub over his police scanner. (R-5178). After passing the English Pub, Sedenka saw two black males coming out of the wooded area, walking north along Military Trail. (R-5179). The taller of the black males came up to Sedenka's vehicle and put a gun to Sedenka's head while the shorter of the black males remained at the front of the vehicle. (R-5190). The taller black male stated to Sedenka, "You are going to drive us." The other black male stated to Sedenka "Do what he says or he will shoot you." (R-5191). Both black males got into Sedenka's vehicle and started to pull out of the lot. They stopped, switched seats and then drove away. (R-5196).

Approximately two hours later Vernon *Amos* was located in a junked car in a junk yard and was thereupon arrested by sheriff's deputies. (R-5279). *Amos* proceeded to give a lengthy statement to detectives only a portion of which was tape recorded. (R-5631). Prior to making a statement, *Amos* was promised by Sergeant Dowdell of the Belle Glade Police Department that if *Amos* cooperated with the Sheriff's office, he would not receive the death penalty. (R-5644). Vernon Amos' statement was suppressed after a Motion to Suppress was filed and the state agreed not to use the statement in their case in chief. (R-5644).

On July 15, 1986, a grand jury indictment was filed against Leonard Spencer and Vernon *Amos* charging two counts of first degree murder and related felonies. (R-6060). In October of 1986, a jury

trial commenced with both Spencer and *Amos* in which they were convicted on all counts and received the death penalty. In October of 1989 on appeal to this court, both Amos and Spencer's convictions and sentences were overturned and the case remanded for a new trial. See Spencer v. State, 545 So.2d 1352 (Fla. 1989). and *Amos* v. State, 545 So.2d 1352 (Fla. 1989). In October of 1989, a second trial commenced for both defendants in which resulted in a hung jury for both on October 20, 1989. In November, 1989 a third trial of both *Amos* and Spencer commenced in which Spencer was convicted on all counts. The case against Amos resulted in a hung jury on December 1, 1989. On January 23, 1990 this trial commenced. (R-4469). During voir dire of the jury venire, several members of the panel were stricken for cause by motion of state based upon their objections to the death penalty. (R-4491-2, 4511, 4514, 4542, 4554, 4583-4, 4590-1, 4600, 4615-6, 4739-45, 4756-8, and 4760-1) Of those jurors stricken for cause, three had stated that under certain circumstances they could recommend the death penalty. The colloquy between the court, the attorneys, and the jurors was as follows:

The Court:	Hi Louis. How do you feel about the death penalty?
Mr. Vers:	I don't think I could -
The Court:	Talk loud.
Mr. Vers:	I don't think I could impose the death penalty or impose the death penalty or recommend it.
The Court:	You don't impose -
Mr. Vers:	Recommend it.

The Court: Why?

Mr. Vers: I don't know. I really never thought about it, until just this moment. And that is the feeling 1 have.

The Court: Well are you just a gentle person, or -

Mr. Vers: I just have a feeling. I honestly never thought about it before. And that is the feeling I get.

The Court: You are telling me, no matter what the facts of the case are, you are never going to vote for death?

Mr. Vers: I don't think 1 could.

Ms. Duggan: Motion.

The Court: Do you want to **ask** him anything?

Mr. Boudreau: Mr. Vers, you say you don't think you could vote for death, but the questions really is if you are put on the jury and the man is found guilty of first degree murder and you go to that Phase 11, and you find out that there is all these terrible aggravating factors and nothing in mitigation, just a grievous crime, do you think you can recommend the death penalty? That is what the law directs you to do.

Mr. Vers: I don't know. I guess if it really was an outrageous crime, I guess I could. Right now, my feeling is that I can't.

Mr. Boudreau: Of course, you think about examples that are worse in the past that warranted it.

Ms. Duggan: Objection.

The Court: Sustained.

Mr, Boudreau: Based on that, I object to this motion.

The Court: I am going to grant the motion.

Thereupon Mr. Vers was dismissed.

(R-4739-45).

The following colloquy took place with Juror Fitzsimmons:

The Court: How do you feel about the death penalty?

Mr. Fitzsimmons: I am opposed to the death penalty.

The Court: Talk a little louder.

Mr. Fitzsimmons: I am opposed to the death penalty.

The Court: The next question is: How opposed? There are some people who are so opposed to the death penalty that, no matter what, they will have nothing to do with the death penalty.

There are other people who say, look, we are opposed to it; we still have to live and operate within a system; any system we operate within will have the laws that we disagree with, but we obey those laws: we enforce those laws: we will vote for those laws, even though we disagree with them in an appropriate case. Where do you fall in that respect?

Mr. Fitzsimmons: Generally, I am opposed. Under some circumstances, I could seemyself choosing that.

The Court: Let me go a little deeper. If you are into the Phase II part of this trial, you heard evidence, what we call aggravating circumstances, you may hear of mitigating circumstances, you first look at the aggravating circumstances, along with the evidence you learn in the case, and you say, look, this either does or does not warrant the death penalty.

If you say it doesn't warrant the death penalty, you recommend life and go home. If you say it - you say, well, these circumstances warrant the death penalty, you then consider the mitigating circumstances and see if they are outweighed by the aggravating circumstances.

If they are not outweighed by the aggravating circumstances, you recommend

-I said that wrong. OK -

Mr. Fitzsimmons: OK.

The Court: Forget that. No. Not really forget that. I got it right. If they are not outweighed by the aggravating circumstances, you would recommend life imprisonment. OK?

So I guess it is proper to say that the law faces two recommendations towards life.

Do you think you can follow the law under those circumstances and vote for death?

Mr. Fitzsimmons: I am not sure that I could.

The Court: OK.

Ms. Duggan: Motion.

Mr. Boudreau: I would like to ask a question.

The Court: Alright.

Mr. Boudreau: Mr.Fitzsimmons, if - you know, big if, if a man is found guilty of first degree murder and then you go to Phase II and at the Phase II hearing you are presented a bunch of aggravating circumstances that you know about the case from the first trial and other things, and there is nothing in mitigation, and in your mind you think, this is the most grievous capital crime that there are ever to be, and in a situation like that, could you vote for the death penalty if that were what the law directed you to do?

Mr. Fitzsimmons: It is possible that I could under those kinds of circumstances.

Mr. Boudreau: Your Honor, I object to that motion.

The Court: I will grant the motion.

Thereupon juror Fitzsimmons was dismissed.

(R-4598-4602).

The next colloquy is with prospective juror Fred Emmer:

The Court: Fred Emmer. How are you doing? Fred, how do you feel about the death penalty?

Mr. Emmer: Well, I need more time to think about it, to be honest about it.

The Court: OK. What do you mean?

Mr. Emmer: It is a difficult question. In other words, one day I might feel for it; the next day I might feel against it.

The Court: How much more time are you going to need?

Mr. Emmer: I don't know. I really don't know.

The Court: If I ask you tomorrow do you think you will think about it tonight?

Mr. Emmer: Maybe. I don't know.

The Court: Let me get the other question out of the way, and maybe I will have true confessions with you tomorrow. But think about it tonight. Do you understand, first of all, how the death penalty works, as far as a capital case is concerned?

If you were to find the defendant guilty of first degree murder then you would be asked to vote whether he gets life imprisonment or death.

And you think about it tonight and let me know tomorrow.

The other thing is: Have you learned about this case at all through the news media?

Mr. Emmer: Just a little bit.

The Court: What have you learned?

Mr. Emmer: Well, just not too much.

The Court: It sounds - do the facts sound familiar, or the names sound familiar, and that is it?

Mr. Emmer: Yes.

The Court: Could you decide the case, based upon what you learn in the courtroom and not something that you might have learned on the TV or the radio?

Mr. Emmer: Say it again.

The Court: Could you decide this case based upon what you have learned in the courtroom and not someplace else, through the media?

Mr. Emmer: No. I couldn't decide.

The Court: You can't decide?

Ms. Duggan: Motion.

Mr. Boudreau: I am not sure what it is he knows from the media.

The Court: He doesn't know what he knows.

Mr. Boudreau: But he doesn't feel -

The Court: He says he cannot decide the case based on the evidence. Isn't that correct?

Mr. Emmer: Yes.

Mr. Boudreau: Can I ask a couple of questions?

The Court: Sure.

Mr. Boudreau: Mr. Emmer, you have heard something in the media about the case?

Mr. Emmer: Yes. Just very little.

Mr. Boudreau: What is it that you recall?

Mr. Emmer: I don't know.

The Court: You are not sure?

Mr. Emmer: I am not sure.

Mr. Boudreau: The question then is: Regardless of that, when you are sitting on the jury, as a juror in this case, can you decide the case based on what you hear in this courtroom?

Mr. Emmer: What I would hear in the future?

Mr. Boudreau: Yes, in the courtroom, in the future.

Mr. Emmer: No, it would still - it would be a very hard decision for me to make.

Mr. Boudreau: No one says it is an easy decision to make. But the question is: Whether anything you have heard in the past has prejudices you in any way.

Mr. Emmer: No.

Mr. Boudreau: It won't prejudice you?

Mr. Emmer: No.

Mr. Boudreau: That is all I have.

The Court: Do you want to ask him anything Ms. Duggan?

Ms. Duggan: No.

The Court: Do you still have a motion?

Ms. Duggan: Yes.

The Court: Granted.

Mr. Boudreau: I object, Judge.

The Court: OK. Let's grant it.

Thereupon Mr. Emmer was dismissed.

(R-4739-45).

Appellant objected to the excusal for cause of jurors Vers, (R-4591); Fitzsimmons, (R-4600); and Emmer (R-4743).

During the jury selection, it had become apparant that some jurors had knowledge of the facts of the case and had discussed those facts with other jurors and/or in the presence of other jurors. One juror, Ms. Stophel, stated that the jurors had been talking about the case in the jury room. (R4574). Another juror, upon being asked by the Court if he remembered anything about the

case, replied that he had, noting several facts of the case. This was juror Seguin. (R-4581-2) Upon learning the juror's discussion about the facts of the case, Appellant's counsel moved to strike the group of ten jurors. (R-4575). The Court denied Appellant's motion. (R-4575).

Further, during the jury selection process, some jurors had raised questions about the felony murder rule and indicated they would have trouble recommending the death penalty where the defendant's involvement was partial or slight. (R-4690). the Court then told the jury:

> Look. Obviously, in a felony murder situation, if you get to the penalty phase, you will consider the extent, as Dr. Nabut, the extent of the persons involvement. And this is a fair consideration for you, to give you, perhaps, the extremes, people that, you know, go in with the intention of committing a robbery, but with the expectation, at least, on the part of one, that there will be no violence, and the other one killed someone. Gee, I didn't even know you had a gun. That is terrible. That is something you ought to take into account. But the other said, let's say, my guy in New York, and the crime is being committed in Miami, and the guy in Miami has a gun, and commits a murder in Miami. The one in New York didn't pull the trigger, but the extent of the involvement that he had is the same. How do you want to view those two people? I don't know. There is - you are the cross section of the community, and it is up to you. (R-4694-5)

To this instruction, Appellant's attorney voiced his objections. (R-4703-4).

