IN THE SUPREME COURT OF FLORIDA

RICKY STEVE CORBETT,

Appellant,

v.

CASE NO. 76,072

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On June 2, 1989, a Walton County Grand Jury returned an indictment charging Ricky Steve Corbett with first degree murder for the shooting death of Sherry Lynn Dailey. (R 725) The indictment also charged Corbett with kidnapping, armed robbery, possession of a firearm by a convicted felon, and use of a firearm during the commission of a felony. (R 725). Prior to trial, the court severed the possession of a firearm by a convicted felon count. (R 3-5) Corbett proceeded to a jury trial on the remaining counts. The jury found Corbett guilty as charged and recommended a death sentence by a vote of seven to five. (R 860-862, 870)

Circuit Judge Clyde B. Wells presided over the guilt and penalty phases of the trial. Unfortunately, the day after the penalty phase was concluded, Judge Wells was killed in an airplane crash. (R 1452-1453) Corbett's case was assigned to Circuit Judge G. Robert Barron for purposes of sentencing and post-trial motions. (R 874) Before sentencing, Corbett moved for a new penalty phase trial during which Judge Barron could hear the various witnesses testify and make the necessary credibility evaluations. (R 872-873) Judge Barron denied the motion, noting that he had reviewed the trial transcripts and presentence investigation report. (R 1452-1453) The judge also denied a post-sentencing motion for a new penalty phase trial on the same grounds. (R 1459-1498)

On April 26, 1990, Judge Barron adjudged Corbett guilty and sentenced him to death for the murder, life for the kidnapping and life for the armed robbery (R 891-898) He imposed no sentence for possession of a firearm during the commission of a felony. (R 891-898) In his findings concerning the death sentence, Judge Barron found five aggravating circumstances: (1) defendant was previously convicted of a violent felony; (2) the murder was committed to avoid arrest; (3) the murder was committed for financial gain; (4) the murder was cold, calculated and premeditated; (5) the murder was especially heinous, atrocious or cruel. (R 890-891) In mitigation, the court found two factors: (1) the defendant's youthful age of 21; and (2) the defendant's low intellectual level. (R 891)

Corbett timely filed his notice of appeal to this court on May 16, 1990. (R 900)

Facts -- Guilt Phase

Sherry Lynn Dailey worked at the King Bee Liquor Store in Freeport. (R 253-254, 276) Her mother, Betty Hardy, drove Dailey to work about 7:30 a.m. for her to begin work at 8:00 on May 5, 1989. (R 254-257) Dailey wore a turquoise shirt, a faded blue-jean skirt and white tennis shoes. (R 255) About 10:30 a.m., Henry McCormick stopped at the liquor store. (R 273-274) No one was present when he entered. (R 274) After several minutes, he yelled a few times, but no one answered. (R 274) He also noticed that the cash register drawer was open. (R 274) Finally, he checked the bathrooms and found no one.

McCormick knew Dailey and noticed that her pocketbook was still in the store. (R 274-275) Another customer, Tina Gavins, drove up at the pickup window and called the store manager. (R 275) McCormick called the Walton County Sheriff's Department. (R 275)

The store manager, Judy Nobles, and Investigator Fred Mann arrived at the store around 11:00 a.m. (R 276-277, 312-313) At Mann's direction, Judy Nobles opened the cash register. (R 277-279, 314-316) After examining cash register tape, Nobles concluded that $112 was missing. (R 277-278) The cash register tape also indicated that the last sale occurred between 10:20 and 10:30 a.m., and the purchase was a lemon-lime squeezer for $1.20. (R 280-282, 315-317) A lemon squeeze bottle was located on the counter. (R 280)

Robert Cupsted and Lillie Miller saw a brown car in the vicinity of the liquor store on the morning of May 5, 1989. (R 267-272, 283-307) Cupsted was driving by the liquor store approximately 10:30 a.m. and noticed a reddish-brown car parked in front of the store. (R 268-269) He did not see a tag number or recognize the make of the car. (R 271-272) Miller said she was driving by the area sometime during the morning when a car switched from the opposite side of the road, made a u-turn into her lane in front of her. (R 284-285) She said there were three people in the car; two black males in the front and a white female in the back seat. (R 286) The female looked at her through the back window of the car. (R 286) Later, Miller saw a picture of Dailey on television and recognized her as the

girl she saw in the back seat of the car. (R 285-286) Miller testified there were two black males in the front of the automobile, although she had earlier given a statement to police officers that one of the men "seemed like he was a white fellow." (R 300) Miller identified a photograph of Dailey as being the same person she saw in the car that day. (R 285-286, 303-305)

Joyce Anderson owned the brown Ford Tiempo automobile that Miller identified as the car which turned in front of her (R 338-340) Anderson had given Ricky Corbett permission to use her car on May 5, 1989, and he left her home with the car at approximately 6:00 a.m. (R 339) Glen Hardy saw Corbett in the Tiempo at 7:13 a.m. (R 258-261) Hardy was a security guard at the Sandestin Beach Resort where Corbett was employed. (R 258-259, 263-264) There were two other black males in the car at the time. (R 264) Hardy recognized one as Donnie Phillips. (R 260) Phillips was a tall, very muscular man. (R 260) Sharee Campbell also saw Corbett and Phillips at the Sandestin Resort about 8:00 a.m. on May 5, 1989. (R 265-266) She said they were in a brown automobile. (R 266) Finally, Ernest Hogans testified that he saw Corbett and Donnie Phillips in Anderson's brown Tiempo about 10:30 a.m. (R 308-311)

On May 8, 1989, Corbett agreed to give a ride to Tommy Watson and Terry Poston. (R 408-412, 488-491) Corbett was driving the brown Tiempo. (R 409, 490-491) William Schofield was also in the automobile. (R 409) All of them were smoking marijuana and drinking beer. (R 413, 424) Watson had contacted

Corbett to get a ride to Freeport for himself and Poston, who was his nephew. (R 423) Schofield, Watson and Poston are white. (R 424) Poston wanted to go to Freeport for a few days because he had an outstanding arrest warrant. (R 421) According to Watson, Corbett stopped the car at a point along Cow Ford Road. (R 425) This was about one and a half or two miles from where Poston and Watson had been staying. (R 425) Watson and Schofield remained in the car. (R 414) Corbett and Poston walked into the woods. (R 414, 493-494)

