IN THE SUPREME COURT OF FLORIDA

DERRICK TYRONE SMITH, :

Appellant, :

vs. : Case No. 76,491

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On May 24, 1983, the Pinellas County Grand Jury indicted the Appellant, DERRICK TYRONE SMITH, for the first-degree murder of Jeffrey Songer on March 21, 1983, in violation of section 782.04-(1)(a), Florida Statutes. (R1,2)[1]

Appellant was convicted of this offense and sentenced to death on November 29, 1983. (R5-8) On July 17, 1986, this Court reversed the conviction and remanded for a new trial because the trial court erred by admitting evidence of Appellant's statement to the police obtained in violation of his right to counsel. (R11-18)

Appellant was again tried by jury before the Honorable Claire K. Luten, Circuit Judge, on May 8-12, 1990. (R375, 1278) The jury found Appellant guilty as charged. (R131) The penalty phase of the trial was conducted on May 16, 1990. (R1382) The jury recommended death by a vote of 8 to 4. (R160)

On July 13, 1990, the court adjudicated Appellant guilty of first-degree murder and sentenced him to death. (R226-235) Appellant filed his notice of appeal on August 1, 1990. (R236) The court appointed the public defender to represent Appellant on this appeal. (R237)

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[1] References to the record on appeal are designated by "R" and the page number.

STATEMENT OF THE FACTS

A. The State's Case

At 12:28 a.m. on March 21, 1983, Yellow Cab dispatcher Milton Brech sent cab driver Jeff Songer to pick up a fare at the Hogley Wogley barbecue restaurant on the 900 block of 9th Street South in St. Petersburg. (R697-702) Songer called in to report that they were going to Fairfield and 31st. (R702) A few minutes later Songer sent a distress call, "D-16." Brech called the police and sent another cab driver, Charles Montgomery, to find Songer. (R703,708)

Montgomery found Songer's cab parked in the 3100 block of Fairfield South in St. Petersburg. The headlights were on, the door was open, and the engine was running. (R708-710) Montgomery found Songer lying face down, 68 feet from the cab, and called the dispatcher to send paramedics. (R711) Montgomery identified Songer for the police and the medical examiner. (R712) At trial he identified photographs of Songer. (R711-712) Montgomery did not see anyone else in the area. (R713)

St. Petersburg police officers were dispatched to the crime scene. They obtained and identified photographs of the scene, the cab, Songer's body, Hogley Wogley Bar-B-Que, and the telephone there. (R750-767,794-798,834-845) Upon examining the body, the officers found a wallet containing Songer's identification and $5.00, and a money pouch containing $145.62. (R754-755,767-768,801-802) Four or five latent fingerprints were found inside the cab.

(R772-773) Latent fingerprints were also found on the phone at the Hogley Wogley. (R834-845)

Officer Jakeway attended the autopsy and obtained more photographs, Songer's fingerprints, and Songer's sweater and T-shirt. (R773-774,780-781) He also collected a small lead fragment found on Songer's shoulder. (R775-778)

The medical examiner, Dr. Joan Wood, examined the body at the crime scene and later performed an autopsy. (R944-949) She determined that the cause of death was a single gunshot which entered Songer's back, damaged both lungs and the aorta, and exited from his chest. (R950-952) She identified Songer's shirt, sweater, and photos of the body. (R947-951)

The State presented the prior testimony of Appellant's deceased uncle, Roy Cone. (R884,887-888) Cone and his wife raised Appellant and his four brothers and sisters after their mother died. Appellant lived with them from the age of eleven to eighteen. (R888-889) Cone last saw Appellant in February , 1983, when he came to visit. (R890) Cone had owned a blue steel .38 Smith and Wesson handgun with a brown handle. He kept the gun under his mattress and had never shown it to anyone except his wife. He had last seen the gun when he fired it on New Year's Eve. He identified a receipt for the purchase of the gun and the box of bullets he kept for the gun. (R891-894,1228-1232) Detective San Marco obtained the box of .38 bullets from Cone and sent two of the bullets to the FBI. (R799-801)

Carolyn Mathis testified that Appellant tried to sell a gun to her and her boyfriend Frank Bellamy for $50 in March, 1983. They refused to buy the gun. (R913-914) Mathis and her sister Regina saw Appellant later that night, around 10:30 or 11:00, at the Cozy Corner Bar with a tall, bright-skinned man. Appellant and his companion walked away towards 9th Street. (R915-916) The gun was shiny, dark silver, with a dark brown handle. (R916-917)

Regina Mathis testified that she saw Appellant at the 12th Street Bar in St. Petersburg on a Saturday night in March, 1983. (R918-919) She saw him again on Sunday at her mother's house and at her sister Carolyn's house. Appellant showed her some bullets, but no gun. She did not hear him offer to sell a gun to her sister. (R919-920) Around 11:00 or 11:30 that night she saw Appellant at the Cozy Corner with a tall, bright-skinned man. She asked whether he had any money. He said no, but he was going to hustle some money. (R9321) She did not know what he meant. (R922-923) Appellant did not say anything about a gun or show her a gun. (R923) Appellant and his companion left the bar together. (R922)

Priscilla Walker testified that she lived with James Matthews in St. Petersburg. On March 20, 1983, Appellant came to the house between 8:00 and 9:00 p.m. to change clothes and eat. Appellant's street name was Rerun. (R1017-1019) Matthews showed her a gun while Appellant was there. (R1018) Appellant left the house, then Matthews left awhile later. (R1019) Appellant returned for his clothes between midnight and 1:00 a.m. (R1019-1020) He said he shot a cab driver in the back because he didn't want to give up the

money. Appellant said he dropped the gun at the scene. (R1020-1021)

James Matthews also testified that Appellant's street name was Rerun. (R1025-1026) In March, 1983, Appellant came to his house around 9:00 and showed him a gun which he showed to Walker. (R1027) Appellant said he was going to get some money. Matthews left the house after Appellant departed. (R1028) When Matthews returned between 12:00 and 2:00, Appellant was talking to Walker in the doorway. He said he might have shot someone, he was scared, and he needed a place to stay. (R1029-1031)

Ernest Rouse was a part-time disc jockey at the Name of the Game Lounge in 1983. Derrick Johnson also worked there. (R895-896) Rouse met Appellant at the lounge on a Sunday night in March, 1983, when he came in with Johnson around 7:30 or 8:00. (R896-897) Appellant put a blue-black revolver with a brown handle under the turntables. (R897) When Appellant recovered the gun, he put it in his coat pocket or his pants. (R899) Appellant and Johnson left the lounge together. (R897) Johnson returned around 12:30 or 1:00. Dennis Peterson gave Rouse and Johnson a ride when they left around 1:30. (R898-899)