Later the Court added:

> You know, they have asked me to be sure you

> understand that when I was discussing the two individuals, the guy in New York **and -** he was involved in the robbery, we are talking about the second phase of the trial, the extent of punishment. My remarks are restricted to that, not the issue of guilt or not guilt. OK? **(R-4704)**

During the state's case, the prosecution never presented any evidence that Appellant ever participated in the crimes, or possess a weapon, or that Appellant had any intention of committing a robbery. The only evidence presented by the state was the Appellant's mere presence at the scene with co-defendant, Leonard Spencer.

Part of the state's case included the introduction into evidence of gruesome photographs and slides. (R-state exhibits: **71-73,** 76-87; Composite **#99** of five (5) photos (autopsy); composite of thirteen (13) photos (Autopsy)). Included among these were eight slides which the state projected onto the wall of the courtroom. **(R-5365).** Appellant made several objections throughout the admission of these photos and slides into evidence and also moved for a mistrial. (R-5362, 5365-66, 5367, **5371, 5400-1, 5405-6, 5457).**

At the close of the state's case, Appellant moved for judgment of acquittal as to each count alledging that the state had proven no more than Appellant's mere presence during the perpetration of the crimes by Leonard Spencer. Appellant's motion was denied. (R-**5452).**

At the start of the defense case, Appellant called Joseph Bachelor. (R-5460). Joseph Bachelor was the other witness to the

events that occured in the English Pub parking lot as he was driving the car in which John Foster, the state's witness, was a passenger. (R-5461). Following his testimony, Appellant Vernon Amos took the stand. Appellant testified that at no time prior to arriving at the Mr. Grocer, did he ever see either Edward Caine or Leonard Spencer with a gun. (R-5513). He stated that he walked into the Mr. Grocer store to by cigarettes and Leonard Spencer followed him in. **(R-5514).** As he was purchasing cigarettes at the counter, Spencer grabbed the patron Terry Howard and held a gun to him. Spencer then ordered the clerk to the ground and then pointed the gun at Appellant and ordered him to open the cash register. (R-5521). Spencer then shot the clerk, took his keys and wallet and walked out of the store with Appellant. (R-5525). Appellant stated that he went with Spencer out of fear, (R-5530), and did exactly what Spencer told him. (R-5531). Appellant also described the incident of how Leonard Spencer shot the second victim Robert Bragman. **(R-5534).**

Following Appellant's testimony on direct examination, the prosecution requested that the court take a lunch recess prior to beginning cross examination because of what the prosecution anticipated would be a lenghty cross examination. **(R-5556).** Prior to the recess, the state requested that the court remind Appellant

> He cannot talk to his attorney, because he is on the stand, because I am concerned Vernon [Appellant] will approach Craig [Appellant's counsel] on his own. **(R-5556).**

Appellant's counsel argued the point with the Court and expressed a desire to confer with his client. (R-5557). The Court

then ruled that counsel could not speak with Appellant. (R-5557). The Court recess lasted for over an hour. (R-5556, 5562).

During the states cross examination of Appellant, the prosecution made several comments concerning Appellant's failure to make certain post-arrest exculpatory statements. The state asked Appellant:

> You told Sgt. Dowdell that you had gone around the cash register and started hiting the buttons?...You never told Sgt. Dowdell at all about the fact that you now stated that you know how to open the register, you just jammed it up purposefully? (R-5594-5)

Appellant's objection was overruled. (R-5595). Later the prosecution again, on Appellant's failure to make certain exculpatory statements when it was asked of Appellant had never told Detective Fitzgerald back in 1986 in a previous statement that the gun had misfired. (R-5625).

Later during prosecution's re-cross examination of Appellant the state asked if Appellant had a complete opportunity to make a statement on tape and if there was anything he wanted to add to the statement at the time he made it. Appellant was asked in essence if he had given a full statement to detectives. (R-5639-40). On re-direct examination of Appellant, Appellant's counsel attempted to have Appellant explain that there were many hours that he spoke to the detectives which were not, in fact, recorded. Defense counsel asked:

> How long were you on that tape?
>
> Amos: I assume it was a thirty minute tape, thirty minutes on each side.

Counsel: What I want to ask you is how many hours did you speak with them that wasn't on the tape?

State: Objection. Beyond the scope of the one question.

Counsel: It is relevant to their question.

Court: Sustained.

(R-5640).

The state called as a rebuttal witness **Edward** Caine. (R.5652). Appellant moved to challange this witness' competency to testify because the witness had expressed several hallucinations and cannot "differientiate between reality." (R-**5253).** Appellant requested a hearing to determine the competency of the witness. (R-5653). The Court overruled Appellant's objection. **(R-5654).** Thereupon, witness Caine testified and attempted to rebutt statements of the Appellant regarding Appellant's theory of defense being that Appellant **was** under durress and was coerced by co-defendant Leonard Spencer.

Appellant renewed his Motion for Judgment of Acquittal and all prior motions. **(R-5724-6).** Appellant reiterated his argument that the state had only proven nothing more that Appellant's mere presence at the scenes of the crimes. Appellant noted that Edward Caine's testimony was only in a capacity of a rebuttal witness whereupon Appellant requested the Court give an instruction as to the limited admissibility of rebuttal testimony. Appellant requested that the instruction reflect that the rebuttal testimony could not be used as substantive evidence. (R-5728). During **the** charge conference, Appellant again raised his request for an instruction on the limited **use** of rebuttal testimony, that it not

be considered substantive evidence. (R-5740-1). The Court denied Appellant's request stating:

> Evidence is evidence. It doesn't matter if it is rebuttal evidence. You couldn't ask a jury to make that mental distinction. I don't think they are capable of it.

Following the charge conference, closing arguments began. (R-5743). During Appellant's closing argument, defense counsel argued to the jury that the prosecution had tailored the evidence by not calling a witness in their case in chief, that being Joseph Bachelor. (R-5787). The Court brought this to the prosectuion's attention whereupon prosectution objected to the defense counsel's remarks. The Court sustained the objection stating that defense counsel could not blame the state for failing to call the witness. (R-5787-8). The Court on its own motion gave a curative instruction to the jury which noted:

> I have sustained the objection. Here's why. The state and defense have equal access to these witnesses. The state has no obligation to call every single witness or produce every single item of evidence. They have an obligation to prove their case beyond and to exclusion of every reasonable doubt. If they don't reach that burden, certainly you should find the defendant not guilty. But it is up to them to decide when they think they have produced enough evidence. Maybe as an analogy is a crime committed in the Orange Bowl with everybody watching. You don't have to call everybody in the Orange Bowl. You can't draw any inference from a failure to call everyone who is in attendance there. OK. (R-5788-9)

The state then began their closing argument wherein the prosecution stated to the jury:

> He [Appellant] even had to admit in his testimony that Leonard **Spencer got out of**

> there. He was diving out of that car just as fast as the defendant was diving head first out of the car. Leonard Spencer got out of there as fast as he could, just as fast as this man was doing his best to get out of there.
>
> He doesn't stop and say, "Officer, what happened to those poor people back there? Can we get them some medical attention?" Or, "I'm having this horrible asthma attack. Please help me." (R-5836-37).

Appellant's counsel objected and requested to approach the bench, both of which were denied by the Court. (R-5837). when state had completed their closing argument, the defense counsel stated that he was unable to make earlier during the state's argument because the Court had denied him the opportunity to approach the bench. Appellant's counsel stated that his objection was based upon the state's direct comment upon Appellant's right to remain silent. Appellant's Motion for Mistrial on these grounds was denied. **(R-5844-5).** Following closing arguments, the Court gave the instructions to the jury. The Court did not give Appellant's second proposed jury instruction. **(R-6487).** Nor Appellant's requested instruction on the limited use of rebuttal testimony. (R-5728, 40). The jury returned a verdict of guilty as to all counts. (R-6559-60). On February 21, 1990, Appellant filed a pro se motion for disqualification of the judge. **(R-6567-90).** On March 6, 1990 during a status check conference Appellant appearing pro se raised his motion for disqualification. The Court stated it had denied the motion because "I didn't want to do it." **(R-5918).**

During that hearing, (R-5913-5920), counsel for Appellant had

not yet, but the trial court proceeded with the hearing in counsel's absence. At said hearing the court considered Appellant's request to discharge his counsel which was made due to the fact that a conflict had arisen between Appellant and his counsel. The court also denied Appellant's Motion For Disqualification of the trial court judge. This hearing was held the day before the sentencing hearing (Phase Two) was held.

The court denied the Appellant's Motion For Disqualification (R-5918). The court also granted Appellant's request to discharge his attorney. However, the court refused to provide other counsel for Appellant and forced Appellant to proceed with the sentencing hearing without counsel (R-5916-5917).

The next day, March 7, 1990, the sentencing hearing (Phase Two) was held (R-5923-5956). The State relied upon the evidence presented at trial. The court inquired of Appellant as to whether he wanted to call his sister as a witness. Appellant indicated that he had just received a deposition of Susan LaFehr, a psychological expert who had examined Appellant, but had not had time to read the deposition and did not know what her testimony might be (R-5926-5927).

Appellant indicated to the court that he was opposed to representing himself at the sentencing hearing and requested appointment of conflict-free counsel. Appellant also renewed his motions, including the Motion For Disqualification of the court. These requests were denied by the court (R-5927-5928).

The court then made the following statement to the jury:

THE COURT: I have been asked to explain the absence of Mr. Boudreau, whom you will remember, who was Mr. *Amos'* attorney.

Mr. *Amos*, in a hearing we held yesterday, indicated that he wanted to discharge Mr. Boudreau.

Of course, he is aware that he is entitled to be represented by counsel, that counsel being Mr. Boudreau, who is ready, willing, and able to serve him.

But he doesn't want Mr. Boudreau. And I can't force it on him.

So he is going to fly this airplane by himself.

I think we caught him a little flat-footed. He has some depositions he needs to review that were delivered to him only this morning. So we are going to take a ten minute recess.

You folks get a cup of coffee, and we will be ready. And you will stay in here, and --

Vernon, you read your depositions. (R-5928-5929).

A short recess was then taken. The court then requested Appellant to present his evidence in mitigation. Appellant indicated that without an attorney he could not put on any evidence (R-5929-5930). The State presented its argument to the jury. The prosecutor told the jury that emotions and sympathy should play no part in determining a sentencing recommendation. (R-5931). In her argument, the State called attention to the fact that Appellant was not represented by counsel and told the jury that should not play a part in their decision. (R-5932). The prosecutor argued that the aggravating factor that the Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence was a two-pronged aggravating factor. (R-5933-

5936).

Following argument by the State, the court offered the Appellant the opportunity to make argument. The Appellant indicated that he had not had sufficient time to prepare and that he had not read depositions which he had just received that morning and he could not go forward with any argument. (R-5956). The court then instructed the jury, and they retired to consider a verdict. (R-5957-5964).

Following deliberations, the jury returned the following verdicts: As to Count 1, in the death of Alan McAninch, a recommendation of life imprisonment without the possibility of parole for twenty-five years by a vote of six to six; in Count 5, as to the death of Robert Bragman, a recommendation of the death penalty by a vote of nine to three. (R-47-48).