Poston stated that Corbett said he had something to show them. (R 493) He asked Poston to accompany him into the woods. (R 493) The two men walked to an area where Corbett showed Poston a body of a woman. (R 494) According to Poston, Corbett showed him the body, laughed and said, "that's what I thing about life." Corbett told Poston that he had robbed a liquor store and had shot the girl. (R 494-495) Corbett said he needed someone to talk to because he was having bad dreams. (R 495) After Corbett drove Watson and Poston to their destination, Poston told Watson about the body and Corbett's statements. (R 495) Poston said they did not go to the police immediately because they were scared. (R 495) Two days later, they went to the police after seeing a notice of a reward for information about the missing girl. (R 496, 427) Both Watson and Poston said the reward was not the reason for their talking to the police. (R 433-434, 496) Poston led the police to the location of the body on May 11, 1989. (R 317)

The body of Sherry Dailey was in a swampy area in Walton County. (R 317) The body was nude and clothing matching the description Dailey wore the day of her disappearance was found in a plastic jug in the same area as the body. (R 323-324) Investigator Mann also recovered a pair of men shoes near the scene. (R 328) These shoes were similar to a pair Corbett allegedly owned. (R 340-341) Donnie Phillips, who was a co-defendant in the case, directed Mann to the shoes. (R 328) Crime scene analysts made casts of tire impressions from the roadway near the scene. (R 352) A bullet was also found in the mud where the victim's head was lying. (R 359) Another bullet was recovered from the head of the victim during an autopsy. (R 353) A hair was located on the chest of the victim. (R 354)

Dr. Edmund Kielman, a pathologist, examined the body at the scene and performed an autopsy. (R 381-385) The body was severely decomposed. (R 385) Keilman found a bullet entrance wound directly above the left ear and an exit wound just forward of the right ear. (R 385) A second bullet entrance wound was through the roof of the mouth. (R 385) That bullet traveled into the cranial cavity, and Keilman recovered the bullet from that location. (R 385) There were two bullet entrance wounds to the palm of the left hand and a single exit wound on the opposite side of that hand. (R 386) The victim was shot a total of four times. (R 389) Keilman concluded the cause of death was the two bullet wounds to the cranial cavity. (R 390) Additional injuries to the victim included a missing right finger, which Keilman concluded had been cut off. (R 390) He also

found a skinning injury that started just below the umbilical stump and was triangular in shape. The wound curved down between the legs all the way back to the anus. (R 390-391) The skin in this area was totally removed in a triangular pattern. (R 391) Keilman testified the injury appeared as if someone had used a knife to cut the skin away. (R 391) On cross-examination, Keilman said that he had no way to know when the amputation of the right finger occurred. (R 392-393) He also could not determine which shots occurred first; the ones to the head or the ones to the hand. (R 394) Keilman also testified that his first conclusion concerning the skinning injury to the abdomen was that decomposition and maggot activity could have caused it. (R 394-395) Sometime after the autopsy, while reading a book by another forensic pathologist, Keilman concluded that the injury to the abdomen was probably caused by someone cutting the skin away rather than maggot activity. (R 395-396) Consequently, he changed his opinion, even though several months had elapsed after the autopsy. (R 396-400)

Several items of physical evidence were analyzed. The bullet recovered from the victim and the bullet recovered from the ground where the body was found were fired from the same weapon, either a .38 caliber or .357 caliber firearm. (R 444) Both bullets were wad-cutter type projectiles with a flat nose designed for target shooting. (R 444-445) Although no firearm was recovered for examination, Tony Phillips, Donnie Phillips' brother, observed a .38 caliber firearm in his house on May 6,

1989, while his brother was living there. (R 343) He also observed wad-cutter type ammunition. (R 343)

An examination of the debris from the victim's clothing disclosed Negroid body hairs. (R 455-458) The hair recovered from the victim was also a Negroid body hair. (R 453-454) None of the hairs were suitable for comparison beyond that general classification. (R 453-458) Debris from the victim's clothing also contained some white and tan polyester fibers. (R 466-470) These were compared to fibers from carpeting found in the brown Tiempo. (R 466-472) The fibers found in the clothing were consistent with the fibers of two different kinds of carpeting found in the automobile. (R 471-474)

A latent fingerprint lifted from the counter of the liquor store was compared to the prints of Donnie Phillips and Ricky Corbett. (R 364-370) The print proved to be the palm print left by Ricky Corbett. (R 368-370) Three fingerprints lifted from the rearview mirror of the Tiempo automobile were made by Donnie Phillips. (R 367)

Jessie Wooden was a cellmate with Donnie Phillips while he was awaiting trial. (R 487) He was in the same cellblock with Ricky Corbett in jail. (R 480-481) Corbett allegedly made statements to Wooden during this time. (R 481) Corbett allegedly said that he and Donnie Phillips planned to rob a bank or a Junior Food Store. (R 482) Ultimately, the plan centered on the robbery of a liquor store. (R 382) Corbett said Phillips had a firearm with him. (R 482) He told Wooden that they robbed the liquor store, and they took the clerk away just to

scare her. (R 483) Corbett never said where he took her, but said it was down a dirt road. (R 483) Corbett allegedly told him that he smoked marijuana with Terry Poston and either showed him or told him about the killing. (R 483-484) Wooden admitted to having several felony convictions. (R 485) He also said he had been in the same cell with Donnie Phillips for about a month. (R 486-487) He did not come forward with any information until the Friday preceding the trial. (R 487)

Penalty Phase and Sentencing

The State presented no additional testimony at the penalty phase of the trial. (R 614) The prosecutor did submit a certified copy of Corbett's prior conviction for armed robbery. (R 614) Corbett presented testimony from a psychologist, Dr. Jim Larson, from his natural father, his stepmother, a sheriff's investigator, and his fiancee. (R 615, 640, 644, 646, 651)