David McGruder testified that he was a cook at Hogley Wogley at 1035 9th Street South in St. Petersburg. (R855-856) Around midnight on March 21, 1983, he saw two men in front of the restaurant. One was short and dark, and the other was tall and light-skinned. The short man came inside and asked for change for a $20 bill. The man went out, then he returned and used a wall

phone to make a call. (R857-859) The man went out again, then returned to make a second call. Two or three minutes later a Yellow Cab arrived. The short man got in back. The tall man got in front. The cab drove away. (R860) In his prior testimony, Mr. McGruder said the short man made three calls. (R868-869) McGruder identified photos of Hogley Wogley and the telephone. (R860-861) The police were there when he went to work at 10:00 the next morning. (R862) Det. San Marco showed him a photo pack, and he identified a photo of the short man. (R862-863) McGruder testified that the photo looked just like the short man, with no change in his appearance. However, he testified in a deposition that the short man had a short Afro haircut, while the man in the photo had pig tails instead. (R870-874,880-882) In the deposition he said the photo showed the tall, light man. (R875-876) McGruder admitted that the was not certain of his identification. (R880-883)

Detective San Marco identified the photo pack he showed to McGruder on April 8, 1983. (R812-814) McGruder identified a photo of Appellant. (R814-815)

Melvin Jones testified that he went out drinking on the night of March 20, 1983. On his way home, he was trying to avoid the police to avoid being arrested on outstanding warrants. (R973-976) He saw a cab which turned from 31st Street onto Fairfield and stopped. (R976-978) Two passengers and the driver exited the cab. Jones recognized the front seat passenger as New York; he was about six feet tall and had a light complexion. Jones recognized the second passenger as Rerun or Derrick Smith. New York said

something and started running. The driver also ran. Appellant ran after the driver. Jones heard a gunshot. Appellant ran past a church, then he ran past Jones with a gun in his hand. The gun was a .32 or .38 with a black barrel and a brown handle. (R978-987,993-997)

Jones went home at 12:43. A female police officer came to the house and spoke to his wife. When the officer left, Jones told his wife he had seen a cab driver get shot down the road. (R987-988)

In November, 1983, Jones encountered Appellant in the county jail. Appellant threatened to kill Jones and his family. Appellant said, "I don't even know you. I don't know why you're doing this here, you know." (R989)

Jones admitted that he had 24 prior felony convictions. (R990) Following his arrest on the outstanding warrants, Jones wrote letters to the State Attorney and the Public Defender telling them what he had seen. He claimed that he was not seeking any personal benefit for providing the information and denied having made any sentencing agreement with the State in exchange for his testimony. (R992-993) However, Jones was facing 17 or 18 pending felony charges at the time. (R997-998) The court sustained the prosecutor's objection when defense counsel asked whether Jones knew the total maximum penalty for all the charges. (R998) Jones testified that the "did" a total of three years on the charges. The court initially sustained the prosecutor's objection when defense counsel asked how much time Jones actually served. (R998)

During a bench conference, defense counsel explained that a reasonable inference could be drawn that Jones did get "a break" in exchange for his testimony. The prosecutor asserted, "And after the Smith trial he has got four and a half to five and a half, and he was sentenced to three plus two, one below the guidelines." The court then ruled that defense counsel could ask how much time he actually served. (R999)

Jones then admitted that the prosecutor testified on his behalf at sentencing because he had come forward with information about this case. When defense counsel asked if he got a break on his sentence as a result, Jones replied, "Well, from my side, I don't think so, but you can say so." (R1000)

The prosecutor objected again when defense counsel asked whether Jones testified for the State in another murder case. During the ensuing bench conference, defense counsel argued that Jones' appearance as a crucial state witness in another murder case a year later when he had more pending charges was relevant to the jury's determination of his credibility. (R1000-1001) The prosecutor responded, "Your Honor, he was sentenced after he testified in Smith and Clinton Jackson. So whatever deal he got was based on both." The court sustained the State's objection. (R1001) The court directed defense counsel to proffer further testimony that Jones "kept ducking subpoenas and dodging more warrants for his arrest" when the State attempted to procure his testimony for a retrial of the Jackson case after reversal on appeal. (R1001)

Defense counsel subsequently proffered Jones' testimony that he was a witness against Clinton Lamar Jackson and Nathaniel Jackson in another murder case. (R1053-1056) Jones said he could not remember whether he had pending charges or probation violations at the time he testified against Clinton Jackson in 1984. (R1056) In 1987 Jones knew that Jackson was going to be retried and spoke to an investigator for the State Attorney's Office by telephone. Jones told the investigator they would have to use his deposition. (R1057) Jones claimed he did not know whether he had pending charges or outstanding warrants at that time. (R1057-1058)

While testifying before the jury, Jones admitted that he attempted to have his attorney negotiate a deal with Det. San Marco in exchange for his information about this case. Because the only thing San Marco would offer was to serve his time in a prison for convicted police officers, Jones gave an altered version of what happened and refused to answer some of the detective's questions. (R1002-1005) Jones claimed that he eventually came forward with the truth because he heard rumors that Appellant was trying to cast all the blame on Derrick Johnson. (R1005-1009)

Jones' wife, Mellow Jones, testified that March 20, 1983, was her birthday. Jones came home late that night and told her he saw a man get shot. The police then came to her door and asked whether she had heard the noise. (R1013-1016)

Co-defendant Derrick Johnson testified that he was a disc jockey at the Name of the Game Lounge on March 20, 1983, when Appellant tried out as a disc jockey. (R1113-1119) Around 9:30 or

10:00 p.m. Appellant asked Johnson to hand him his pistol from a shelf. The gun was a .38 caliber revolver with a six-inch barrel, black cylinder, and brown handle. Appellant put the gun in the waistband of his pants. (R1118-1121)

About half an hour later, Appellant and Johnson went to Norm's Bar. (R1121-1123) Johnson suggested robbing a marijuana dealer. (R1123,1179) Appellant loaded his gun and returned it to his waistband. (R1124) They walked to the Cozy Corner Bar. (R1124-1125) Appellant spoke to two women and told them he and Johnson were "seriously thinking about going to hustle up some money." (R1125)

They walked down the street. Appellant held the gun in his hand and said he felt like shooting it. (R1126) They talked about taking a cab and going to rob a motel. A cab driver refused to give them a ride. Johnson knocked on the door of the Yellow Cab Company but no one responded. (R1127)

They proceeded to Hogley Wogley Bar-B-Q. Johnson suggested robbing the restuarant, then they decided to rob a cab. (R1127-1128,1179) Appellant went inside to call a cab. He came back outside, and they planned the robbery. (R1128-1130) Johnson or Appellant went back inside Hogley Wogley to call the cab again. They waited outside. (R1131)