On April 10, 1990, Appellant again indicated that he wanted and needed conflict-free court-appointed counsel but had a conflict with Craig Boudreau, his court-appointed trial counsel. Appellant indicated that he did not want to represent himself but did not trust Mr. Boudreau. The court refused to appoint counsel and forced Appellant to continue to represent himself. (R-5974-5976).

The State called Jay Mullens, who testified as to fingerprint evidence of prior convictions for sentencing in the non-homicide counts. (R-5978-5981). The State then presented legal argument as to why a sentence of death should be imposed for both Count 1 and Count 5. (R-5981-6009). The court then inquired of Appellant whether he wanted to present evidence of wait for a presentence

investigation which had yet to be received. Appellant indicated that he wished to wait. **(R-6009-6010).**

On May 14, 1990, Appellant appeared for sentencing. Appellant again requested conflict-free counsel. That request again was denied. **(R-6028).**

The Appellant was sentenced as follows: Count 1, First Degree Murder - life imprisonment with no possibility of parole for twenty-five years; Count 5, First Degree Murder - a sentence of death; Count 2, Robbery with a Firearm - life imprisonment; Count 3, Attempted First Degree Murder - life imprisonment; Count 4, Robbery with a Firearm - life imprisonment; Count 6, Robbery with a Firearm - life imprisonment; Count 7, Aggravated Assault with a Firearm - life imprisonment; Count 8, Robbery with a Firearm - life imprisonment. All sentences were to run consecutively to each other. **(R-6029-6033).**

The court issued a written order on May 14, 1990 setting forth findings upon which the sentence was based pursuant to F.S. **921.141. (R- 6653-6661).**

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

POINT I

THE TRIAL COURT ERRED IN PRECLUDING APPELLANT FROM CONSULTING WITH HIS COUNSEL DURING TRIAL WHICH VIOLATED APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant submits that he was denied his Sixth Amendment Right to Effective Assistance of Counsel and his right guaranteed under the Florida Constitution when the trial court precluded Appellant from consulting his attorney during a one hour long trial recess which occurred prior to the state's cross-examination of Appellant. Upon the conclusion of Appellant's testimony on direct examination, Appellee requested a recess for lunch prior to beginning cross-examination because of what Appellee's anticipates will be a lengthy cross-examination. (R-5556). Prior to the recess, Appellee requests that the Court remind Appellant:

> "He cannot talk to his attorney, because he on the stand, because I am concerned Vernon [Appellant] will approach Craig [Appellant's counsel] on his own."

(R-5556).

Appellant's counsel argues the point, and expresses his desire to confer with his client.[1] Then the Court rules that counsel may not talk with Appellant. (R-5557).

Several cases have required reversal where a defendant had been denied the right to consult with counsel during a court recess. In Bova V. Dugger, 858 F.Ed.2d 1539, (11th Cir. 1988), the

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[1] Undersigned counsel files a motion to supplement the record on appeal with the filing of Appellant's initial brief. Affidavits from Appellant's trial counsel, Craig Boudreau, Esquire, and from Appellant would reflect Appellant's desire to confer with counsel during the Court recess.

Court held that a defendant is denied the effective assistance of counsel when precluded from consulting with his attorney during a 15 minute court recess. The Court, in relying on United States v. Conway, 632 F.Ed.2d 641 (5th Cir. Unit B 1980), found that any conflict between preventing potential, improper coaching, and the right of a defendant to freely consult with counsel, must be resolved in favor of the Sixth Amendment and the assistance and guidance of counsel. The Court did not consider the "harmless error" standard of review. Additionally, the recess in Bova was found to be "sufficiently long to permit meaningful consultation between defendant and his counsel." Bova, supra at 1540.

In the instant case, Appellant was precluded from conferring with his counsel during a trial recess of approximately one hour. (R-5556, 5562). Appellant's counsel made the court aware of his desire to confer with his client during the lunch hour but was ordered not to speak to him. Aside from the possibility of discussing defendant's testimony during a one hour recess, the time period was certainly long enough to allow the attorney and his client to confer about other aspects of the case. Even if this Court were to apply harmless error analysis, to confer over a one hour period concerning the defendant's case in general, cannot be deemed harmless. It has been held that a criminal defendant's right to counsel encompasses the right to consult with his attorney during any recess, even if the recess occurs in the middle of the defendant's testimony. See Thompson v. State, 507 So.2d 1074, 1075 (Fla. 1987) and Kingery v. State, 523 So.2d 1199 (1st DCA 1988) and

Cabreriza v. State, 517 So.2d 51 (3rd DCA 1987). It cannot be disputed that the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. A defendant requires the guiding hand of counsel at every step in the proceedings against him. Powell v. Alabama, 287 **U.S.** 45, 53 S.Ct. 55, 77 L.Ed 158 (1932).

Several of these federal cases have expressed concern with the possibility of witness coaching during a recess where an attorney confers with his client. In Crutchfieldv. Wainwright, 803 F.Ed.2d 1103 (11th Cir. 1986), the Court dealt with this concern.

> We have explored the possibility that the instruction in this case "Don't talk about your testimony", is appropriate because it is narrowly tailored to prevent coaching. Coaching has come to mean improperly directing a witness' testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses. We conclude that the trial court's solution to its concern about coaching could not take the form of an admonition against Crutchfield consulting with his counsel. Id. at 1110.

The U.S. Supreme Court opinion in Perry v. Leeke, 109 S.Ct. 594, (1989) is noteworthy. While the Court held that a 15 minute recess called at the conclusion of the defendant's direct testimony did not violate defendant's Sixth Amendment right to effective assistance of counsel the Court noted that a longer recess would encompass matters that go beyond the content of the defendant's own testimony, matters that the defendant does have a constitutional right to discuss with his lawyer such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea **bargain. It** is the defendant's right to unrestricted access

to his lawyer for advice on a variety of trial related matters that is controlling in the context of a long recess. See Geders v. United States, 425 U.S. 80, 88, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592. The Court also noted that it would be appropriate to permit even such brief consultations as a matter of discretion in individual cases or as a matter of law in the States. The Court's decision rested only on its basis in the Federal Constitution.

Again, Appellant was denied the opportunity to confer with his counsel regarding other matters concerning his case such as trial tactics and the availability of witnesses, matters which could have been discussed during this one hour recess. As such, the denial of effective assistance of counsel to Appellant cannot be deemed harmless error. Accordingly, Appellant's conviction must be reversed.

POINT II

TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO SILENCE BY ALLOWING PROSECUTOR TO COMMENT UPON APPELLANT'S FAILURE TO OFFER EXCULPATORY STATEMENTS PRIOR TO TRIAL.

It is well settled that Court's must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also State v. Kinchen, 490 So.2d 21 (Fla. 1985) and Starr v. State, 518 So.2d 1389 (Fla 4th DCA 1988). In the instant case, the state continually comments on the defendant's failure to make certain post-arrest exculpatory statements. Such comments were made during cross-examination of defendant's testimony during trial and during the state's closing argument. Appellant's objections to such comments were overruled and Appellant's motion for mistrial regarding the comments made by the prosecutor during closing argument was denied.

During Appellant's direct testimony, Appellant stated that he knew how to open a cash register draw from his prior experience of working at a grocery store. This testimony was offered to support Appellant's statement that he deliberately did not open the cash register following Spencer's command to do so. Upon cross-examination of Appellant, the state asked "You never told Sgt. Dowdell at all about the fact that you now stated that you knew how to open the register, you just jammed it up purposefully?" Appellant's objection was overruled. Further in cross-examination of Appellant, the state again comments on Appellant's post-arrest

silence in asking Appellant in essence why he did not tell Detective Fitzgerald in 1986 in a previous statement that the gun had misfired. Finally, in closing argument, argued to the jury that:

> He [Appellant] even had to admit in his testimony that Leonard Spencer got out of there. He was diving out of that car just as fast as the defendant was diving head first out of the car. Leonard Spencer got out of there as fast as he could, just as fast as this man was doing his best to get out of there.
>
> He doesn't stop **and** say, "Officer, what happened to those poor people back there? Can we get them some medical **attention?"** Or, **"I'm** having this horrible asthma attack. Please help me."

Appellant**'s** counsel objects and requests to approach the bench, both of which are denied by the Court. Following completion of the state's closing argument, Mr. Boudreau states his objection that he was not able to make earlier during the state's argument. Appellant's counsel states that his objection is based upon the state's direct comment upon Appellant's right to remain silent. Appellant's motion for mistrial on these grounds was denied.

The test to determine whether the prosecution's remarks amount to a comment upon the defendant's right to remain silent is as stated by the Kinchen, supra, whether the remark is fairly suspectable of such an interpretation by a jury. See also David v. State, **369** So.2d 943 (Fla. 1979). They stated that the prosecution is not permitted to comment upon a defendant's failure to offer an exculpatory statement prior to trial, since this would amount to a comment upon the defendant's right to remain silent.

Molina v. State, 447 So.2d 253, 256 (Fla. 3rd DCA 1983); review denied 447 So.2d 888 (Fla. 1984). *See* also Lee v. State, 422 So.2d 1928 (Fla. 3d DCA 1982); review denied 431 So.2d 989 (Fla. 1983) and Weiss v. State, 341 So.2d 528 (Fla. 3d DCA 1977).

In Hosper v. State, 513 So.2d 234 (Fla. 3d DCA 1987), the defendant Hosper admitted his guilt as to a marijuana charge at trial in order to explain why he appeared to be nervous at the train station upon his arrest. The prosecution there sought to attack Hosper's credibility by questioning him as to why he never admitted this previously. The Court noted that had the jury believed this exculpatory statement, it might have found the remaining evidence consistent with Hosper's hypothesis of innocence. Therefore, the Court found that the improper comment had an effect upon the outcome of the trial, and the error was not harmless.

Similarly, in the case sub judice, had the jury believed Appellant's testimony, which was consistent with his post-arrest statements, they may have found a reasonable hypothesis of innocence. The prosecutor's comments on silence were especially critical since Appellant's testimony was the only evidence that could explain Appellant's theory of duress and coercion by the co-defendant Spencer. Additionally, the fact that Appellant answered a few questions post-arrest does not constitute a waiver of his Fifth Amendment privilege. Miranda states that an individual can invoke his right to remain silent "at any time prior to or during questioning." Miranda v. Arizona, 384 U.S. 436, 473-474, 86 S.Ct.

1602, 1627-1628, 16 L.Ed.2d 694 (1966).

Finally, in State v. Smith, 573 So.2d 306 (Fla. 1990) this Court reversed a conviction of a defendant were the prosecution solicted answers from a state witness concerning exclupatory comments not made by the defendant in a post-arrest statement. The Court found the Smith case similar to the facts of Starr v. State, supra, wherein a defendant charged with trafficking in cocaine failed to explain to the police how he acquired the contraband. The Court held that the state's comment to the jury several times about the defendant's failure to explain possession was constitutional error. This Court also cited Murphy v. State, 511 So.2d 397 (Fla. 4th DCA 1987) wherein it was constitutional error in argument and testimony concerning a witness' statement that he did not hear the defendant deny ownership of cocaine found in defendant's car. The defendant's conviction was overturned. Likewise, Appellant's conviction herein must be reversed.