Larson examined Ricky Corbett and met with several of his family members as well as performing a battery of psychological tests. (R 618-619) He found that Corbett has a I.Q. of 80, which is in the lower nine percentile. (R 620) Larson said this is the dull-normal range of intelligence. (R 620) The score is one point above the borderline mental retardation range. (R 620) Corbett reads at a fifth grade level and performs arithmetic at a seventh grade level. (R 621) As a result, the MMPI testing was not possible since you need a sixth grade reading level to perform the test. (R 621) Corbett's personal history indicated he grew up in a poor

family in Georgia. (R 622) His mother had six children but never married. (R 622) The family never had enough money, and Corbett's mother frequently had to get some help from her employer for food and clothing. (R 622) The family was very involved in a small Baptist church and Corbett was in church sometimes five times a week while growing up. (R 622) Corbett did not meet his father until he was five years old, and never had a relationship with him. (R 623) Corbett had no father figure while growing up. (R 623) At age eleven, Corbett's mother died. (R 623) The children were split up and went to live with various relatives. (R 624) Ricky went from relative to relative and house to house and never settled anywhere. (R 624) All of the families were impoverished. (R 624) Ricky went to live with his natural father when he was twelve-years-old, since he had been living on the streets. (R 624) He stayed there for about six-months before leaving again. (R 625) The remainder of his growing up years was without a family unit. (R 625) Larson concluded that based on his family history, Corbett was in a high risk for involvement with crime, delinquency, and substance abuse. (R 626) Corbett became involved with drugs and alcohol in early adolescence. (R 626) He was arrested at age sixteen for a robbery. (R 627-628) Larson indicated that Corbett has the mental age of about fourteen. (R 628) He did conclude that Corbett has no gross mental illness and is not psychotic. (R 629)

On cross-examination, the state asked if Corbett had mentioned anything about the circumstances of the homicide. (R

633). The witness said that Corbett refused to talk about it. (R 635) Defense counsel objected to the question and answer as a comment on Corbett's right to remain silent and moved for a mistrial. (R 637-640)

Ricky's natural father, David Clark, and his stepmother, Ethel Clark, testified in mitigation. (R 640-641, 644) Ricky was an illegitimate child. (R 642) His father saw him shortly after he was born and did not see him again until he was about five or six years-old. (R 642) His father would see him occasionally but was never a part of his life. (R 642) Ricky lived with his father for a brief time when he was about fifteen. (R 643-644, 645)

An investigator with the Walton County Sheriff's Office, Rick Sutton, testified that Ricky assisted in making some undercover drug buys. (R 647) He was not paid for this work, (R 649) and on several occasions, he provided substantial assistance to the Sheriff's Office. (R 649) Sutton also knew the co-defendant, Donnie Phillips, and described him as about 6'2", weighing 250 pounds. (R 650) Sutton had no knowledge of Ricky Corbett using drugs while he was making buys. (R 651)

Ricky's fiancee, Joyce Anderson, testified that she had known Ricky for about two years. (R 652) Ricky lived with her for a period of time and was entrusted with the care of her nine-year-old daughter. (R 654) She said he loved children and said they had a nice relationship. (R 654-655) She did admit they have fights and she did cut him on one occasion. (R 660, 665)

Corbett also submitted the judgement and jury recommendation in his co-defendant's case. (R 668-670) Donnie Phillips was convicted of murder and his jury recommended a sentence of life imprisonment. (R 670) Phillips later received a life sentence.

SUMMARY OF ARGUMENT

1. The State provided the defense with the names of two new witnesses Friday afternoon before the trial commenced on Monday. One of the witness's testimony concerned alleged incriminating statements he heard Corbett make while in jail. The court conducted a hearing on the late discovery compliance and found that the State provided the names of the witnesses as soon as they became known. However, because of the late notice to the defense, Corbett's counsel asked for a continuance. After arranging for counsel to depose the witnesses at the conclusion of the first day of jury selection, the court denied the motion. Counsel renewed the motion for a continuance so that he could investigate for possible impeachment information. The court abused its discretion and improperly denied the renewed motion, depriving counsel of adequate time to investigate and prepare a defense.

2. During cross-examination of Terry Poston, defense counsel attempted to impeach him via questions about charges and arrest warrants pending at the time he came forward to the police with the incriminating information against Corbett. The prosecutor objected, arguing that defense counsel was attempting to impeach the witness improperly because the question should be limited to prior felony convictions. Judge Wells agreed with the State and incorrectly assumed that counsel was attempting a general impeachment by showing that the witness had outstanding arrest warrants or prior arrests. Corbett was entitled to impeach the witness with pending criminal charges.

The court's ruling deprived Corbett of his right to confront and cross-examine the witness.

3. Judge Wells was killed in an airplane crash the day after the penalty phase of the trial. The case was assigned to Circuit Judge G. Robert Barron for sentencing and post-trial motions. Corbett moved for a new penalty phase trial in order for Judge Barron hear the witnesses testify and evaluate their demeanor and credibility. Judge Barron denied the motion, noting that he had reviewed the trial transcripts and the presentence investigation report. Judge Barron proceeded to make findings of fact, weigh the aggravating and mitigating circumstances and impose a death sentence. In sentencing Corbett to death without personally hearing and evaluating the testimony of the witnesses, Judge Barron violated Sections 38.12 and 921.141 Florida Statutes and denied Corbett his constitutional rights under the Sixth, Eighth and Fourteenth Amendments as well as Article I Sections 9, 16 and 17 of the Constitution of the State of Florida.

4. During the testimony of Dr. Jim Larson, who testified for the defense at the penalty phase of the trial, the State, on cross-examination, asked if Larson questioned Corbett about the details of the murder. Defense counsel objected that the questioning was designed to elicit a comment on Corbett's right to remain silent. The court allowed the question and answer and denied Corbett's motion for mistrial. Allowing the State to elicit the fact that Corbett refused to answer the

psychologist's questions about the details of the offense violated Corbett's right to due process.

5. Corbett claimed that he was under the domination of his codefendant, Donnie Phillips, at the time of the crime. He asked the court to allow him to present his codefendant for the jury to see his physical appearance. The prosecutor claimed that he would have the right to cross-examine Phillips, even though he was never asked a question on direct. The court agreed and ruled that Phillips could be presented to the jury only if he waived his Fifth Amendment privilege for purposes of the State's cross-examination. Phillips asserted his Fifth Amendment privilege and Corbett was not allowed to present Phillips before the jury. This denied Corbett his right to present evidence in mitigation of his sentence and rendered his death sentence unconstitutional.

6. The trial judge improperly found two aggravating circumstances in sentencing Corbett to death. First, the evidence failed to prove that the dominant motive for the killing was to eliminate the victim as witness. Therefore, the aggravating circumstance of the homicide being committed to avoid arrest was not proven beyond a reasonable doubt. Second, the victim died nearly instantaneously from a gunshot wound to the head. This fails to qualify as a heinous, atrocious or cruel manner of death, and the court should not have used this aggravating circumstance.