A Yellow Cab arrived. Johnson got in the front seat. Appellant got in the back seat. The driver, Songer, sent a coded message to his dispatcher, "D-16." (R1132-1133) Appellant told Songer to stop on 31st Street. (R1139-1140) Johnson got out on the

right side of the cab. Songer got out and opened the door for Appellant. Johnson walked around the cab and saw that Appellant was holding the gun. (R1140-1141,1181) Johnson asked what was up, and Appellant replied, "You know what's up." Songer asked if there was a problem and said he didn't want any trouble. (R1142)

Songer ran down the street. Johnson ran the opposite direction, stopped, and looked back to see Appellant running after Songer. (R1142-1143,1181-1182) Appellant stopped, raised the pistol, and fired one shot. (R1143-1144) Songer said, "Oh, shit," and screamed. (R1144) Johnson ran toward 31st Street. Appellant caught up with him. (R1145,1182-1183) He was trying to put the gun back in his pants. Appellant said something to the effect that "I told you I was going to shoot him, [or] I had to shoot him." (R1145)

Johnson returned to the Name of the Game Lounge until closing time. (R1145-1147) He got a ride home, then proceeded to another bar. He went home around 2:00. (R1147)

Johnson talked to his mother then next day. (R1153-1154) The defense waived cross-examination concerning Johnson's plea agreement to avoid admission of Johnson's prior consistent statements. (R1154-1173) Johnson admitted having one prior felony conviction. (R1174) In October, 1983, Johnson testified that he told the cab driver to take them to 3130 31st Street South. (R1176-1177) In March, 1983, Johnson made sworn statements to the police that he first met Appellant at the Hogley Wogley on the night of the offense. (R1177-1178) At a preliminary hearing on June 23, 1983,

Johnson testified that he never had the gun in his hand. (R1178) Johnson also denied telling Larry Martin that Appellant had nothing to do with the shooting. (R1184)

Before trial, defense counsel moved to exclude evidence that Appellant robbed a Canadian couple in their motel room about twelve hours after the homicide. Defense counsel argued that the evidence was irrelevant and unfairly prejudicial. (R40-42,63,251-252,262-267) The prosecutor argued that the evidence was relevant to Appellant's motive and possession of a gun. (R252-262,267-269) The court denied the motion. (R64,292) Defense counsel renewed the motion at trial. (R389)

Over defense counsel's renewed objection and motion to exclude evidence of the robbery victim's injury, the court allowed the State to present the testimony of Marcel DeBulle. (R1191-1193) The court instructed the jury that his testimony would be considered only for the purpose of proving motive and possession of a firearm. (R1194) DeBulle testified that Appellant entered his motel room shortly after noon on March 21, 1983, and robbed DeBulle and his wife at gunpoint of their money, jewelry, and watches. (R1194-1203) Appellant slapped DeBulle in the face and punched him in the eye with his fist. (R1197) Appellant grabbed DeBulle's briefcase and looked inside. (R1198)

Also over defense counsel's renewed objection and upon instructing the jury on the limited purpose of the evidence, (R847-848) the court permitted crime scene technician Roy Kirby to testify that he obtained a latent fingerprint from DeBulle's

briefcase. (R849-854) Fingerprint examiner Frank Reinhart compared the print as well as the latent print found on the Hogley Wogley telephone to Appellant's known prints and found that both latent prints matched Appellant's left thumb. (R1209-1220)

FBI Agent Robert Sibert examined Songer's sweater and T-shirt and found bullet holes and traces of lead. (R924-930) He also found traces of lead around the pockets of Appellant's jeans, but he could not determine the source. (R935,940-942) Sibert examined the lead fragment found at the autopsy. It could have come from the bullet that passed through the body, but it had no remaining bullet characteristics. (R930-933)

FBI Agents Roger Asbery and Donald Havekost analyzed the lead fragment from the autopsy and lead from the bullets obtained from Roy Cone. Both agents determined that the composition of the lead in the fragment was the same as the lead in the bullets. (R1033-1050,1062-1086)

B. The Defense

Appellant was represented at his first trial by attorneys Richard Smith and Thomas Donnelly. (R5) They pursued an alibi defense. (R16-17) Upon this Court's remand for a new trial, the court again appointed Smith and Donnelly as counsel. (R28)

On July 26, 1987, Appellant wrote a letter to the court requesting the appointment of substitute counsel. (R50) Smith and Donnelly moved to withdraw as counsel based upon Appellant's request, irreconcilable differences, and an ethical conflict. (R51-

52) The court granted the motion and appointed attorney Richard Sanders to represent Appellant. (R54,56)

On October 25, 1989, Sanders moved to withdraw as counsel on the ground that Appellant "wants counsel to represent testimony that counsel believes to be perjurious." (R86) The court conducted a hearing on the motion on November 6, 1989. (R351) Sanders explained that Appellant wanted him to present alibi witnesses at trial, but Sanders believed that the witnesses were not telling the truth. (R535-356) The court denied the motion and directed Sanders to redetermine whether he could ethically call the witnesses at trial. (R95,358-359)

Appellant wrote a letter to the court on November 6, 1989, stating,

> Richard Sanders told me my case was the first murder case he's handled, he's outclassed and it shows more and more as time passes. I don't want Richard Sanders representing me on this particular case and it's obvious that he and I have a conflict of interest. . . . I don't want to be like a lamb lead to slaughter and that's how I feel with Richard Sanders representing me. I feel that a trial with him representing me is a mere formality. I ask that you reconsider your decision to deny his motion to withdraw. (R92-93)

The court responded to Appellant's letter with a letter dated November 9, 1989, stating,

> Please be advised that I am unable to be of any assistance to you regarding the above-mentioned case. Any, and all, correspondence to me must be done through your attorney, Mr. Richard Sanders, and a copy of your letter, along with a copy of my response, is being sent to him. (R94)

Defense counsel renewed his motion to withdraw at trial, but the court again denied it. (R394) Defense counsel requested the court to call Appellant's alibi witnesses as court witnesses because he could not vouch for their credibility. The court reserved ruling. (R962-965) After the State rested, (R1235) defense counsel informed the court that he would not call the alibi witnesses, Kahn Campbell and James Hawkins, because he believed they would commit perjury. The court refused to call them as court witnesses or to allow Appellant to call them on his own. (R1237-1253)

Larry Martin testified for the defense that he spoke to Derrick Johnson in the Pinellas County Jail during the summer of 1983. Johnson told him Appellant was not the one who shot the cab driver. Johnson did not say who did it. (R1257-1259) Martin told Christine Gadson and Johnson's mother what Johnson said to him, but Martin denied telling them Appellant wanted him to testify that Johnson did the shooting. (R1259-1260,1267)