POINT III

THE ERRONEOUS EXCLUSION OF PROSPECTIVE JURORS FOR CAUSE ON THE BASIS OF THEIR OBJECTIONS TO THE DEATH PENALTY, VIOLATED APPELLANT'S RIGHT TO A FAIR *AND* IMPARTIAL JURY GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Appellant submits that the trial court erroneously excluded prospective, qualified jurors for cause, based solely upon their views on the death penalty. Under the law in Witherspoon v. Illinois, 391 U.S. 510, *88* S.Ct. 1770, 20 L.Ed.2d 776, **and** its progeny, the right to an impartial jury under the Sixth and Fourteenth Amendments, prohibits the exclusion of prospective jurors for cause in capital cases unless their opposition to the death penalty would prevent or substantially impair the performance of their duties as jurors. During voir dire of Appellant's trial, several qualified jurors were excluded for cause. The record reflects that almost all of the prospective jurors who voiced any objection to capital punishment were excused for cause by the trial court. Of those jurors, some indicated, upon a brief questioning, that they could not vote for the death penalty. Others of those stricken indicated only that they were uncertain about their views on the death penalty and their capability to recommend it.

Upon being questioned, one juror, Mr. Vers, responded:

> I don't think I could impose the death penalty or recommend it...I don't know. I really never thought about it, until just this moment. **And** that is the feeling I have." (R-4589).

After further questioning and upon Vers being asked if he could recommend the death penalty in certain circumstances, Mr. Vers replies:

> "I don't know. I guess if it really was an outrageous crime, I guess I could. Right now, my feeling is that I can't." (R-4590).

Based upon these responses, motion to strike juror Vers for cause was granted by the trial court, over Appellant's objection. (R-4590-91).

Appellant also objected to Appellee's challenge for cause of another prospective juror, Mr. Fitzsimmons. (R-460). Upon being asked how he felt about the death penalty, Fitzsimmons stated "I am opposed to the death penalty." (R-4597). Further inquiry by the court called for a more detailed explanation of Mr. Fitzsimmons views on the death penalty to which the juror replied: "Generally, I am opposed. Under some circumstances, I could see myself choosing that." (R-4598). Later during his colloquy, Fitzsimmons restates his position that he could possibly vote for the death penalty depending an the circumstances. (R-4600). At no point did the prospective juror indicate any commitment to vote against the death penalty.

Another member of the venire, Mr. Emmer, indicated his uncertainty concerning the death penalty. (R-4739-45). Upon excusing Emmer for cause, the court primarily reasoned: „He shilly-shallied on the death penalty." (R-4744). Appellant objected. (R-4743).

None of the three jurors noted above indicated in any way that

their views on capital punishment would prevent them from making an impartial decision on the question of guilt. To permit the exclusion for cause for prospective jurors based upon their views of the death penalty "unnecessarily narrows the cross section of venire members. It stacks the deck against the petitioner. To execute such a death sentence would deprive him of his life without due process of law." Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987) citing Witherspoon, supra.

In Gray, the Court stated that an erroneous exclusion for cause of a prospective juror can never be an isolated incident having no prejudicial effect and can never be treated as harmless error. In an earlier decision the U.S. Supreme Court noted:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCall, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137 (1986).

The Gray court modified this principle, ruling that the exclusion of a juror for cause who is not "irrevocably committed" to vote against the death penalty, regardless of the circumstances, is reversible, constitutional error, which cannot be subjected to harmless error review.

Accordingly, Appellant's conviction must be reversed.

POINT IV

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO STRIKE A GROUP OF TEN PROSPECTIVE *JURORS* WAS REVERSIBLE ERROR *AND* DENIED APPELLANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

The trial court's denial of Appellant's motion to strike a group of ten prospective jurors denied Appellant a fair and impartial trial were some jurors had knowledge of the facts of the case and discussed those facts with other jurors and/or in the presence of other jurors.

During voir dire, one prospective juror, Ms. Stophel, was asked by the Court if she had read anything or learned anything about the case. Ms. Stophel replied "I don't know any - we were just talking about it in the jury room. Somebody said: Does anybody remember?" While Ms.Stophel claimed she could decide the case based on the evidence in the courtroom, the discussion of the facts of the case amongst the jurors cannot be disregarded. Another juror, Mr. Seguin, included in that same panel of ten was asked if he remembered anything about the case. He replied that he had, noting several facts of the case. Upon being asked by the Court if he had discussed any of the facts with the other jurors, he replied "No. In fact - no. Some of them were saying, I have lived here since before '56 or '66, I don't remember it."

It is apparent from Mr. Sequin's comments that discussion in fact was had about the facts of the case.

After it was revealed that the jurors had discussed the facts

of the case, Appellant's counsel below stated

> I guess this just goes to show why I say jurors don't do what the Court said. They went back there and asked each other. The whole panel disobeyed the Court's instruction, and I ask you to strike this whole group of ten.

Thereupon, the Court replied

> No way. My kids don't listen when I talk to them, believe me.

(R-4575).

It is fundamental to a fair trial, that the verdict be based on the evidence developed at trial. See Turner v. Louisiana, 379 **U.S. 466, 85** S.Ct. **546, 13** L.Ed.2d **424 (1965)** and Irvin v. Dowd, **366 U.S. 717, 81 S.Ct. 1639, 6** L.Ed.2d **717 (1961).** In commenting on the principal, the Fifth Circuit Court of Appeals stated:

> It is of course "the very stuff of the jury system" (citing Irvin) for the jury to exercise its collective wisdom and experience in dissecting the evidence properly before it; and in this process the crass pollination of opinion, viewpoint, and insight into human affairs is one of the jury's strengths. But this does not include communication from one juror to another of objective, extrinsic facts regarding the criminal defendant or his alleged crimes.

United States v. Howard, 506 F.2d 865 at 867 (5th Cir. 1975).

The Howard court held were there is a reasonable possibility of prejudice **to** a defendant when **jurors** consider extrinsic evidence, a new trial is required. Accordingly, the Appellant's conviction must be reversed.

POINT V

THE TRIAL COURT ERRED WHEN, DURING JURY SELECTION, IT MISSTATED THE LAW ON FELONY MURDER.

During jury selection, some jurors raised questions about the felony murder rule and indicated they would have trouble recommending the death penalty where the defendant's involvement was partial or slight. In an attempt to clarify the rule, the Court misstated the law on felony murder. The Court stated:

> Look. Obviously, in a felony murder situation, if you get to the penalty phase, you will consider the extent, as Dr. Nabut, the extent of the persons involvement. And this is a fair consideration for you, to give you, perhaps, the extremes, people that, you know, go in with the intention of committing a robbery, but with the expectation, at least, on the part of one, that there will be no violence, and the other one killed someone. Gee, I didn't even know you had a gun. That is terrible. That is something you ought to take into account. But the other said, let's say, my guy in New York, and the crime is being committed in Miami, and the guy in Miami has a gun, and commits a murder in Miami. The one in New York didn't pull the trigger, but the extent of the involvement that he had is the same. How do you want to view those two people? I don't know. There is - you are the cross section of the community, and it is up to you.

The Court later stated to the jury:

> You know, they have asked me to be sure you understand that when I was discussing the two individuals, the guy in New York and - he was involved in the robbery, we are talking about the second phase of the trial, the extent of punishment. My remarks are restricted to that, not the issue of guilt or not guilt. OK?

The Court seems to confuse Phase II with the felony murder

rule saying that the factors the Court had previously mentioned should be considered at Phase II and not with regard to Phase I, specifically felony murder. What the Court essentially did was tell the jury that they could not consider these circumstances without regard to Phase I. Yet these are elements of Phase I felony murder which must be considered at trial. In Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986) a similar error was committed during jury selection when the prosecutor there attempted to elicit from the prospective jurors whether they had any preconceived notions as to premeditation at the time required to form the design to kill. The prosecutor defined premeditation as "killing after consciously deciding to do so" and "operation of the mind." The definition did not include reflection, the integral second requirement for premeditation. Citing Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The Waters court held that the trial court erred by allowing the prosecutor to follow this questioning over the defense counsel's objection and this permitted an improper definition of premeditation to form in the minds of the jurors. Id. at 615.

In the instant case, the Court's misstatement of the law regarding felony murder permitted an improper definition of the felony murder law to form in the mind of the jurors. This was especially critical in light of the fact that jurors were confused about the felony murder rule to begin with as evidenced by their questions to the attorneys. Such error cannot be harmless and

Appellant's conviction must be reversed.

POINT VI

THE **TRIAL COURT ERRED BY LIMITING APPELLANT'S RE-DIRECT EXAMINATION ON A MATTER RAISED BY THE STATE DURING RE-CROSS EXAMINATION**

The law is clear that testimony which tends to qualify, explain, or limit cross examination testimony is admissible on re-direct. Tompkins V, State, **502** So.2d 415 (Fla. 1986). Hinton v. State, 347 **So.2d 1079** (Fla. 3d **DCA)**, cert. denied, 354 So.2d 981 (Fla. 1977); and Tampa Electric Company V. Charles, 69 Fla. **27**, 67 So. **572** (1915). **In** the trial below, the Court allowed the prosecution on re-cross examination to ask Appellant if he had a complete opportunity to make a statement on tape and if there was anything he wanted to add to the statement. This questions was asked by the prosecution in an attempt to prove that there were certain statements made by the defendant on direct testimony during trial that were not made during the taped statements back in 1986 at the time of Appellant's arrest. On re-direct examination, the defense attorney elicited testimony from Appellant to the effect that the taped statement was 60 minutes long. Defense counsel then asked Appellant how many hours he spoke with detectives that were not, in fact, recorded on the tape. To that, the prosecution objected because it was beyond the scope of the question asked on re-cross examination. The prosecution's objection **was** sustained by the Court over Appellant's objection that the re-direct testimony **was** relevant to the question asked on re-cross.

Defense counsel's question was in fact relevant to the matter

raised by the prosecution on re-cross examination. By limiting Appellant's testimony on re-direct, the trial court denied Appellant the right to explain, that the reason certain statements were not found in the taped statement made by Appellant in 1986, was because the statements and questions arose during the hours of interview by detectives that were unrecorded. Again, the rule is that testimony is admissible on re-direct which tends to qualify, explain, or limit the cross examination testimony. It is clear that defense counsel's question was an attempt to explain the matter or inference raised by the state during re-cross examination.

In Tompkins, supra, defense counsel asked the murder victim's mother on re-cross examination to confirm that the victim had never complained to her mother about the defendant making any type of sexual advances. To which the witness replied, "She never." On re-direct examination, the prosecution asked whether the victim had voiced any complaint about the defendant in February of 1983. The trial court permitted the witness to testify that the victim, her daughter, had begged her not to go back with the defendant Tompkins. The trial court found that the defense had opened the door to this testimony. A ruling, which was upheld by this Court.

Accordingly, Appellant should have been allowed to testify to the matters raised on re-cross examination. Because the trial court did not allow this testimony, Appellant's conviction must be reversed.

POINT VII

THE COURT ERRED IN FAILING TO CONDUCT AN INQUIRY INTO THE COMPETENCY OF A STATE WITNESS

After the defense rested its case below, prosecution called Edward Cain as a rebuttal witness. Appellant challanged the capacity of the witness to testify and requested that the Court conduct a hearing based upon the witness' prior statements wherein he had expressed severe hallucinations which prevented him from "differentiating between reality." The Court refused to conduct such an inquiry.