7. The evidence in this case did not show Corbett to be any more culpable than his co-defendant who received a life

sentence. No evidence of the details about how this crime was committed exists. An alleged statement of Corbett's that he shot the victim is the only available evidence about the relative participation of the defendants. Although the sentencing judge found that Corbett was the controlling force and triggerman, there is nothing in the record to support the finding that Corbett was the controlling force. His death sentence is disproportionate, and he asks this Court to reduce it to life.

8. The standard penalty phase jury instruction for the heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague. It fails to apprise the jury of the limitations on the applicability of that factor. Although this Court has attempted to narrow the class of cases to which the circumstance applies, the instruction does not provide this guidance to the jury. The instruction violates the Eighth and Fourteenth Amendments.

9. The trial court ordered a presentence investigation prior to sentencing Corbett to death. A victim impact section was included which contained several letters from the victim's relatives and friends. Nine letters reflected the emotional anguish the victim's relatives suffered as a result of the murder, and each asked the court to impose a death sentence. These letters reflecting the effects of the crime on the relatives should not have been considered in sentencing.

10. The trial court should not have read the standard penalty phase jury instruction which told the jury that the sentencing decision was solely the judge's responsibility. An

instruction stressing the importance of the jury's recommendation should also have been given. The instruction as read improperly diminishes the role of the jury in violation of the Eighth and Fourteenth Amendments.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING A CONTINUANCE AFTER THE LATE DISCLOSURE OF A MATERIAL STATE'S WITNESS WHICH DEPRIVED THE DEFENSE OF THE OPPORTUNITY TO INVESTIGATE POTENTIAL IMPEACHMENT EVIDENCE TO USE AGAINST THE WITNESS.

Corbett's trial was to commence on Monday, January 29, 1990. (R 829) At 4:15 p.m. on Friday, January 26th, the State provided the defense with the names of two new witnesses, Jesse Wooden and Donnie Phillips. (R 6-7, 829) Wooden testified at trial. (R 478) He had been incarcerated in the same cell with Donnie Phillips, Corbett's co-defendant, and in the same cell block as Corbett. (R 480-481, 486-487) His testimony concerned alleged incriminating statements he heard Corbett make while in jail. (R 482-484)

The court conducted a hearing on the late discovery compliance and found that the State provided the names of the witnesses as soon as they became known. (R 6-21, 829) However, because of the late notice to the defense, Corbett's counsel asked for a continuance. (R 6-21) After arranging for counsel to depose the witnesses at the conclusion of the first day of jury selection on Monday, January 29th, the court denied the motion. (R 21, 830) Counsel renewed the motion, after taking the deposition, on the ground that he wanted to investigate for possible impeachment information. (R 229-231) In particular, counsel wanted to contact other inmates who were present when the alleged statements were made. (R 229-231) The court denied

the renewed motion, stating that such an investigation would not be worth a continuance. (R 231)

A trial judge has considerable discretion in deciding whether to grant or deny a motion for continuance. See, e.g., Jackson v. State, 464 So.2d 1181 (Fla. 1985); Magill v. State, 386 So.2d 1188 (Fla. 1980); Cooper v. State, 336 So.2d 1133 Fla. 1977). However, where the circumstances establish that defense counsel cannot adequately investigate and prepare a defense, a continuance must be granted. E.g. Jackson; Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988); Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983). The First District Court of Appeal held that deference to a trial court's ruling on a motion for a continuance is not absolute, and

> [a] denial of a motion for continuance will be reversed when the record demonstrates... that adequate preparation of a defense was placed at risk by virtue of the denial.

Smith, 525 So.2d at 480. Preparation of Corbett's defense was placed at risk and impaired by the denial of his motion for continuance. His rights to adequate representation by counsel, due process and a fair trial were denied. Amends. V, VI, XIV, U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.

In Brown v. State, the First District Court reversed for a new trial after concluding the trial court abused its discretion in denying a continuance. The trial was held on a Tuesday morning. Defense counsel learned of a hypnosis session of a state witness midday of the Friday before trial. Counsel deposed the hypnotist on Monday. A motion for continuance was

premised on counsel's need to secure an expert witness to assist in rebutting the State's evidence. The court wrote,

> A number of cases detail circumstances rising to the level of a palpable abuse of discretion. Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981); Lightsey v. State, 364 So.2d 72 (Fla. 2d DCA 1978); and Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975). The common thread running through each of these cases is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defenses. This right is inherent in the right to counsel. Harley, at 384, citing Brooks v. State, 176 So.2d 116 (Fla. 1st DCA 1965), cert. denied, 177 So.2d 479 (Fla. 1965). Further, it is founded on constitutional principles of due process and cast in the light of notions of a right to a fair trial. Harley, at 383-384; see also Sumbry, 310 So.2d at 447.

426 So.2d at 80. The court held "[s]urely, due process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence". Ibid. at 81.

In Smith v. State, the appellate court reversed the trial court's order denying a continuance of a sentencing hearing where the defense was furnished with notice of a state's expert witness one day prior to the hearing. The one-day notice did not provide defense counsel an opportunity to depose the witness, contact an expert for the defense, or "assemble other evidence in opposition of" the state's expert witness. 525 So.2d at 480. Recognizing that the defense was jeopardized by the late notice, the First District Court reversed emphasizing that a palpable abuse of discretion in denying a continuance is shown where the defense is deprived of sufficient opportunity to prepare. Ibid. at 479.

The time element in this case also placed Corbett's counsel at a great risk of inadequate preparation. When he renewed the motion for continuance after having deposed the witness at the conclusion of the first day of trial, counsel detailed the investigation he would perform if given time. (R 229-230) His desire was to talk to other inmates who could have been in the cell at the time the alleged statements were made to Wooden. (R 229) The trial judge should have granted a continuance to allow Corbett's lawyer time to investigate. This Court must now reverse this case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN RESTRICTING THE CROSS-EXAMINATION OF A STATE'S WITNESS BY NOT PERMITTING INQUIRY INTO THE WITNESS'S PENDING CRIMINAL CHARGES.

During cross-examination of Terry Poston, defense counsel attempted to impeach him via questions about charges and arrest warrants pending at the time he came forward to the police with the incriminating information against Corbett. (R 263) Counsel's questioning proceeded as follows:

> Q. Mr. Poston, the reason you went to Freeport is because you thought you were going to get arrested; isn't it?
>
> A. I guess you could say that.
>
> Q. You knew they had warrants out for you arrest?