When defense counsel asked Martin how many times he had been convicted of a felony, Martin replied, "A couple times, I think. I'm not sure." (R1260) The prosecutor had judgments and sentences showing eight felony convictions which he intended to use to impeach. (R1260-1261) Defense counsel objected that he had not been notified of the prosecutor's intended use of these judgments in discovery. (R1261,1263) The court's initial response was that the State had no duty to disclose the judgments because Martin was a defense witness. (R1261,1263) Defense counsel responded that

neither he nor Martin knew the number of convictions. (R1264) The court found that there was no prejudice to the defense witness because the number of felony convictions did not matter. (R1264) The court then permitted the prosecutor to use the judgments to refresh Martin's memory and elicit his admission that he had eight felony convictions. (R1265-1266) The court granted the State's request to admit the judgments into evidence, (R1266) but the State later reconsidered its position and obtained the court's agreement not to provide the judgments to the jury during their deliberations. (R1355-1356)

Appellant waived the right to testify, and the defense rested. (R1269)

C. The State's Rebuttal

Maxine Nelson testified that she was Derrick Johnson's mother. Christine Gadson is her former neighbor. (R1270) Nelson and Gadson had a telephone conversation with Larry Martin. Martin said Appellant wanted him to say Derrick Johnson killed the cab driver, but he would not do it. (R1270-1271)

D. Penalty Phase

The State presented a certified copy of Appellant's judgment and sentence for the armed robbery of Mr. DeBulle. (R1411)

Appellant's brother, Rodney Brown testified that they were born in Jersey City, New Jersey. Their mother died in 1974. They moved to St. Petersburg to live with their great aunt, Louise Cone, their only relative who wanted all five of the children together. (R1413-1415) Appellant's father had passed away. (R1415) In New Jersey, Appellant had been given many responsibilities in helping to care for his brothers and sisters. He was like a father. In Florida, either their aunt or their uncle was always home, so Appellant's responsibilities diminished, but he continued to be a good brother. He helped discipline the other children and gave them good advice. (R1415-1416) Their mother's death affected Appellant more than the younger children. (R1417) Appellant attended church regularly with the others. (R1417-1418) He was involved in church activities; he sang in the choir, served as an usher, and played drums for a musical group. (R1418) Appellant respected his aunt and uncle and did as they said. (R1418) Their aunt and uncle were good parents. (R1421) He got in trouble with the law a couple of times for shoplifting and a burglary. He was sent to the Pinellas Youth Home. When he returned, he continued to be a good brother. (R1420-1422)

Louise Cone's deposition was read to the jury. (R1423) Her husband Roy died in 1985. (R1424) Appellant's mother was her niece. She died in 1974. She had asked Mrs. Cone to take care of her five children if anything ever happened to her. (R1425)

Appellant was eleven when he came to live with her. (R1424) He was the oldest child. "He was a really nice boy." Appellant did not give her any trouble. (R1426) He helped take care of his brothers and sisters and kept Mrs. Cone informed about their behavior. (R1426-1427) He also helped with the house cleaning and laundry. (R1427) All five of the children attended church regularly. (R1427-1428) Appellant ushered, sang in the choir, and played the drums in the Sunshine Band. He loved going to church. Appellant was eighteen when he moved out. (R1428) Appellant was a "nice kid" who got in with the "wrong crew" who led him astray. (R1429) He was picked up for shoplifting and was sent first to the Pinellas Youth Home, then to the Pinellas Marine Institute, from which he was expelled for fighting. (R1432-1433) He also got in trouble for curfew violations. (R1434) He was arrested for entering the window of a burned out house, but he was released to her. (R1435)

A video tape of the deposition of Reverend B.O. Walker was played for the jury. (R1436,1558-1572) Appellant was a member of his church from 1975 to 1979. (R1559-1560) Appellant was in his early teens. His aunt was a church member. She took care of five of the six children of her deceased niece. Appellant was the oldest. He was a "typical young man." He assumed a leadership role with his brothers and sisters and with the other young people in the church. (R1560) Appellant made a favorable impression upon Rev. Walker when he came to the defense of another boy who was being harassed by the other children and when he expressed

repentance for having blamed God for his mother's death. (R1564-1565) Appellant was involved in church activities and was never a problem until he entered high school and began feeling that his aunt and uncle were too strict. (R1561-1563,1566-1568) He began staying away from home and church and got involved with the wrong boys. (R1569-1570)

In another video taped deposition, Walter Gaulette testified that he is a Jehovah's Witness minister who conducts Bible studies in the Pinellas County Jail. (R1576-1577) Appellant began attending these classes in 1983. He caused problems at first, but his behavior improved dramatically after Gaulette and the chaplain had a talk with him. (R1577-1580) Afterwards, Appellant was "a changed man," a "God-fearing man," a fine man whose character is very good. (R1580) Appellant understands the scriptures and helps explain them to others. "All he says now -- he talks is God. He lays in his bunk; he talks to God. And he -- he just puts it in God's hands." (R1581)

Appellant testified that he was born on August 7, 1962, in Jersey City, New Jersey. His father died when he was three or four, so he never really knew him. His mother died in 1974 when he was eleven. Her death left him feeling all alone, "like the whole world was against me." (R1438-1439) He was the oldest of five children. They came to Florida to live with their great aunt and uncle, Louise and Roy Cone. Appellant did not want to come. He was scared and felt he could take care of himself. (R1439-1440)

Sometimes Appellant felt that more was expected of him because he was the oldest and that he wasn't being treated fairly. However, his aunt provided love, discipline, and principles. (R1441) When he was fourteen, Appellant was in a store with another boy who stole some playing cards. They were both arrested, and Appellant was sent to Pinellas Youth Home. (R1442) He ran away because he was the only black person there, and he felt out of place. He was sent to another program at Pinellas County Tri-Center, and then to the Job Corps in Kentucky. (R1443) He obtained permission to leave and returned to St. Petersburg. His aunt told him he had to leave, so he obtained a job and lived in a rooming house. (R1444) He began "smoking dope" when he was thirteen or fourteen and stopped going to school. He began using cocaine when he was nineteen. (R1444-1445)

When Appellant was sixteen or seventeen, he climbed through the window of a burned out house to get out of the rain. The police caught him and charged him with burglary. He was sent to Okeechobee Boy's School for three months. When he returned home, his aunt told him he had to leave after two weeks. (R1445-1446) When he was eighteen or nineteen, he went joy riding to Miami with a friend who had stolen a car. When they were stopped, he refused to give the police his name. He was charged with grand theft and obstructing a police officer. (R1447)