Florida courts have held that a defendant may challange the capacity of a witness against him. Hightower v. State, 431 So.2d 289 (Fla 1st DCA 1983); Cruz v. State, Fla 1st DCA 1983, case number AJ-349, opinion filed 14, April 1983; and Murrell v. State, 335 So.2d 836 (Fla. 1st DCA 1976).

In Sinclair v. Wainwright, 814 F.Ed.2d 1516 (11th Cir. 1987) the Court found that it is the duty of the Court to make an examination as to competency once challanged by a party. The Court added that if the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness. Citing Hills v. Henderson, 529 F.Ed.2d 397, 401 (5th Cir.), cert. denied, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). The Court added "this is not to say that every illusion as to competency of a witness is to be exhaustively explored by the trial judge, particularly wHere all other evidence substaniates

competency." Citing United States v. Crosby, 462 F.Ed.2d 1201, 1203 n.5, DC Cir.(1972). In the instant case, Edward Cain testimony could not be ignored. It was the only evidence produced that directly rebutted the defense's theory of duress and coercion on the part of the co-defendant Spencer. Surely this testimony was crucial. The Sinclair court stated:

> Only by a reasonable exploration of all the facts and circumstances could the trial judge exercise sound discretion concerning the competency of the witness **and** the findings of the court with respect to competency should have been made to appear on the record. The record reflects no searching exploration and no stated reasons for overruling Appellant's competency objections. In such circumstances were are obliged to remand for determination on the record of the competency of the witness Cleveland Speights. If the witness was competent, then Appellant should suffer adverse **judgment** on his due process claim. If the witness was incompetent, then unless admission of his testimony **was** harmless beyond a reasonable doubt, a violation of due process should be found and judgment entered accordingly.

Accordingly, Appellant requests his case be remanded for a determination on the record of the competency of the witness Edward Cain.

POINT VIII

THE TRIAL COURT ERRED BY NOT PERMITTING APPELLANT'S DEFENSE ATTORNEY TO COMMENT, DURING CLOSING ARGUMENT, ON THE PROSECUTION'S FAILURE TO CALL A WITNESS WHERE APPELLANT HAD IN FACT CALLED THAT WITNESS ON DIRECT EXAMINATION DURING APPELLANT'S CASE IN CHIEF.

During Appellant's case in chief, Appellant called Joseph Batchelor as a witness to the stand. Batchelor was an eye witness to the events that occurred in the parking lot at the English Pub. Batchelor was also a witness who was available to both the prosecution and defense. However, he was not called by the state. The defense attorney argued to the jury during closing argument that the prosecution had tailored the evidence by not calling a witness in their case in chief; Joseph Batchelor. Defense counsel argued that Appellant had called the witness because the jury had a right to hear all of the evidence. The Court interjected and inquired of the state. To which the state objected to defense counsel's remarks. The objection was sustained by the Court. The court told defense counsel he could not blame the state for failing to call the witness. Defense counsel agreed with the general rule but noted that he in fact had called Batchelor as a witness. The court, on its own motion, gave a curative instruction to the jury which noted:

> I have sustained the objection, here's why. The state and defense have equal access to these witnesses. The state has no obligation to call every single witness or produce every single item of evidence. They have an obligation to prove their case beyond and to

> the exclusion of every reasonable doubt. If they don't reach that burden, certainly you should find the defendant not guilty. But it is up to them when to decide when they think they have produced enough evidence.
>
> Maybe an analogy is a crime committed in the Orange Bowl with everybody watching. YOU don't have to call everybody in the Orange Bowl. You can't draw an inference from a failure to call everyone who is in attendance there. OK.

While the law is clear that when witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. State v. Michaels, 454 So.2d 560, 562 (Fla. 1984) and Haliburton v. State, 561 So.2d 248 (Fla. 1990). Florida courts have also held that an inference adverse to a party based on the party's failure to call the witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction. Martinez v. State, 478 So.2d 871 (Fla. 3d DCA 1985), review denied, 488 So.2d 830 (Fla. 1986).

While it is true that witness Joseph Batchelor was available to both the state and defense it must be noted that the defense counsel did in fact call Bachelor as a witness, distinguishing the rule on availability of witnesses. Further, Batchelor was an eye witness to the events occurring at the English Pub and his testimony did in fact elucidate the events that transpired. Appellant should not have been denied the opportunity to comment on the prosecution's failure to call this important witness in their case in chief. Therefore, Appellant's conviction must be

reversed.

POINT IX

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO OFFER INTO EVIDENCE SEVERAL GRUESOME PHOTOGRAPHS AND SLIDES OF THE VICTIMS WHERE THE PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE

It has long been the rule that the admission of gruesome photographs into evidence is permitted only when the probative value is not outweighed by the danger of unfair prejudice. Burney v. State, 579 So.2d 746 (Fla. 4th DCA 1991); Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990); Bush v. State, 461 So.2d 936 (Fla. 1984), cert. **denied** 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986) and Czubak v. State, 570 So.2d 925 (Fla. 1989).

During the state's case in chief, during the testimony of medical examiner James Benz, the state introduced over 15 photographs of the victims. At one point during Benz' testimony the state introduced eight slides of the victims which were projected on the wall in the courtroom. Over several objections and a motion for mistrial by Appellant's attorney at trial, the Court allowed the photographs into evidence along with the slides. Many of the photographs and slides did not assist the medical examiner in explaining the victims' wounds or the cause of death to the jury. They were duplicitous. There was other evidence in the record which showed the path of the bullets for both victims Bragman and McAninch and the medical examiner could have testified without the use of the photographs. Further, the state did not

show the necessity for the admission of those photographs and especially, the state failed to explain the need for blowing up the photographs and projecting them through slides onto the courtroom wall. The Appellant contends that the danger of unfair prejudice far outweighed the probative value of the photographs and slides and was thus he was denied a fair trial. Appellant requests that his conviction be reversed.

POINT X

THE TRIAL COURT ERRED BY FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION ON MERE PRESENCE.

The law is clear that mere presence at the scene of the crime, without more, is insufficient to establish either an intent to participate or an act of participation. J.H. v. State, 370 So.2d 1219 (Fla. 3d DCA 1979), G.C.v. State, 407 So.2d 639 (Fla. 3d DCA 1981), Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978), Horton v. State, 442 So.2d 1064 (Fla. 1st DCA 1983), Statton v. State, 519 So.2d 622 (Fla. 1988) and West v. State, 16 F.L.W. D2287 (Fla. 4th DCA 1991). During the charge conference, Appellant requested a jury instruction on mere presence which stated:

> Mere presence at the scene of a crime, including driving a perpetrator to and from the scene, or display of questionable behavior after the fact, is not sufficient to establish intent to participate or an act of participation. (See Defendant's Second Proposed Jury Instruction. R - 6487).

During the trial below the state failed to present any evidence of Appellant's intent to participate in the robbery nor did they present any evidence that Appellant had ever possessed a gun. The evidence deduced at trial showed only that Appellant was present at the scenes of the crimes with co-defendant, Leonard Spencer. At the most there was only circumstantial evidence of Appellant's behavior which may have been questionable. However, Florida law has held that neither knowledge that the offense is being committed nor mere presence at the scene nor a display of

questionable behavior after the fact is equivalent to participation with criminal intent. Collins v. State, 438 So.2d 1036 (Fla. 2d DCA 1983). In Stuckev v. State, 414 So.2d 1160 (Fla. 3d DCA 1982) the Court concluded that the defendant's conduct in driving the actual perpetrator to the scene of the crime in combination with other questionable after-the-fact behavior was insufficient to sustain a conviction even though such evidence might suggest guilt. Such evidence was held to be insufficient as a matter of law to exclude a reasonable hypothesis of Stuckey's innocent presence at the scene that could be drawn from the same evidence.

The facts of the instant case are similar to those in Stuckev wherein Appellant's innocent presence at the scene was an inference that could have been drawn from the evidence deduced at trial. As the law is clear on this point, the Court erred by failing to give Appellant's written requested instruction and thus Appellant's conviction must be reversed.

POINT XI

THE TRIAL COURT ERRED BY FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION ON THE LIMITED USE OF REBUTTAL EVIDENCE

Florida law holds that when evidence is inadmissible for one purpose but admissible for another, the court, "upon request, is required to instruct the jury as to the limited purpose for which the evidence is received." §90.107 F.S. (1985). Mazzara v. State, 437 So.2d 716 at 719 (Fla. 1st DCA 1983). Following the testimony of state's rebuttal witness Edward Caine and during the charge conference, Appellant requested such an instruction to the effect that rebuttal testimony cannot be used as substitutive evidence. Appellant's request was predicated on the rebuttal testimony of Edward Caine who was the only witness to rebut Appellant's theory of duress and coercion by Leonard Spencer. In denying Appellant's request, the trial court stated that "Evidence is evidence. It doesn't matter if it is rebuttal evidence. You couldn't ask a jury to make that mental distinction. I don't think they are capable of it."

The 1st District Court of Appeal held that in the event a witness' statement meets the criteria for adverseness, his prior inconsistent statements are admissible for impeachment purposes, but may not be used as substantive evidence. Citing Jackson v. State, 451 So.2d at 463; Austin v. State, 461 So.2d 1380 at 1383 (Fla. 1st DCA 1984); and Mazzara, supra at 719.

In the case of Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988), the court held:

> After declaring the state's witness partially adverse, the trial court improperly **denied** defense counsel's request for a limiting instruction. The admission of the witness' deposition and testimony, without an instruction to jury as to the limited purpose for which the evidence was being received, permitted the state to **use** what could fairly be termed affirmatively prejudicial testimony as substantive evidence in closing argument. Since **we** are unable to say, beyond a reasonable doubt, that the state's subsequent use of this testimony as substantive evidence did not affect the verdict, the trial court's ruling on this point must be considered harmful. Citing State **v.** DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). See also Pitts V. State, 333 So.2d 109 (Fla. 1st DCA 1976)

Since witness Edward Caines' rebuttal testimony was the only evidence the state offered to rebut the defense's theory that Appellant acted under duress and coercion by the co-defendant, Leonard Spencer, the testimony of Caine was critical. As such, the error cannot be considered harmless. Appellant's conviction must accordingly be reversed.

POINT XII

THE TRIAL COURT ERRED IN FAILING TO DIRECT A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF THE DEFENSE CASE BASED UPON THE INSUFFICIENCY OF THE EVIDENCE.

At the close of the state's case, defense counsel moved for a Motion of Judgment of Acquittal based upon the fact that the state had shown no more than Appellant's mere presence at the scene. Throughout the state's case there was no evidence that Appellant had intended to participate in the robbery nor was there any evidence that Appellant ever possessed a gun. The state further could not prove that the Appellant had any direct participation in the crimes alleged.

The testimony of Appellant during direct examination concerning his theory of defense, that being that he was under duress and was coerced by co-defendant Leonard Spencer because Spencer had held a gun on him, was not refuted by any direct or substantive evidence produced by the state.