(R 263) The prosecutor interrupted with an objection. (R 263) He argued that defense counsel was attempting to impeach the witness improperly because the question should be limited to prior felony convictions. (R 264) Judge Wells agreed with the State and said,

> JUDGE WELLS: You are attempting to impeach him improperly because the only way you can impeach him on a criminal record is to ask him if he's been convicted of a crime. Do you acknowledge that?

(R 264) Defense counsel responded and tried to explain that he was attempting to impeach the witness in different manner.

> MR. BISHOP: I understand that. But I'm not doing it in that manner, Judge. But, I am attempting to show his bias and his possibility for bias --

(R 264) The judge interrupted, told counsel his inquiry was irrelevant and sustained the State's objection. (R 264)

The trial court incorrectly assumed that counsel was attempting a general impeachment by showing that the witness had outstanding arrest warrants or prior arrests. While such general impeachment is not permitted, Corbett was entitled to impeach the witness with pending criminal charges. See, Torres-Arboledo v. State, 524 So.2d 403, 408 (Fla. 1988); Fulton v. State, 335 So.2d 280 (Fla. 1976); Morrell v. State, 297 So.2d 579 (Fla. 2d DCA 1974). As this Court has said,

> When charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest.

Torres-Arboledo, 524 So.2d at 408. Poston had arrest warrants and pending charges at the time he alleged he acquired the incriminating information and told law enforcement. Corbett was attempting to bring this fact before the jury to demonstrate a possible bias or self-interest motive on the part of the witness. This was not impermissible general impeachment with prior arrests.

The trial court's ruling violated Corbett's constitutional right to confront and cross-examine the witness. Amends. VI, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const. Corbett asks this Court to reverse his conviction for a new trial.

ISSUE III

THE SENTENCING JUDGE, WHO DID NOT PRESIDE OVER THE TRIAL AND PENALTY PHASE, ERRED IN SENTENCING CORBETT AFTER MERELY REVIEWING THE TRANSCRIPTS OF THE TRIAL AND WITHOUT PERSONALLY HEARING THE TESTIMONY OF THE WITNESSES PERTINENT TO THE SENTENCING DECISION.

The day after the penalty phase of the trial and the jury returned its recommendation, Judge Wells was killed in an airplane crash. Corbett's case was assigned to Circuit Judge G. Robert Barron for purposes of sentencing and post-trial motions. (R 874) Before sentencing, Corbett moved for a new penalty phase trial in order for Judge Barron hear the witnesses testify and evaluate their demeanor and credibility. (R 872-873) Judge Barron denied the motion, noting that he had reviewed the trial transcripts and the presentence investigation report. (R 1452-1453) Defense counsel did not stipulate to the use of the transcripts for sentencing and objected to this procedure. (R 1452-1462) Judge Barron proceeded to make findings of fact, weigh the aggravating and mitigating circumstances and impose a death sentence. (R 890-891, 1498-1506) Corbett filed a post-sentencing motion for a new penalty phase trial on the same grounds which the court denied. (R 1459-1498) In sentencing Corbett to death without personally hearing and evaluating the testimony of the witnesses, Judge Barron violated Sections 38.12 and 921.141, Florida Statutes and denied Corbett his constitutional rights under the Sixth, Eighth and Fourteenth Amendments as well as Article I Sections 9, 16 and 17 of the Constitution of the State of Florida.

Section 38.12 Florida Statute provides that no parties shall suffer any detriment as the result of the death of a judge. The provision reads:

> Upon the resignation, death, or impeachment of any judge, all matters pending before him shall be heard and determined by his successor, and parties making any motion before such judge shall suffer no detriment by reason of his resignation, death, or impeachment. All judges, upon resignation or impeachment, shall file all papers pending before them with the clerk of the court in which the cause is pending; and the executor or administrator of any judge who dies pending any matter before him shall file all papers found among the papers of his intestate or tester with the said clerk.

This statute allows a successor judge, who has not heard the evidence at the pending trial or hearing, to enter findings or a judgement only after a new trial or hearing. Bradford v. Foundation & Marine Construction Co., 182 So.2d 447 (Fla. 2d DCA 1966). The rationale behind the rule, as expressed in Bradford, centers on the importance of the fact-finder having the opportunity to personally hear and see the witnesses:

> Our adoption of the rule requiring a decision upon the facts from a judge who heard the evidence is not to be lightly taken. No one would contend that the permanent absence of a juror, after having heard the evidence and before a verdict is rendered, would not be grounds for a mistrial. Appellate courts lean as heavily upon judge's findings as they do upon jury verdicts. This reliance on a judge, or jury as a trier of fact is in recognition of their opportunity to personally hear the witnesses and observe their demeanor in the act of testifying. The absence of this opportunity leaves a gap in the proper procedure of trial.

182 So.2d at 449. Consequently, a successor judge cannot render findings and a judgement on a pending matter on the basis of a transcript, unless the parties stipulate to using the transcript for that purpose. See, Bradford; Blitch v. Owens, 519 So.2d 704 (Fla. 2d DCA 1988); Tompkins Land and Housing, Inc. v. White, 431 So.2d 259 (Fla. 2d DCA 1983). Judge Barron violated these principles when he made findings of fact regarding the aggravating and mitigating circumstances, weighed these findings and the jury's recommendation, and imposed a death sentence without personally hearing the testimony of the witnesses.

Florida's capital sentencing procedures make the sentencing decision of the judge paramount. Sec. 921.141(3) Fla. Stat. The trial judge is charged with the responsibility of finding and weighing the aggravating and mitigating circumstances along with weighing the jury's recommendation. The judge's findings of fact and weighing of the aggravating circumstances is given great deference on appellate review. See, e.g., Holmes v. State, 374 So.2d 944, 950 (Fla. 1979); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). This Court has consistently emphasized the importance of the findings of fact in support of a death sentence to demonstrate the sentencing judge's reasoned decision based on the evidence. Ibid. The findings must be clear, complete, thorough and accurate. Campbell v. State, 571 So.2d 415 (Fla. 1990); Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990); Mann v. State, 420 So.2d 578, 581 (Fla. 1990). Finally, failure to timely file the written findings is fatal to any

death sentence imposed. Christopher v. State, Case No. 74,451 (Fla. May 30, 1991); Grossman v. State, 525 So.2d 833 (Fla. 1988); Van Royal v. State, 497 So.2d 625 (Fla. 1986). Judge Barron's decision to sentence, based upon findings made from a cold record, deprived Corbett of due process. Corbett was entitled to be sentenced by a judge who had personally heard the important witnesses and who had the opportunity to evaluate the demeanor of the witnesses while testifying. The death sentence is unconstitutionally imposed in this case.