Appellant has one child, a daughter who was seven at the time of trial. He maintained contact with her and talked to her on a regular basis. (R1447-1448)

When Appellant went to jail he was very rebellious. When he was fourteen and again when he was twenty, he blamed God for his mother's death and his other problems. In jail he returned to church to find peace of mind. (R1448-1449) If he were sentenced to life, he would try to better himself and to help his brother, sisters, and daughter. (R1450)

Defense counsel Richard Sanders testified that he had been representing Appellant for two and a half years. (R1453-1454) Appellant had been sentenced to life without parole for the DeBulle robbery. (R1454-1455) Appellant developed a self-protective shell to shield himself from the potentially threatening people he encountered in prison. (R1455-1457) But Sanders had gotten to know Appellant pretty well, and learned that Appellant is smart although uneducated. Appellant is a good judge of other people. He understands his situation and how he got there. He accepts responsibility for that. (R1457) Appellant has a very strong desire to live and to better himself. (R1457-1458) He has a good sense of humor. He is easy to get along with once he trusts you. (R1458)

E. Sentencing

On July 10, 1990, the court heard arguments of counsel and the testimony of additional defense witnesses. (R1497-1523)

Appellant's sister, Yolanda Brown, testified that there was no permanent father figure in their house in New Jersey. She remembered playing with Appellant. When their mother died, they moved to Florida to live with the Cones. The children did not know the Cones. (R1500-1501) Appellant played with, talked to, and helped the other children; he was like a father to them. (R1502) She was too young to understand what caused Appellant to get in trouble. (R1502-1503)

Cynthia Teal testified that she had been Appellant's pen-pal for the past two years. She met him in person when he was transferred from state prison to the county jail. (R1504-1505) She described Appellant as "a very caring, warm, sensitive person." She loved Appellant and felt that he was a "giving, sweet and understanding, compassionate person." (R1505)

Appellant addressed the court to express his remorse. He also pointed out that the State offered him a life sentence on two or three different occasions. He felt that he did not deserve to die because he let the case go to trial. (R1520)

On July 13, 1990, the court sentenced Appellant to death. (R226-235,1525-1529) The court filed a written order in which it found two aggravating circumstances: (1) The homicide was committed while Appellant was attempting to commit a robbery. (2) Appellant

was previously convicted of a felony involving the use of force, the robbery of Marcel DeBulle. (R231-132)

In mitigation the court found: (1) Appellant has no significant history of prior criminal activity; his prior offenses were non-violent in nature. (2) Appellant's background, potential for rehabilitation, and drug dependence were shown by the testimony of Rodney Brown, Louise Cone, Rev. Walker, Walter Gaulette, Richard Sanders, the Appellant, Yolanda Brown, and Cynthia Teal. The court summarized each witness's testimony. (R233-235) The court also considered Appellant's expressions of remorse. (R235)

SUMMARY OF THE ARGUMENT

I. Richard Sanders, Appellant's court-appointed defense counsel, moved to withdraw because Appellant wanted him to present witness testimony which Sanders believed to be false. After the court heard and denied the motion without directing any inquiries to Appellant, Appellant wrote a letter to the court asking the court to discharge Sanders as counsel because of disagreements between them, Sanders' inexperience in murder cases, and an alleged conflict of interest. The court denied the request without conducting any inquiry. The court's failure to determine the basis for Appellant's complaints about counsel violated Appellant's constitutional right to effective assistance of counsel. The court's failure to determine whether Appellant was seeking to discharge counsel and represent himself violated Appellant's constitutional right to self-representation. These errors require reversal and remand for a new trial.

II. A new trial is also required because the court failed to conduct an adequate inquiry when defense counsel objected to the prosecutor's failure to disclose impeachment evidence in discovery. The court allowed the prosecutor to use undisclosed judgments showing that defense witness Larry Martin had eight prior felony convictions to impeach Martin's credibility. The discovery violation adversely affected Appellant's ability to prepare for trial because it prevented defense counsel from effectively preparing Martin to testify accurately about his prior convictions. The court's

failure to conduct an adequate inquiry into the discovery violation was per se reversible error.

III. The court committed reversible error when it denied defense counsel's motion to exclude evidence of an irrelevant collateral crime. About twelve hours after cab driver Jeffrey Songer was shot and killed on the city streets, Appellant entered the motel room of a Canadian tourist couple, Mr. and Mrs. DeBulle, and robbed them at gunpoint of their watches, jewelry, and money. Appellant slapped Mr. DeBulle in the face and punched him in the eye, but he did not fire the gun. The prosecutor persuaded the court to admit the evidence of the DeBulle robbery to prove Appellant's motive and possession of a gun. In the absence of any evidence that the gun used in the DeBulle robbery was the gun used to shoot Songer, Appellant's possession of a gun in the DeBulle robbery was not relevant to any material issue in his trial for killing Songer. Furthermore, evidence of the DeBulle robbery was not relevant to prove Appellant's motive for shooting Songer. The robbery evidence served no purpose at trial other than to demonstrate Appellant's bad character and propensity to commit violent crimes. Admission of this evidence violated Appellant's right to a fair trial.

IV. The trial court violated Appellant's constitutional right to confront and cross-examine adverse witnesses when it allowed the prosecutor to conceal the specific terms of Melvin Jones' prior sentencing agreement with the State made in exchange for his testimony against Appellant at Appellant's original trial. The court

also violated the right to effective cross-examination to expose the witness's bias and motive to testify by prohibiting defense counsel from cross-examining Jones about his past dealings with the State as a witness in another murder trial. Because Jones was one of two purported eyewitnesses to the shooting of Jeffrey Songer, and the other was co-defendant Derrick Johnson, Jones' credibility was crucial to the State's case against Appellant. The court's violation of the right to effectively cross-examine Jones adversely affected defense counsel's ability to attack Jones' credibility and requires reversal for a new trial.

V. The trial court violated the cruel and unusual punishment prohibitions of the state and federal constitutions by imposing a death sentence which was not warranted by the aggravating and mitigating circumstances. The State proved only two aggravating factors -- murder committed during an attempted robbery and previous conviction of another violent felony, the subsequent robbery of Marcel DeBulle. The defense presented evidence of a number of statutory and nonstatutory mitigating circumstances, which were found to be mitigating by the court -- no significant history of prior criminal activity, childhood trauma, loving relationships with family members, genuine religious belief, positive change in character in prison, a history of drug abuse, and genuine remorse. Although rejected by the court, Appellant's youth, age 20 at the time of the offense, should be considered mitigating when viewed in the context of the other mitigating circumstances. The mitigating circumstances outweighed the aggravating factors. The death sen-

tence was disproportionate to the circumstances of the offense and Appellant's background and character. The death sentence was also disproportionate in comparison to other, similar capital cases in which death sentences were vacated. The death sentence must be vacated, and the case must be remanded for imposition of a life sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO SELF-REPRESENTATION BY FAILING TO INQUIRE INTO THE BASIS FOR APPELLANT'S PRO SE REQUEST TO DISCHARGE COURT-APPOINTED COUNSEL.