This Court held in Staten v. State, 519 So.2d 622 (Fla. 1988) that in order to be convicted as a principle for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. Id. at 624. *See* also Florida Statute, §777.011 (1985); Collins v. State, 438 So.2d 1036 (Fla. 2d DCA 1983). The holding in Staten noted that neither knowledge that the offense is being committed nor mere presence at the scene nor display of

questionable behavior after the fact is equivalent to participation of criminal intent. 519 So.2d at 624. See also Collins, 438 So.2d at 1038 n.3. Further, in Stark v. State, 316 So.2d 586 (Fla. 4th DCA 1975) cert. denied 328 So.2d 845 (Fla. 1976). It was held that when the state relies on the aiding and abetting theory, it can prove intent either by showing that the defendant had a reckless intent himself or that he knew the principal had that intent. Although the evidence of intent may be circumstantial, it must exclude every reasonable inference that the defendant did not intend to participate in criminal activity. Citing Stuckev v. State, 338 So.2d 33 (Fla. 3d DCA 1976). The facts of the instant case are similar to those in Stuckey wherein the Court considered facts that are similar to this case and concluded that the defendant's conduct by driving the actual perpetrator to the scene of the crime in addition to other questionable after the fact behavior was insufficient to sustain a conviction even though the evidence might suggest guilt. The Court held that the evidence was insufficient as a matter of law to exclude a reasonable hypothesis of Stuckey's innocent presence at the scene, an inference that could have been drawn from the evidence. In West v. State, 16 F.L.W. D2287, a similar conclusion was made by the Court wherein the lack of sufficient evidence, direct or circumstantial, of West's intent to participate in a robbery precluded his conviction for murder in the shooting death that occurred during the robbery. Accordingly, Appellant requests that his conviction be reversed.

POINT XIII

THE TRIAL JUDGE ERRED BY NOT GRANTING APPELLANT'S PRO SE MOTION FOR DISQUALIFICATION

The rule is clear that when a party to any proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of prejudice by the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in a manner prescribed by the laws of this state for the substitution of judges at the trial of the cause in which the presiding judge is disqualified. Every such affidavit shall state the facts and reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel that such affidavit and application are made in good faith. 538.10 Florida Statutes.

Appellant's pro se motion complied with this rule in that Appellant alleged acts of a judge which would result in his denial of a fair trial. See (R-6581-90). Appellant further complied by filing the appropriate affidavits and a certificate of good faith.

During a hearing prior to sentencing where Appellant appeared pro se, Appellant inquired as to the status of his motion for disqualification. When Appellant asked on what grounds the Court had denied his motion, the Court responded "because I didn't want to do it." Since Appellant's motion was legally sufficient, it could only be determined that the judge went beyond the sufficiency

of the motion in denying such motion. The law is clear that going beyond the sufficiency of a motion for disqualification is improper. Fruehe v. Reasbeck, 525 So.2d 471 (Fla. 4h DCA 1988), MacKenzie v. Super Kids Bargain Store, Inc, 565 So.2d 1332 (1990), and Lake v. Edwards, 501 So.2d 759 (Fla. 5th DCA 1987).

Based upon the foregoing authority, Appellant submits that his sentence be vacated.

POINT XIV

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL

The penalty jury instructions assure arbitrariness. They simply repeat the vague words of the statute for each aggravator which is insufficient to guide discretion. See Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990); Cartwright, 486 U.S. 356, 363-4. In Shell v. Mississippi, 111 S.Ct. 313 (1990), the Court held a much more extensive definition of HAC did not pass constitutional muster. Since this Court ordered the vague short instruction be read, see Pope, 441 So.2d at 1078; Lemon v. State, 456 So.2d 885, 887 (Fla. 1984), Florida's statute, as construed, is unconstitutionally vague. Although the instruction read to the jury differed, it still contained vague disjunctive phrases condemned by the Supreme Court in Shell. R 796. Mr. Amos' jury, in reasonable probability, relied on the vague disjunctives to consider evidence which was not statutory or constitutionally appropriate aggravation. The denial of the special requested jury instruction defining HAC to require a purpose to torture was error. R 2607, 706. See also Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) (HAC lessened by irrational frenzy; instruction refused at 2640, 717). The jury had unbounded discretion in deciding penalty. See Jones, 569 So.2d at 1238. The aggravator instruction also allowed unchannelled discretion. Florida refuses to require trial courts to define the underlying felonies in this felony aggravator. See Hitchcock v. State, 16 F.L.W. S23, S26 (Fla. December 20, 1990). The jury was never told the definition of the felony aggravators.

R 795. Such uncontrolled discretion, a result of judicial decision-making, violates due process and the prohibition against cruel and unusual punishment.

A verdict by a bare majority violates due process and prohibition against cruel and unusual punishment. This error harmed Mr. Amos since his jury voted for death by a vote of 9 - 3. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356 (1972); Burch v. Louisiana, 441 U.S. 130 (1979); cf. Parker, 111 S.Ct. 731 (appellate review must comport with the Eighth Amendment); Anders v. California, 386 U.S. 736 (1967) (although no constitutional right to appeal, appeal granted by state law must comply with due process). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority. This unreliable procedure, unique among the jurisdictions, must be struck as violating due process and the prohibition against cruel and unusual punishment.

In Proffitt V. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. In Parker, 111 S.Ct. 731, the Supreme Court reaffirmed this requirement. History has shown that intractable ambiguities in our statute have prevented the sort of evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Refusing to reweigh the aggravating and mitigating evidence calls

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

Florida has institutionalized disparate application of aggravating and mitigating circumstances by erecting the contemporaneous objection rule to **bar** valid claims.[3] See, e.g., Rutherford v. State, **545** So.2d **853** (Fla. 1989); Grossman v. State, 525 So.2d **833** (Fla. 1989); Smallev v. State, 546 So.2d 720 (Fla.

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2 Mr. Elledgemovedto declare the statute unconstitutional on this ground and **for** an evidentiary hearing. R ***1512, 2384.*** The state opposed both motions. **R 1626,** 2376. The trial court denied both. R. ***2375,* 32.** This **court** must at least order an evidentisry hearing be held to protect Mr. Elledge's rights to due process, freedom from cruel and unusual punishment, and counsel.

3 In Elledge v. State, ***346* So.2d *998,* 1002** (Fla. 1977), **this** Court **held** that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of **review"** in capital cases. Mr. Elledge contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

1989). Use of retroactivity principles works similar mischief. See Myers v. Ylst, 897 F.2d 417 (9th Cir. 1990). This system arbitrarily denies meaningful appellate review of death sentences, contrary to due process and the prohibition of cruel and unusual punishment. Cf. Parker, supra.

The trial court below instructed the jury it must find mitigating evidence reaches a 'reasonably convincing' burden of proof before giving any consideration to it. R 5960. The court refusedto eliminate this unconstitutional burden of proof. If not reasonably convinced the evidence establishes the circumstance, then the evidence is ignored. Ignoring evidence not meeting the reasonably convinced standard is the law in Florida for both juries and judges. See Fla.Std.Jury Instr. (Crim.) Penalty Proceedings -- Capital Cases; Campbell, 571 So.2d 415; Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986). This Court recently equated this burden with the greater weight of the evidence test. See Campbell, supra; Nibert, 574 So.2d at 1061. When there is a reasonable likelihood, a standard of certainty greater than a possibility but less than more-likely-than-not, that the finder of fact has been precluded from considering mitigating evidence, the law violates the Eighth Amendment. See Boyd v. California, 110 S.Ct. 1190, 1198 (1990). Thus, instructing the fact-finder to reject mitigating circumstances under a burden of proof more stringent than reasonable likelihood, as defined in Boyd, unconstitutionally restricts consideration of mitigating evidence. But see Walton, 110 S.Ct. at 3055 (plurality)(states may impose this burden). The

Campbell burden violates this principle; the instructions given below even more so. "Convinced" means certain, not reasonably likely. See State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The instruction below led the jury in reasonable probability to reject the mitigators under an overly stringent burden of proof as defined by both Florida law and the Federal Constitution. Since the trial court presumably usedthe Mischler burden himself, having instructed on it, his findings are also contrary to state law and the Federal Constitution. This court must reverse for resentencing before a properly instructed jury.

The sentencer was selected by a system designed to exclude Blacks from participation as circuit judges, contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the heightened reliability and carefully channelled decision making required by the prohibition of cruel and unusual punishment.[4] This system of purposeful discrimination results in imposing the death penalty based on racial factors. Since Mr. *Amos* was sentenced by a judge selected by a racially discriminatory system resulting in death sentences based on racial factors, this Court must declare this system unconstitutional and vacate the penalty.[5] As the killer of a white, Mr. *Amos* is harmed by this discrimination. When the

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4 These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution and Article I, Sections 1, 2, 9, 16, 17 and 21 of the Florida Constitution.

5 Mr. Amos moved to declare 0921.141 unconstitutional on these grounds and for a hearing on this issue. The court denied both motions. Due process, the freedom from cruel and unusual punishment, and the right to counsel at least require this Court to remand for an evidentiary hearing.

decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, due process and equal protection require that the conviction be reversed and sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment, enforced in part by the Voting Rights Act, Chapter 42 U.S.C. §1973 et al., as wall. The election of circuit judges in circuit-wide races was first instituted in Florida in 1942;[6] before this time, judges were selected by the governor and confirmed by the Senate. 26 Fla. State. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982): McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-7 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated, 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (1984).[7] The history of elections of black circuit judges in Florida, and in Palm Beach County in particular, shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven black circuit judges, 2.8% of the 394 total circuit judgeships; in Palm Beach County, only two of the 30 circuit judges are black. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990. Florida's population is 14.95% black. County

6 For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

7 The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

and City Data Book, 1988, United States Department of Commerce. Florida's history of racially polarized voting, discrimination and disenfranchisement and use of at-large election systems to minimize the black vote shows an invidious purpose stood behind enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-8. It also shows an invidious purpose exists for maintaining this system in Palm Beach County. The results of choosing judges as a whole in Florida establishes a prima facie case of racial discrimination contrary to equal protection and due process in selection of the decision makers in a criminal trial.[8] These results show discriminatory effect which together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida violate the right to vote as enforced by Chapter 42, Unites States Code, 51973. See Thornburg, 478 U.S. at 46-52. This discrimination also violates the needs for heightened reliability and carefully channelled decision making required by the guarantee from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27

8 The results of choosing judges in Palm Beach County, 2 blacks out of 30 positions is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

(1984). Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that the law violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

Mr. Amos' sentencer is selected by a vote of the electors at large in the Fifteenth Judicial Circuit. Consequently, a circuit judge's career is often on the line when deciding whether to condemn a defendant. This system violates the heightened reliability required by the cruel and unusual punishment and due process clauses for death sentencings. "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." In re Murchison, 349 U.S. 133, 136 (1955). Allowing a judge whose salary and position is threatened by the decision to impose a death sentence violates the constitution. See In re Murchison, supra; Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Connally v. Georgia, 429 U.S. 245 (1977). The law must "prevent even the possibility of unfairness." In re Murchison, 349 U.S. at 136. The requirement of freedom from cruel and unusual punishment also requires fact-finders free from pernicious influences. See Ford v. Wainwright, 477 U.S. 399, 416 (1986) (placing decision of competency to be executed in executive branch a "most striking defect" which, among

others, made Florida's procedure to determine that fact unreliable). The judge certainly had a "possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused..." Ward, 409 U.S. at 60. This unfair weight on the judicial scales in favor of the state violates due process and the heightened reliability required for death sentencings by the prohibition against cruel and unusual punishment.'