Corbett is aware of Fla.R.Crim.P. 3.700(c) which allows a judge who did not preside over a defendant's trial to preside at the sentencing proceedings if he has familiarized himself with the case. See, Haggerty v. State, 566 So.2d 825 (Fla. 1st DCA 1990); Castor v. State, 351 So.2d 375 (Fla. 1st DCA 1977); Moore v. State, 378 So.2d 792 (Fla. 2d DCA 1979); Caplinger v. State, 271 So.2d 780 (Fla. 3d DCA 1973). The rule provides:

> (c) In those cases where it is necessary that sentence be pronounced by a judge other than the judge who presided at trial, or accepted the plea, the sentencing judge shall not pass sentence until he shall have acquainted himself with what transpired at the trial or the facts, including any plea discussions, concerning the plea and the offense.

Judge Barron was apparently attempting to follow the procedures outlined in this rule when he read the transcript of the trial and penalty phase. However, this rule does not apply to the circumstances in this case. First, it does not take into consideration the unique fact-finding responsibilities of the sentencing judge in a capital case. Sec. 921.141(3) Fla. Stat.

Second, the rule envisions that the different judge will preside over the entire sentencing. Here, Judge Barron entered the case after the most significant portion of the sentencing hearing was complete. He never heard the testimony critical to sentencing. Therefore, even if the rule can apply to capital sentencing, it was improperly applied here.

Corbett's death sentence was improperly imposed. He asks this Court to vacate his sentence and to remand for a new penalty phase trial.

ISSUE IV

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL DURING PENALTY PHASE WHEN THE STATE, ON CROSS-EXAMINATION OF THE DEFENSE PSYCHOLOGIST, ELICITED THAT CORBETT EXERCISED HIS RIGHT TO REMAIN SILENT ABOUT THE DETAILS OF THE CRIME DURING THE PSYCHIATRIC INTERVIEW.

During the testimony of Dr. Jim Larson, who testified for the defense at the penalty phase of the trial, the State, on cross-examination, asked if Larson questioned Corbett about the details of the murder. (R 633) Defense counsel objected that the questioning was designed to elicit a comment on Corbett's right to remain silent. (R 633) However, the court allowed the question and answer and denied Corbett's motion for mistrial. (R 637)

The prosecutor's examination of Larson began as follows:

> Q. Did you talk to the defendant about this crime?
>
> A. Yes, I did.
>
> Q. Talk with him about the mutilation --

(R 633) At this point, defense counsel objected on the grounds that the questioning was violating Corbett's right to remain silent. (R 633) The court had the prosecutor proffer his questions and the witness's answers. (R 633-635) Larson said that Corbett refused to talk about the circumstances of the crime. (R 636-637) After argument, the court ruled that the State could ask the witness if Corbett told him anything about the crime and the witness could give the negative answer. (R 637) Counsel moved for a mistrial, which the court denied. (R 637)

The following question and answer occurred in the presence of the jury:

> Q. Doctor, did the defendant tell you anything about the facts of this crime?
>
> A. No, he did not.

(R 637)

The trial court should not have permitted the State to elicit the fact that Corbett refused to answer the psychologist's questions about the details of the offense. Since this Court's decision in State v. Burwick, 442 So.2d 944 (Fla. 1983), the law has been clear that evidence of a defendant's post-arrest silence and assertion of his right to counsel cannot be introduced to rebut evidence of the defendant's mental state at the time of the offense. Expressly disapproving of a Second District Court opinion to the contrary, Greenfield v. State, 337 So.2d 1021 (Fla. 2d DCA 1976), this Court said

> The Greenfield decision permits the state to rebut the defense of insanity with evidence, taken during custodial interrogation, of a defendant's desire to remain silent and his request for an attorney. That decision is based largely on the unfounded assumption that post-arrest, post-Miranda silence is probative of sanity. Inasmuch as this position cannot be reconciled with the principles of law announced in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), and Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), we disagree.
>
> * * *
>
> Regardless of the nature of the defense raised, the evidentiary doctrine in Hale remains intact. Post-arrest, post-Miranda silence is deemed to have dubious probative value by reason of the many and ambiguous

> explanations for such silence. 422 U.S. at 180, 95 S.Ct. at 2138. Contrary to what Greenfield intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue. The same evidentiary problems addressed by the Supreme Court in Hale are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent. In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt. Accordingly, the state should not be permitted to confirm Burwick's mental state with evidence of his post-Miranda silence.

Burwick, at 947-948; see, also, Spivey v. State, 529 So.2d 108 (Fla. 1988). In 1986, United States Supreme Court concurred with this Court's ruling in Burwick and disapproved Greenfield. Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed. 2d 623 (1986). Just as in Burwick and Greenfield, the State here was not allowed to present a comment on Corbett's choice to remain silent about the details of the offense. Such silence had no probative value and tended to prejudice the jury.

Corbett's rights as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Constitution of Florida have been violated. He asks this Court to vacate his sentence for a new penalty phase trial with a new jury.

ISSUE V

THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENSE TO PRESENT THE CODEFENDANT DURING THE PENALTY PHASE MERELY TO ALLOW THE JURY TO VIEW HIS PHYSICAL APPEARANCE.

Corbett claimed during the penalty phase, in part, that he was under the domination of his codefendant, Donnie Phillips. See, Sec. 921.141 (6)(e) Fla. Stat. (R 594-596) He asked the court to allow him to present Phillips, who had already been convicted at another trial, for the jury to see his physical appearance. (R 594-597) Defense counsel merely wanted Phillips identified for the jury; he did not plan to ask any questions other than his name, height and weight. (R 595) Counsel also said that presenting Phillips without asking any questions of him at all would be acceptable. (R 595) The prosecutor claimed that he would have the right to cross-examine Phillips, even though he was never asked a question on direct. (R 594-596) The court agreed and ruled that Phillips could be presented to the jury only if he waived his Fifth Amendment privilege for purposes of the State's cross-examination. (R 597) Phillips asserted his Fifth Amendment privilege and, consequently, Corbett was not allowed to present Phillips before the jury. (R 611-612) This ruling denied Corbett his right to present evidence in mitigation of his sentence and rendered his death sentence unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9. 16, 17 Fla. Const.