The Sixth and Fourteenth Amendments guarantee the accused both the right to effective assistance of counsel and the right to waive counsel and to represent himself. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); U.S. Const. amends. VI and XIV. Similarly, the Florida Constitution guarantees the accused the right "to be heard in person, by counsel or both. . . ." Art. I, §16, Fla.Const.

In this case, defense counsel moved to withdraw as counsel on the ground that Appellant wanted him to present testimony which counsel believed to be false. (R86,353-356) The court heard and denied this motion on November 6, 1989, six months before the commencement of the trial on May 8, 1990. (R95,.351,358-359,375) Appellant was present for this hearing (R353), but he did not address the court, and neither the court nor counsel directed any inquiry to Appellant. (R353-363)

Later on the same day, Appellant wrote a letter to the court asking the court to discharge defense counsel:

> Richard Sanders and myself don't see eye-to-eye on many matters pertaining to the case.

> . . . I'm on trial for my life and I feel its only right that I be afforded the opportunity to be able to fight on equal terms. . . . Richard Sanders told me my case was the first murder case he's handled. He's outclassed and it shows more and more as time passes. I don't want Richard Sanders representing me on this particular case and it's obvious that he and I have a conflict of interest. I relayed to you in my earlier letter that I don't want to be like a lamb lead [sic] to slaughter and that's how I feel with Richard Sanders representing me. I feel that a trial with him representing me is a mere formality. I ask that you reconsider your decision to deny his motion to withdraw. (R92-93)(Emphasis added.)

This letter, particularly the statement, "I don't want Richard Sanders representing me," was a very definite and unequivocal request to discharge defense counsel. Moreover, the letter raised grounds for discharge which were not addressed in the hearing on defense counsel's motion to withdraw, including counsel's lack of experience and an alleged conflict of interest. Yet the court's only response to Appellant's request was a letter stating,

> Please be advised that I am unable to be of any assistance to you regarding the above-mentioned case. Any, and all, correspondence to me must be done through your attorney, and a copy of your letter, along with a copy of my response, is being sent to him. (R94)

The court's response to Appellant's request to discharge defense counsel, directing Appellant to submit his request to the same attorney he wanted discharged, was more than ironic. It was an abdication of the court's duty to inquire into the basis for the request to determine whether there were sufficient grounds to discharge counsel and either to appoint substitute counsel or to allow Appellant to exercise his right of self-representation.

When the accused moves to discharge his court-appointed counsel and alleges ineffective assistance of counsel as one of the reasons for the motion, the court is obligated to

> 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 effect 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 ineffective representation, the court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla.), cert.denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), quoting Nelson v. State, 274 So.2d 256, 258-259 (Fla. 4th DCA 1973). Accord Davenport v. State, No. 91-1245 (Fla. 1st DCA March 9, 1992)[17 F.L.W. D676]; Taylor v. State, 557 So.2d 138, 143 (Fla. 1st DCA 1990); Black v. State, 545 So.2d 498, 499 (Fla. 4th DCA 1989).

The trial court's failure to determine whether defense counsel was providing effective assistance and whether there were adequate grounds to discharge counsel and appoint a substitute was reversible error. Perkins v. State, 585 So.2d 390, 391-393 (Fla. 1st DCA 1991); Brooks v. State, 555 So.2d 929 (Fla. 3d DCA 1990); Black v. State, 545 So.2d at 499; Williams v. State, 532 So.2d 1341, 1342-1343 (Fla. 4th DCA 1988).

Moreover, even if the court had conducted an inquiry and determined that there were no reasonable grounds to discharge

counsel and appoint a substitute, the trial court was also obligated to inform Appellant of his right to self-representation and to determine whether he knowingly and intelligently chose to waive his right to counsel and exercise his right to represent himself. In Hardwick v. State, 521 So.2d at 1074, this Court ruled,

> We recognize that, when one such as appellant attempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. . . . However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, and the court commits reversible error if it fails to do so. . . . This particularly is true where, as here, the accused indicates that his actual desire it to obtain different court-appointed counsel which is not his constitutional right. [1st emphasis added.]

Again, the trial court's failure to advise Appellant of his right to self-representation and to determine whether he was competent to represent himself was reversible error. Perkins v. State, 585 So.2d at 391-393; Taylor v. State, 557 So.2d at 143.

In Faretta v. California, 422 U.S. at 820, 45 L.Ed.2d at 562, the U.S. Supreme Court opined,

> The language and spirit of the Sixth Amendment contemplates that counsel . . . shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Moreover, the court declared, "To force a lawyer on a defendant can only lead him to believe that the law contrives against him." Id., 422 U.S. at 834, 45 L.Ed.2d at 581.

Thus, the underlying policy of the Faretta decision was to avoid exactly what happened in this case. By failing to advise Appellant of his right to self-representation and by failing to determine whether Appellant knowingly and intelligently chose to waive his right to counsel and represent himself, the court left Appellant to feel "like a lamb [led] to slaughter" for whom the trial was a "mere formality" (R93) after which Appellant was once again condemned to die.

The trial court's failure to conduct the requisite inquiries necessitated by Appellant's pro se request to discharge defense counsel violated Appellant's fundamental rights under both the state and federal constitutions to be provided with effective assistance of counsel or to be permitted to represent himself and to present his own defense unfettered by counsel whose assistance he was not willing to accept. These rights exist in order to prevent the treatment of the accused as "a lamb [led] to slaughter." The trial court's violation of these rights requires reversal of the conviction and sentence and entitles Appellant to a new trial.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE RICHARDSON INQUIRY WHEN DEFENSE COUNSEL OBJECTED TO THE STATE'S VIOLATION OF THE DISCOVERY RULE.

Florida Rule of Criminal Procedure 3.220 provides reciprocal discovery rights and obligations for the defense and the State. In Richardson v. State, 246 So.2d 771 (Fla. 1971), this Court held that the trial court is required to conduct an inquiry when the defense objects to a violation of the discovery rule by the State. The court is required to determine whether the violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, whether it affected the defendant's ability to prepare for trial. State v. Hall, 509 So.2d 1093, 1096 (Fla. 1987).