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9 Mr. Elledge moved that 8921.141 Florida Statutes be declared unconstitutional on these grounds. R 1374, 2366. The state opposed the motion. R 1612, *2364.* The trial court denied it. R 2528, 30.

POINT XV

THE TRIAL COURT ERRED IN FINDING IMPROPER AGGRAVATING CIRCUMSTANCES IN ITS SENTENCE OF DEATH.

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

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

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

D. THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE PRESENTED DID NOT DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

E. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH AS THE DEATH PENALTY IS UNCONSTITUTIONALLY DISPROPORTIONAL PUNISHMENT AS APPLIED TO THIS CASE IN REGARD TO THE CULPABILITY OF APPELLANT

F. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH IN AN ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONALLY DISPROPORTIONATE MANNER WHEN APPELLANT WAS SENTENCED TO LIFE IMPRISONMENT IN COUNT I

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

The trial court found that the capital felony in this case **was**

committed for the purpose of avoiding or preventing a lawful arrest. There was **absolutely** no evidence presented in the instant case which could **support** such a finding as to this **particular** aggravating circumstance.

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

> In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the defendant's motive, Riley v. State, **366** So.2d 19 **(Fla.** 1978), **and** that it be clearly shown the dominant or only motive for the murder was the elimination of the [ ] witness. Bates v. State, **465** So.2d **490** (Fla. 1985); Oats v. State, 446 **So.2d** 90 (Fla. **1984).** We have also held **that** the mere **fact** that the victim **knew** and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Caruthers v. State, 465 So.2d **496** (Fla. 1985); Rembert v. State, 445 So.2d **337** (Fla. 1984); Riley.

In Perry v. State, 522 **So.2d 817 (Fla.** 1988), this Court held that, if the victim is not a law enforcement officer, as in the instant case, it must be clearly shown that the dominant or only motive for the murder was the elimination of the witness. The same holding was **set** forth in Bates and Oats, supra. There is no evidence in the record in the instant case to support a contention that the dominant or only motive for the murder was to eliminate the witness. In fact, the State presented argument that the dominant motive for the capital felony **was** robbery.

In the instant case, the shooting of Robert Bragman, which resulted in his death, was arguably due only to panic which overcame the shooter, whether that was Appellant or his co-

defendant, during the robbery of an automobile.

In the instant case, the trial court presumed the intent of Appellant to kill in order to avoid or prevent lawful arrest.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court held that such a presumption of intent is improper to support this aggravating circumstance and falls short of the "clear proof" required by Riley, et al. A similar holding was reached in Scull v. State, 532 So.2d 1137 (Fla. 1988), wherein it was held that mere speculation on the part of the State that witness elimination was the dominant motive behind a first degree murder is insufficient to establish this particular aggravating circumstance."

In conclusion, there is no competent evidence to establish to any degree beyond speculation, let alone beyond all reasonable doubt, that the dominant motive behind the killing of Robert Bragman was to eliminate him as a possible witness. Therefore, the trial court erred in making its findings that this aggravating circumstance (F.S. 921.141(5)(e)) had been proven. Therefore, the death sentence of Appellant must be vacated.

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

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

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

2. The capital felony was committed for pecuniary gain.

This Court has repeatedly held that it is error to double up on these two aggravating factors and that they must be considered cumulative and not individually under the circumstances of the instant case.

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

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

Subsequent to Oats, the identical conclusion has been reached

by this Court an numerous occasions. See, Cherry v. State, 544 So.2d 184 (Fla. 1989); Mills v. State, 476 So.2d 172 (Fla. 1985); and Griffin v. State, 474 So.2d 777 (Fla. 1985).

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

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

This blanket statement is inadequate to cure the error. In addition, it is contrary to the clear intent in the court's sentencing order, wherein the court enumerates separate findings as to these two aggravating circumstances.

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

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

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

In the instant case, the decedent was killed during a struggle over the keys to his truck. The trial court found as follows:

> Both murders were for pecuniary gain, as is evident by the items which the Defendant attempted to take. At Mr. Grocer, Vernon Amos and Leonard Spencer attempted to take U.S. currency and succeeded in taking a wallet, cigarettes, the Defendant's dollar bill, car keys, and an automobile. At the English Pub Vernon Amos and Leonard Spencer took a truck and keys. All these items have pecuniary value. (R-6658).

In Scull v. State, 533 So.2d 1137 (Fla. 1988), this Court addressed the issue of whether that murder was committed for pecuniary gain. In Scull, the defendant took the decedent's car following the murder as in the instant case. This Court found that it was not shown beyond a reasonable doubt that the primary motive for the killing was pecuniary gain and determined that the record did not support the conclusion that the decedent was murdered for her car.

A similar factual pattern was presented in Peak v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). In Peak, the defendant was convicted of murdering a female victim at her home and stealing her car. This

Court held as follows:

> Although it appears that appellant ransacked Mrs. Carlson's purse and made off with her automobile, there is no evidence that any money or household belongings were taken. The record does not support the conclusion that Mrs. Carlson was murdered to facilitate the theft, or that appellant had any intention of profiting from his illicit acquisition. The more reasonable inference is that appellant stole the car in order to quicken his escape from the scene of the murder. Considering all the circumstances, the evidence linking the murder to a motive for pecuniary damage is insufficient to establish this aggravating factor beyond a reasonable doubt. Speak, supra, at 499.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), the defendant and the co-defendant attempted to rob a Winn-Dixie supermarket. As he left the supermarket, the defendant shot and killed a man slipping out the back of the store. The Court found that the trial court's conclusion that the murder was for pecuniary gain was not supported by the record, since the killing occurred during flight and thus was not a step in furtherance of the sought-after gain. Also see, Simmons v. State, 419 So.2d 316 (Fla. 1982).

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

D. *THE* DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE PRESENTED DID NOT DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found that the murder of Robert Bragman was committed in a cold, calculated and premeditated manner. This finding is most definitely not supported by the record in the instant case. In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court enunciated its interpretation of F.S. 921.141(5)(i).

At page 533, this Court stated:

> We also find that the murder was not cold, calculated and premeditated, because the State has failed to prove beyond a reasonable doubt that Rogers! actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in a capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See. Tatzel V. State. 356 So.2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand; think out ... to design, prepare, or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

As in Rosers, where the defendant and a co-defendant attempted to rob a store, in the instant case, where Appellant and his co-defendant robbed a store, there was not proof beyond a reasonable doubt that Appellant's actions were accomplished in a "calculated" manner.

In Hamsbrough v. State, 509 So.2d 1081, (Fla. 1987), this Court stated at 1006 that: "This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings." See also, Bates v. State, 465 So.2d 615 (Fla. 1976), and State v. Dixon, 283 So.2d 1 (Fla. 1973).

This Court, in Brown v. State, 473 So.2d 1260 (Fla. 1985), held that the "cold, calculated and premeditated" component of F.S. 921.141(5)(i) requires some sort of heightened premeditation, something in the perpetrator's state of mind beyond a specific intent required to prove premeditated murder." The Court went on to indicate that heightened premeditation and advance planning are the kinds of factors that properly bear on the "cold, calculated" circumstance. Further, the Court stated at page 1268 as follows: "The factor places a limitation on the use of premeditation as an aggravating circumstance in the absence of some quality setting the crime apart from mere ordinary premeditated murder. Combs v. State, 403 So.2d 418, 421 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982)."

In its sentencing order, the trial court focused upon the "calculating" manner in which Appellant and the co-defendant planned a robbery. There is no evidence that a murder was planned

or even contemplated in that same manner.

In addition, the record in the instant case does not establish that Appellant was the shooter in the death of Robert Bragman or that Appellant knew that the co-defendant would carry out the killing of Robert Bragman in the manner in which it was accomplished. Therefore, even if this Court were to find that the killing was "cold and calculated", that aggravating factor cannot be applied vicariously to Appellant. See, Omelus v. State, 16 FLW S455 (June 13, 1991), wherein this Court held that the henious, atrocious, or cruel aggravating factor cannot be applied vicariously.

Therefore, the trial court erred in its application of this aggravating circumstance, and, accordingly, Appellant's death sentence must be vacated.

POINT XVI

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH AS THE DEATH PENALTY IS UNCONSTITUTIONALLY DISPROPORTIONAL PUNISHMENT AS APPLIED TO THIS CASE IN REGARD TO THE CULPABILITY OF APPELLANT.

It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant. In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court "citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder" under the circumstances of that case. Tyson v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), at 1682; c.f. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1987). Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tyson, 481 U.S. at 156, 107 S.Ct. at 1687. Therefore, if the State has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment.

In the instant case, there is no evidence to support a conclusion that Appellant planned the murders or robberies with the co-defendant, carried a firearm at any time, participated in the robberies, attempted to kill, or intended to kill.

In addition, the facts in the instant case show Appellant to be less culpable than the defendant in Enmund. The facts in Enmund were clearly that the defendant planned the robbery with two other individuals. There is no evidence in the record to support the proposition that Appellant was aware that Leonard Spencer was about to rob the convenience store which began the chain of events which led to the killing of Robert Bragman.

This Court stated, in Jackson v. State, 575 So.2d 181 (Fla. 1991), at 190, 191:

> In Enmund and Tyson, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the State's evidence of mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even if the defendant anticipated that lethal force might be used, because 'the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tyson, 481U.S. at 151, 107 S.Ct. at 1684. However, the death penalty may be proportional punishment if the evidence shows both that the defendant was a major participant in the crime, and that the defendant's state of mind amounted to reckless indifference to human life." (emphasis added). As the Court said, "we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Endmund culpability requirement." Tyson, 481 U.S. at 158, 107 S.Ct. a 1688. Court's may consider a defendant's "major participation" in a crime as a factor in determining whether the culpable state of mind existed. However, such participation alone may not be enough to establish the requisite culpable state of mind. Id. 481U.S. at158 n. 12, 107 S.Ct. at

1688 n. 12.

In the instant case, the state could only rely upon the theory of felony murder to prove first degree murder. Appellant admits that the robbery of the convenience store should not even be considered in determining Appellant's culpability in the death of Robert Bragman as it was a separate incident. As to the robbery of the truck from Robert Bragman, Appellant's culpability is not great.

In Jackson v. State, supra, the defendant was involved with the co-defendant in a robbery felony murder. The court found that the totality of the record showed that the defendant had previously indicated his intent to rob the store. It was found from the record that a reasonable inference could be drawn that either of the two robbers fired the gun, contrary to the finding of the trial judge. Appellant submits that is precisely the case here.

In Jackson, there was no evidence presented at trial to show that the defendant personally possessed or fired a weapon during the robbery, or that he harmed the deceased. There was evidence that he carried a weapon or intended to harm anybody when he walked into the store to rob it, or that he expected violence to erupt during the robbery. Again, a similar scenario is established by the facts of the instant case.