Initially, Donnie Phillips had no Fifth Amendment privilege to the mere presentation of his physical appearance

because it would have been non-testimonial. See, Pennsylvania v. Muniz, 496 U.S. ___, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (slurred nature of defendant's speech not testimonial); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (speaking for voice identification not testimonial); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966) (blood samples not testimonial); Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) (requiring defendant to try on a garment not testimonial). The question then becomes whether the non-testimonial presentation of Phillips' physical appearance allows the State the right to elicit testimony on cross-examination. Since the trial court ruled that the State had such a right, and Phillips would not waive his Fifth Amendment privilege, Corbett was not permitted to present Phillips before the jury.

The trial court's ruling that the State could elicit testimony on cross-examination when no testimony was presented contradicts this Court's decision in Macias v. State, 515 So.2d 206, 209 (Fla. 1987). In Macias, the defendant, during her trial for driving under the influence alcohol, was required to act out field sobriety tests to show her present faculties. On appeal, the circuit court reversed her conviction, but, on certiorari, the district court quashed the lower court's order. The district court reasoned that the acts Macias was required to perform were not testimonial and did violate her privilege against self-incrimination. On discretionary review, this Court approved the district court's decision. This Court's

opinion also specifically overruled Machin v. State, 213 So.2d 499 (Fla. 3d DCA 1968) and Wells v. State, 468 So.2d 1087 (Fla. 3d DCA 1985), which had held that similar presentations of a defendant's physical appearance were testimonial and opened them to full cross-examination by the State. 515 So.2d at 209. The trial judge, here, may have been incorrectly relying on Machin and Wells when he ruled that the mere presentation of Phillips physical appearance to the jury would give the State the right to cross-examine. This ruling improperly deprived Corbett of evidence which would have supported his position that he acted under the domination of Phillips.

Corbett was improperly denied his right to present evidence at the penalty phase of his trial. Although one witness had testified to Phillips' height and weight (R 650), Corbett should have been allowed to present Phillips for observation. The trial judge refused to give the instruction on the mitigating circumstance that Corbett acted under the domination of another at the time of the crime. Sec. 921.141(6)(e) Fla. Stat. (R 676) This excluded evidence would have provided further support for the giving of this instruction. Consequently, the court's ruling on the admission of the evidence also deprived Corbett of a jury instruction on his theory of a mitigating factor. See, Floyd v. State, 497 So.2d 1211 (Fla. 1986).

Corbett urges this Court to vacate his death sentence for a new penalty phase trial with a new jury.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING AND CONSIDERING IN SENTENCING AS AGGRAVATING CIRCUMSTANCES THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST AND IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

The court found the offense qualified for the aggravating circumstances provided for in Sections 921.141(5)(e) & (h) Florida Statutes. The trial court's findings of fact, in their entirety are as follows:

> 1. That the Defendant, along with the co-defendant, Donnie Phillips, robbed, kidnapped, and murdered Sherry Lynn Dailey.
>
> 2. That the victim, Sherry Lynn Dailey, after being robbed and kidnapped, was transported several miles in Defendant's car, made to strip nude, was mutilated, and shot four times.
>
> 3. That the Defendant, Ricky Steve Corbett, was the controlling force instigating the murder and was the actual triggerman.
>
> 4. That the Defendant, Ricky Steve Corbett, took a friend unconnected with the murder to the wooded area where the body was hidden, showed him the body, laughed, and said that was what he thought of human life.
>
> 5. That there was approximately $110.00 removed from the custody and possession of the victim.
>
> 6. That during the course of events, one of the victim's fingers was amputated. The reason for the amputation is unclear from the evidence.
>
> 7. The Defendant had previously been convicted of armed robbery and had only been released from prison for approximately one year at the time these crimes were committed.

> 8. That the Defendant, at the time of the commission of this crime, was twenty-one years of age, has a somewhat low intellectual level, and has led an impoverished life-style. His mother died at an early age.

(R 890-891)

Initially, the sentencing order is not clear as to which facts the court relied upon to find the homicide was committed to avoid arrest and in a heinous, atrocious or cruel manner. The judge listed a series of facts and then listed the aggravating factors he deemed proven beyond a reasonable doubt. (R 890-891) However, there is no analysis as to the reasoning the court use to determine how the listed facts established these aggravating circumstances. (R 890-891) For this reason, alone, this Court should reverse Corbett's death sentence for resentencing. See, Lucas v. State, 568 So.2d 18 (Fla. 1990).

A. The Avoiding Arrest Circumstance

The avoiding arrest aggravating factor is not applicable in cases where the victim is not a police officer, unless the evidence proves that the only or dominate motive for the killing was to eliminate a witness. E.g., Perry v. State, 522 So. 2d 817 (Fla. 1988); Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bates v. State, 465 So.2d 490, 492 (Fla. 1985); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978). Evidence that the homicide victim was the only witness to other felonies does not meet this requirement. Jackson v. State, 502 So.2d 409 (Fla. 1986); Rembert v. State, 445 So.2d 337 (Fla. 1984); Foster v.

State, 436 So.2d 56 (Fla. 1983). Even the fact that the victim knew and could identify the defendant is insufficient. E.g., Perry; Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert. The sole motive of eliminating a witness must be established. This case does not meet that test because the evidence provides nothing, other than the fact that the victim was the witness to the robbery.

This Court has disapproved the avoiding arrest factor in other similar circumstances even where the victim knew the defendant. In Perry v. State, 522 So.2d 817, the defendant killed his former next-door neighbor during an attempted robbery. In Amazon v. State, 487 So.2d 8 (Fla. 1986), the defendant also killed his next-door neighbors during a burglary, robbery and sexual battery. Amazon stabbed the mother and her eleven year-old daughter when he saw the daughter telephoning for help. There was also conflicting evidence that Amazon told a police officer that he killed to eliminate witnesses. In Rembert v. State, 445 So.2d 337, the defendant killed a victim who had known him for a number of years.

Eliminating a witness was no more the sole or dominant reason for the homicide here, than it was in these cases. The trial court should not have found and considered this aggravating circumstance.

B. The Heinous, Atrocious or Cruel Circumstance

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes and said it applies to

> ...those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid at 9. Although the court's order is not clear as to what evidence supports this factor, the court found that the homicide fits this definition.