The State has the burden of proving that its own discovery violation was not prejudicial to the defense. Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977); Lee v. State, 538 So.2d 63, 65 (Fla. 2d DCA 1989). The question of prejudice is not dependent upon the impact of the undisclosed evidence on the jury but rather upon its impact on the defendant's ability to prepare for trial. Smith v. State, 500 So.2d 125, 126 (Fla 1986). The purpose of the inquiry is to ferret out procedural rather than substantive prejudice. Id.; Wilcox v. State, 367 So.2d 1020, 1023 (Fla. 1977).

In this case, Larry Martin was the only defense witness during the guilt phase of the trial. (R1235-1269) He testified that co-defendant Derrick Johnson told him that Appellant was not the

person who shot the cab driver. (R1257-1259) This evidence was inherently crucial to the defense because it was the only evidence of Appellant's possible innocence.

During direct examination, defense counsel asked Martin how many time he had been convicted of a felony. Martin replied, "A couple times, I think. I'm not sure." (R1260) The prosecutor requested a bench conference and informed the court that he had judgments and sentences showing eight felony convictions which he intended to use to impeach Martin. (R1260-1261) Defense counsel objected that he had not been notified of the prosecutor's intended use of the judgments through discovery. (R1261,1263)

The court's initial response to defense counsel's objection was that the State had no duty to disclose the judgments because Martin was a defense witness. (R1261,1263) The court was wrong. Florida Rule of Criminal Procedure 3.220(b)(xi) required the prosecutor to disclose:

> Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged [sic] to the accused.

Moreover, the prosecutor's duty to disclose the judgments he intended to use was not removed by the fact that he intended to use them to impeach a defense witness. There is no exception to the discovery rule for impeachment or rebuttal evidence. Smith v. State, 500 So.2d at 127.

When defense counsel persisted to object, the court conducted what it called a Richardson hearing. (R1263-1265) But the court placed no burden on the State and directed its inquiry solely to

defense counsel. The court first determined that defense counsel had talked to the witness. The court then asked if defense counsel was aware of the felony convictions. Counsel answered, "I didn't know how many he had. He didn't know either." (R1264) The court then ruled,

> I can see no prejudice to you. I want to put that on the record. I am not finding that there is necessarily a discovery violation. I am certainly finding if there is one that there is no prejudice to the Defense witness [sic] convicted of felonies. How many doesn't matter. (R1264)

The court's inquiry was plainly inadequate to satisfy the requirements of Richardson. First, the court put the burden of proof upon the wrong party. Since the State was the party who violated the discovery rule, the State had the burden of showing there was no prejudice to the defense. Cumbie v. State, 345 So.2d at 1062; Lee v. State, 538 So.2d at 65. Second, the court failed to determine whether the violation was willful or inadvertent and whether it was trivial or substantial because the court failed to even determine that there had been, in fact, a State violation of the discovery rule. (R1263-1264) Most importantly, the trial court irrelevantly concluded that there was no prejudice to the defense witness, who was not the aggrieved party. (R1264)

The procedural prejudice to the defense is obvious from the record. Defense counsel was entitled to prospectively rehabilitate his witness by bringing out the facts of the witness's prior felony convictions on direct examination. Lawhorne v. State, 500 So.2d 519 (Fla. 1986). But neither defense counsel nor Martin knew the

number of felony convictions. (R1264) Had the prosecutor disclosed the judgments in discovery, as he was required to do, defense counsel could have prepared Martin to truthfully and accurately answer the question. Because the prosecutor failed to disclose the judgments, Martin was not prepared to answer the question accurately. As a result, the prosecutor was allowed to impeach his original answer and to elicit Martin's admission to eight prior convictions. (R1265-1266) This in turn diminished the credibility of the only defense witness in the eyes of the jury and resulted in substantive prejudice to the defense.

On this appeal, this Court does not need to consider the degree of prejudice incurred by the defense because of the prosecutor's discovery violation. The precise purpose of a Richardson inquiry is to determine whether the discovery violation was prejudicial or harmless. Smith v. State, 500 So.2d at 126. Thus, a new trial is required when the trial court fails to conduct an adequate inquiry, even if the reviewing court feels the error may have been harmless. Id. Florida courts have repeatedly held that the trial court's failure to conduct an adequate Richardson inquiry is per se reversible error. Brown v. State, 515 So.2d 211, 213 (Fla. 1987); Sharif v. State, 589 So.2d 960 (Fla. 2d DCA 1991); Ratcliff v. State, 561 So.2d 1276 (Fla. 2d DCA 1990); Lee v. State, 538 So.2d 63 (Fla. 2d DCA 1989). Appellant's conviction and sentence must be reversed, and this case must be remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF AN UNRELATED ROBBERY WHICH WAS NOT RELEVANT TO ANY MATERIAL FACT IN ISSUE.

> Our justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense.

Peek v. State, 488 So.2d 52, 56 (Fla. 1986). Thus, evidence of other crimes committed by the accused is admissible only if it is relevant to some material fact in issue; it is not admissible when it is relevant solely to the defendant's bad character or propensity. State v. Lee, 531 So.2d 133 (Fla. 1988); Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2)(a), Fla. Stat. (1991).

In this case, Appellant committed an armed robbery about twelve house after the shooting of Mr. Songer. He entered the St. Petersburg motel room of Canadian tourists Mr. and Mrs. DeBulle and robbed them at gunpoint. He slapped Mr. DeBulle in the face and punched him in the eye with his fist. No shots were fired from the gun, and there was no evidence to prove that the gun used in this robbery was the same gun used to shoot Mr. Songer. (R1194-1203)

There were no other significant similarities between the offenses. Mr. Songer was a cab driver who was shot in the back on a city street in the middle of the night when he ran away from his cab during a confrontation with Appellant and Derrick Johnson after

giving them a ride and attempting to collect the fare. (R1140-1145) Mr. Songer's money was not taken. (R754-755,767-768,801-802) In contrast, the DeBulles were an older tourist couple who were robbed of their money and jewelry inside their motel room in the middle of the day. No shots were fired. Appellant struck Mr. DeBulle in the face with his hand. (R1194-1203)

Defense counsel moved to exclude evidence of the DeBulle robbery from the guilt phase of the trial on the grounds that it was not sufficiently similar to the charged offense and was not relevant to any issue other than Appellant's bad character and propensity. (R40-42,63,251-252,262-267,389,1191-1193) The prosecutor urged the court to admit the evidence as relevant to show Appellant's motive and possession of a gun. (R252-262,267-269) The court denied defense counsel's motion and admitted evidence of the robbery. (R64,292,1191-1193) The court instructed the jury to consider the evidence only insofar as it was relevant to show motive and possession of a gun. (R1194)

The prosecutor and the court were wrong. Since the State could not prove that Appellant possessed the same gun during the DeBulle robbery that was used to shoot Songer, the mere fact that Appellant possessed a gun about twelve hours later was not relevant to prove his guilt of shooting Songer. In State v. Lee, 531 So.2d at 135, this Court held evidence that Lee possessed a gun during a subsequent bank robbery was not relevant to prove Lee's commission of a prior kidnapping, rape and robbery of a woman earlier the same day:

> It was not established that the gun used during the bank robbery was the gun used during the offenses at issue. Furthermore, the mere fact that a gun was used during the bank robbery does not establish that Lee used a gun during the charged offenses under review. Because no connection was established between the bank robbery and the instant offenses, the evidence of the bank robbery was not relevant to establish the entire context out of which the criminal conduct arose. The testimony relating to the bank robbery did not have a relevant or a material bearing on any essential aspect of the offenses being tried and did not tend to prove a material fact in issue. . . .