This Court held, in Jackson, supra, at 193:

> Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder. Accord White v. State, 532 So.2d

> **1207, 1221-22** (Miss. 1988)(Endmund and Tyson are not satisfied in murder **case with** multiple defendants and no eyewitnesses where all evidence is circumstantial **and the** actual killer is not clearly identified). To give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of Endmund and Tyson, that the constitution requires proof of culpability great enough to render the death penalty proportional punishment, and it fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. **862, 877, 103 S.Ct.** 2733, 2742, 77 L.Ed.2d 235 (1983).

The record in this **case does** not support **the** conclusion **that** Appellant meets the criteria set forth in Endmund to warrant the death penalty. Nor does the record support a conclusion that Appellant was a major participant in the crime and that his state of mind amounted to reckless indifference to human life as required to warrant the death penalty in Tyson. The death sentence in the instant case is disproportional to the culpability of Appellant and must be vacated.

POINT XVII

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH IN AN ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONALLY DISPROPORTIONATE MANNER WHEN APPELLANT WAS SENTENCED TO LIFE IMPRISONMENT IN COUNT I

In Count I, the trial court sentenced the Appellant to life imprisonment without the possibility of parole for twenty-five years. In Count V, the court imposed the sentence of death upon the Appellant. In doing so, the Court found the same five aggravating factors to have been proven beyond a reasonable doubt as to both Count I and Count V. The Court also found that there were no mitigating circumstances as the Appellant had not offered any evidence or argument during the sentencing hearing during which he was without the benefit of counsel. (R - 6654-6661).

The findings by the trial court are inconsistent in two respects. First, in following the jury's recommendation and imposing a life sentence in Count I, while following the jury's recommendation and imposing a death sentence in Count V, imposed disparate sentences based upon the exact same aggravating circumstances and lack of mitigating circumstances. Second, as to Count I, the court imposed a sentence of life imprisonment rather than death, although it found that there were no mitigating circumstances. Presumably, despite what the written sentencing order indicates, the trial court had to find and consider some mitigating circumstances, whether statutory or non-statutory from the record in order to impose a life sentence rather than a death sentence.

These inconsistencies clearly demonstrate tha the death sentence was imposed in an arbitrary, capricious and disproportionate manner and must be vacated.

In Spaziano v. Florida, 468 U.S. 447, **460, 104 S.Ct. 3154, 3162, 82** L.Ed.2d 340 (1984), the United States Supreme Court held as follows: **"If** a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." The Constitution prohibits the arbitrary or irrational imposition of the death penalty. Id., at 466-467, 104 S.Ct, at 3165-3166.

The United State Supreme Court recently dealt with this issue in Parker v. Dusser,

This is a Florida case in which the defendant was convicted of two counts of first degree murder wherein the jury recommended a sentence of life imprisonment on both counts. The trial judge accepted the jury's recommendation for one count, but overrode the recommendation for the other count and sentenced the defendant to death. The trial court explained that he had found six aggravating circumstances as to the count where a death sentence was imposed and no statutory mitigating circumstances as to that count. He did not discuss evidence of, or reach an explicit conclusion concerning nan-statutory mitigating evidence, but declared that there were no mitigating circumstances that outweighed the aggravating circumstances as to either count.

The Florida Supreme Court a firmed the death sentence, although it concluded that there was insufficient evidence of two of the aggravating circumstances. The Florida Supreme Court declared that the trial court had found no mitigating circumstances to balance against the four properly applied aggravating circumstances.

The Federal District Court granted the defendant's habeas corpus petition as to the imposition of the death penalty, ruling that the sentence was unconstitutional. The Court of Appeals reversed.

The United States Supreme Court held that the Florida Supreme Court acted arbitrarily and capriciously by failing to treat adequately the defendant's non-statutory mitigating evidence. The Court held that the state Supreme Court's affirmance of the death sentence was based upon non-existent findings as that court did not conduct an independent reweighing of the evidence and relied upon what it took to be the trial court's findings of no mitigating circumstances. Therefore, it was held that the defendant was deprived of the individualized treatment to which he is entitled under the Constitution. Clemons v. Mississippi, 494 U.S. , , 110 S.Ct. 1441, 108 L.Ed.2d 725.

Therefore, in the instant case, the imposition of the death penalty was arbitrary, capricious and disproportionate and must be vacated.

POINT XVIII

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY DURING THE SENTENCING HEARING (PHASE 11) AS TO THE DEFINITION OF THE FELONIES BY WHICH IT WAS ALLEGED THAT AGGRAVATING CIRCUMSTANCES SET FORTH IN FLORIDA STATUTE 921.141(5)(e)(d) WERE PRESENT.

In i s instructions to the jury during the penalty phase, the trial court did not give instructions on the elements of the crime of robbery. Robbery was the underlying felony for aggravating circumstance 921.141(5)(d). Nor did the trial court instruct the jurors in the penalty phase as to the elements of First Degree Murder, which along with Robbery, was being relied upon by the State to establish the aggravating circumstance set forth in Florida Statute 921.141(5)(e) (R-5956-5964).

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

In Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978), the United States Supreme Court held that in the absence of a jury finding of forceful rape, a death sentence could

not be upheld on the basis that the evidence in th record supported the conclusion that the defendant was guilty of that offense, which in turn established the element of bodily harm necessary to make kidnapping a sufficiently aggravating circumstance to justify the death sentence. The Court stated, at 236, 237:

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

Therefore, the trial court erred in its jury instructions during the penalty phase, and Appellant's death sentence must be vacated.

POINT XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE; IN REFUSING TO APPOINT NEW COUNSEL FOR THE PENALTY PHASE; *AND*, IN NOT ALLOWING APPELLANT SUFFICIENT TIME TO PREPARE AFTER FORCING APPELLANT TO REPRESENT HIMSELF AT THE PENALTY PHASE.

Appellant was denied his Sixth Amendment right to effective assistance of counsel under the United States Constitution and his similar right guaranteed under the Florida Constitution when the trial court refused to appoint conflict-free counsel to represent Appellant during the penalty phase. Appellant filed a motion to withdraw counsel, alleging appointed trial counsel's failure to present timely motions, constant conflicts with said counsel throughout three trials, and ineffective assistance of counsel. (R-6579-6580). The trial court considered Appellant's request the day prior to the date scheduled for the penalty phase. (R-5913-5920). Counsel for Appellant had not yet arrived at the hearing, but the trial court proceeded with the hearing nonetheless in counsel's absence. The motion to withdraw counsel was denied. The trial court further refused Appellant's request for conflict-free counsel. The next day the penalty phase was held. Appellant had wanted to call his sister and Susan LaFehr, a psychological expert, but had not had time to read Ms. LaFehr's deposition or prepare in any way for the hearing. The trial court again denied a request by Appellant for conflict-free counsel and forced the Appellant to proceed to the penalty phase

without benefit of counsel. The trial court also denied Appellant's request to continue the penalty phase so that Appellant could become prepared to present his own evidence and argument.

The court made the following statement to the jury:

> THE COURT: I have been asked to explain the absence of Mr. Boudreau, whom you will remember, who was Mr. *Amos'* attorney.
>
> Mr. *Amos*, in a hearing we held yesterday, indicated that he wanted to discharge Mr. Boudreau,
>
> Of course, he is aware that he is entitled to be represented by counsel, that counsel being Mr. Boudreau, who is ready, willing, and able to serve him.
>
> But he doesn't want Mr. Boudreau. and I can't force it on him.
>
> So he is going to fly this airplane bv himself. (emphasis added)
>
> I think we causht him a little flat-footed. (emphasis added) He has some depositions he needs to review that were delivered to him only this morning. So we are going to take a ten minute recess.
>
> You folks get a cup of coffee, and we will be ready. And you will stay in here, and --
>
> Vernon, you read your depositions. **(R-5928-5929).**

Appellant indicated that without an attorney he would be unable to present any evidence **(R-5929-5930).** In her argument, the State called attention to the fact that Appellant was not represented by counsel and told the jury that should not play a part in their decision. (R-5932). The prosecutor also called the jury's attention to the fact that no evidence in mitigation had been presented by stating the following: "So what you are doing

is weighing aggravating factors against nothing in mitigati n whatsoever." (R-5948). This comment by the prosecutor only exacerbated the problem and the error.

Appellant had a right to effective representation of counsel at the penalty phase., He was deprived of that right by the actions of the trial court. There was a legitimate conflict between Appellant and his court-appointed trial counsel. The trial court had an obligation to appoint conflict-free counsel. Notwithstanding that fact, when it failed to appoint conflict free counsel, the trial court should have continued the penalty phase hearing for a reasonable period of time so that Appellant could properly prepare to represent himself. As the record reflects, Appellant was given depositions to review for a few minutes just prior to the penalty phase and had no opportunity to subpoena any witnesses to testify on his behalf or to prepare his sister for testifying.

In Hardwick v. State, 521 So.2d 1071 (Fla.???) cert. denied, _____ U.S. _____, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), this Court approved the procedure set forth in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), to be applied when a defendant seeks to discharge court-appointed counsel:

> If incompetence of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel, to determine whether or not there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that affect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable

> basis appears for a finding of effective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not be thereafter required to appoint a substitute. Hardwick, 521 So.2d at 1074-75. See also, Johnston v. State, 497 So.2d 863 (FLa. 1986).

In Brooks v. State, 555 So.2d 929 (Fla. 3rd DCA 1990), the defendant had filed written motions alleging conflict of interest and requesting dismissal of his counsel as Appellant did in the instant case. Prior to the beginning of trial, the defendant orally renewed the motion to dismiss counsel. In each motion, the defendant challenged his counsel's competence. However, the trial court made no inquiry of the defendant or his counsel and failed to rule on whether a reasonable basis existed for Brooks belief that his counsel was not rendering effective assistance. In fact, the court did not give proper and full consideration to the motion and even prevented the defendant from explaining the reason for his request. A similar situation occurred in the instant case.

In the instant case, the trial court summarily denied Appellant's motion to discharge counsel and failed to make any insuire of court-appointed counsel. The error was compounded by the trial court's failure to continue the penalty phase hearing so that Appellant, proceeding pro se, could properly prepare to present evidence and argument in mitigation.

In conclusion, Appellant was a denied a proper inquiry and hearing as required by Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), concerning his conflict with counsel and his ability to represent himself. Appellant was forced into a "Catch-22" situation in which he either had to proceed to

the penalty phase representing himself and completely unprepared or to proceed to the penalty phase hearing with counsel with whom there was a conflict.

Florida Rule of Criminal Procedure 3.111(d)(5) is also clear on this issue. It states that if a waiver of counsel is accepted in any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings in which the defendant appears without counsel. There was not a proper renewal of the offer of conflict-free counsel at the time of the penalty phase hearing, the sentencing hearing, or the sentencing. See, Parker v. State, 539 So.2d 1168 (Fla. 1st DCA 1989).

Therefore, Appellant's death sentence must be vacated.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the OFFICE OF THE ATTORNEY GENERAL, 111 Georgia Avenue, West Palm Beach, Florida 33401 by United States Mail on this 8th day of November, 1991.

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