The trial court's finding is wrong. This homicide was a nearly instantaneous shooting death which does not qualify for the heinous, atrocious or cruel aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). The medical examiner testified that the fatal shots to the head could have been fired first, before any of the other injuries he found. (R 392-394) Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Multiple gunshots administered within minutes do not satisfy the requirements for this circumstance. See, e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within

a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee). Here, the gunshots were likely fired within moments of one another at the scene where the body was found.

This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-810 (Fla. 1988). Even though the victim was abducted and transported to a remote area, there was no evidence that she knew she would be killed. The fact that the victim may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death. Although there was evidence that the body may have been mutilated, nothing indicates this occurred before death. (R 392-394) Consequently, this is irrelevant to the heinous, atrocious or cruel factor since there is no proof the victim suffered pain. Scott v. State, 494 So.2d 1134 (Fla. 1986); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

The heinous, atrocious or cruel aggravating circumstance should not have found and considered in the sentencing equation. Corbett urges this Court to reverse his death sentence.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING CORBETT TO DEATH SINCE A DEATH SENTENCE IS DISPROPORTIONAL TO THE OFFENSE COMMITTED.

This Court has held that equally culpable defendants should be sentenced equally. In Slater v. State, 316 So.2d 539 (Fla. 1975), this Court reversed a death sentence because of the lesser punishment given to the defendant's codefendant and said,

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

Ibid. at 542. Since that time, this Court has frequently foun disparate treatment of those equally guilty to be a basis for a life sentence. E.g., Caillier v. State, 523 So.2d 158 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). The evidence in this case did not show Corbett to be any more culpable than his co-defendant who received a life sentence. His death sentence is disproportionate, and he asks this Court to reduce it to life.

There was no evidence providing details about how this crime was committed. Aside from Poston's testimony that Corbett said he shot the victim (R 494-495), there is nothing to show the actions of Corbett and his co-defendant, Donnie Phillips. Corbett realizes that the sentencing judge found

that Corbett was the controlling force and triggerman. (R 890) However, there is nothing in the record to support the finding that Corbett was the controlling force or that Phillips was any less culpable in his participation. See, Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (non-triggerman's participation found equally culpable with triggerman's) Nothing supports the disparity in their sentences.

Corbett's culpability is no greater than his co-defendant's and his sentence should be no greater. The sentencing judge should not have sentenced him to death. This Court must reduce the sentence to life.

ISSUE VIII

THE TRIAL COURT ERRED IN GIVING PENALTY PHASE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY ADVISE THE JURY AS TO THE LIMITATIONS AND FINDINGS NECESSARY TO SATISFY THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

Ricky Corbett's jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court used the standard penalty phase jury instructions and instructed on the aggravating circumstances provided for in Section 921.141(5)(h) Florida Statutes as follows:

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

(R 704) Additionally, the court defined the terms "heinous", "atrocious" and "cruel" as follows:

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

(R 704) Although this explanation of the aggravating circumstance was taken from this Court's decision in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it is inadequate to guide and limit the jury's sentencing function. The instructions given are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853,

100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); Dixon v. State, 283 So.2d at 9., the jury was not adequately instructed on the limitations imposed via this Court's opinions. The instructions, as given, could have lead the jurors to "believe that every unjustified, intentional taking of human life is `especially heinous'." Maynard, 100 L.Ed.2d at 382. Corbett's jury was left with no guidance and unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using precisely the same wording as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Corbett's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Corbett's jury were likewise constitutionally inadequate.

Proper jury instructions were critical in the penalty phase of Corbett's trial. He was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstances. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments. This Court must reverse his death sentence.

ISSUE IX

THE TRIAL COURT ERRED IN REVIEWING A PRESENTENCE INVESTIGATION WHICH CONTAINED VICTIM IMPACT INFORMATION.

The trial court ordered a presentence investigation prior to sentencing Corbett to death. (R 1509-1528) A victim impact section was included which contained several letters from the victim's relatives and friends. (R 1513, 1517-1528) Nine letters reflected the emotional anguish the victim's relatives suffered as a result of the murder, and each asked the court to impose a death sentence. (R 1517-1528) This material should not have been considered in sentencing. Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987); Grossman v. State, 525 So.2d 833 (Fla. 1988); Patterson v. State, 513 So.2d 1257 (Fla. 1987).

In Booth v. Maryland, the United States Supreme Court addressed the propriety of the sentencing authority in a capital case receiving and considering information about the impact of the crime on the victims. Maryland's practice was to present the sentencing jury with a presentence investigation which included a victim impact statement. The statement included information about the character of the victim, the emotional impact of the crime on relatives and family members' views about the crime and the defendants. Concluding that this information was irrelevant to the capital sentencing decision and likely to improperly shift the focus of the sentencer to arbitrary considerations, the Court held that the introduction of these statements violated the Eighth Amendment. In Grossman, this Court

followed Booth and condemned the practice of a sentencing judge in a capital case hearing testimony from relatives of the victim concerning the crime's impact. This Court held that Section 921.143 Florida Statutes (1985), which allows the next-of-kin of homicide victims to appear or present written statements concerning the crime's impact for consideration by the court at sentencing, is unconstitutional when applied to the capital sentencing process. 525 So.2d at 842. The trial judge erred in following that statute and in considering the improper information in this case.

The information in the PSI in this case was similar to the information provided in the Maryland procedures and the same constitutional error has occurred. The trial court, as the sentencing authority, improperly received irrelevant sentencing material. Corbett's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments. He asks this Court to reverse his sentence for a new sentencing proceeding.

ISSUE X

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISH THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 267, reversed, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1988). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988),

cert. den., 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

The trial court read the standard penalty phase instructions to the jury. In part, those instructions stated:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of me, the judge; however, it is your duty to follow the law which will now be given you by the court and render to the Court an advisory sentenced [sic]....

(R 702) The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely its responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Corbett realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, 525 So.2d 853 (Fla. 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence.

CONCLUSION

For the reasons and authorities presented in Issues I and II, Ricky Corbett asks this Court to reverse his convictions for a new trial. Alternatively, for the reasons presented in Issues III through X, Corbett asks this Court to reverse his death sentence with directions to impose a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Richard B. Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Ricky S. Corbett, #A-097382, R-3-S-5, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 11 day of June, 1991.

W. C. McLAIN