Similarly, in Peek v. State, 488 So.2d at 55-56, this Court held that evidence of Peek's subsequent and dissimilar rape of a young woman was not relevant to any material issue at his trial for the earlier rape and murder of an older woman. This Court reasoned,

> If we held the testimony concerning Peek's collateral crime admissible under these circumstances, any collateral crime evidence would be admissible as long as the crimes were of the same type and were committed within the same vicinity.

Id., at 55.

Just as the subsequent rape was not relevant in Peek, the subsequent robbery of Mr. DeBulle was not relevant to prove motive or any other material issue in Appellant's trial for the shooting and attempted robbery of Mr. Songer. The fact that Appellant took Mr. DeBulle's money at gunpoint does not tend to prove Appellant's motive in shooting Mr. Songer, whose money was not taken. It merely proved that Appellant has a propensity to commit armed robbery.

The admission of such irrelevant collateral crime evidence violated Appellant's due process right to a fair trial. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. In Peek v. State, 488 So.2d at 56, this Court ruled,

> The admission of improper collateral crime evidence is "presumed harmful error because of the danger that the jury will take the bad character or propensity to commit crime thus demonstrated as evidence of guilt of the crime charged." [Citation omitted.]

The trial court's error in admitting irrelevant and prejudicial evidence of the DeBulle robbery during the guilt phase of trial cannot be deemed harmless because the other, properly admitted evidence was legally sufficient to sustain Appellant's conviction. State v. Lee, 531 So.2d at 136-137. The State bears the burden of proving beyond a reasonable doubt that the error did not affect the jury's verdict. Id., at 136. The State cannot satisfy that burden in this case. Appellant's defense was that Derrick Johnson had admitted that Appellant was not the person who shot Mr. Songer. (R1257-1259) Evidence of Appellant's propensity to commit armed robbery would strongly tend to convince the jury of Appellant's guilt, while it was not relevant to any material issue concerning his guilt or innocence. The judgment and sentence must be reversed, and the case must be remanded for a new trial.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM WHEN IT ALLOWED THE STATE TO CONCEAL THE TERMS OF MELVIN JONES' PRIOR SENTENCING AGREEMENTS WITH THE STATE.

The Sixth and Fourteenth Amendments guarantee the accused the fundamental right to confront and cross-examine the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347, 353 (1974); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. amends. VI and XIV. The Florida Constitution also guarantees this right. Coxwell v. State, 361 So.2d 148, 150 n.5 (Fla. 1978); Coco v. State, 62 So.2d 892, 894-895 (Fla. 1953); Art. I, §16, Fla. Const.

The defendant's right to cross-examine a State witness includes the right to impeach or discredit the witness. This may be accomplished by introducing evidence of the witness's prior criminal conviction, by revealing possible biases, prejudices, or ulterior motives, and even by revealing a "partiality of mind at some former time. . . ." Davis v. Alaska, 415 U.S. at 316-317 and n.5; 39 L.Ed.2d at 353-354 and n.5.

Furthermore, the defense must be allowed to explore on cross-examination the underlying facts which form the basis for the attack on the witness's credibility:

> [T]o make any such inquiry effective, defense counsel should [be] permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could

> appropriately draw inferences relating to the reliability of the witness.

Id., 415 U.S. at 318, 39 L.Ed.2d at 355. Thus, the defendant has the "right to probe into the influence of possible bias in the testimony of a crucial identification witness." Id., 415 U.S. at 319; 39 L.Ed.2d at 355.

In the present case, Melvin Jones was a crucial State witness. He was one of two purported eyewitnesses to the shooting of Mr. Songer. (R978-987,993-997) The other eyewitness was co-defendant Derrick Johnson (R1142-1144), whose bias and self-interest in placing the blame for the shooting on Appellant is self-evident, especially in light of his admission that he, and not Appellant, was the originator of the plan to rob Songer. (R1123,1127-1128, 1179) Also, defense witness Larry Martin testified that Johnson told him Appellant was not the one who shot Songer. (R1257-1259) Thus, Jones' corroboration of Johnson's testimony that Appellant was the one who shot Songer was vital to the State's case against Appellant.

Melvin Jones' credibility was automatically placed in issue when he took the stand to testify against Appellant. Mendez v. State, 412 So.2d 965, 966 (Fla. 2d DCA 1982). Defense counsel should have been "afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as he has." Id.

Moreover, the prosecutor opened the door to a penetrating inquiry into Jones' past dealings with law enforcement by eliciting Jones' testimony that he was seeking to evade the police because of outstanding arrest warrants at the time he witnessed the shooting.

(R975) Jones further testified on direct that he was incarcerated in the county jail in November, 1983, when Appellant threatened to kill Jones and his family and said, "I don't know why you're doing this here, you know." (R989) Jones admitted that he had twenty-four prior felony convictions. (R990)

This Court has ruled that

> "a fair and full cross-examination of a witness upon the subjects opened by direct examination is an absolute right . . . which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. . . . Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error."

Coxwell v. State, 361 So.2d at 151 (footnote omitted), quoting Coco v. State, 62 So.2d at 894-895. The scope of such cross-examination

> ". . . is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. . . ."

Coxwell v. State, 361 So.2d at 151 (footnote omitted), quoting Coco v. State, 62 So.2d at 895, quoting 58 Am.Jur. Witnesses §632, at 352 (1948).

On cross-examination, Jones testified that after his arrest on the outstanding warrants, he wrote a letter to the State Attorney's Office and the Public Defender telling them what he had seen. (R991-992) Jones denied that the purpose of the letter was to "cut a deal" for himself. His purpose was to inform the State Attorney

and Public Defender "who actually done it." He was not expecting any personal benefit. (R992) Jones denied that he tried to bargain with the State for a reduction in his own sentence in return for his testimony. (R992-993) Yet Jones admitted that he was facing 17 to 18 felony charges for which he "did" only three years. (R998) When defense counsel attempted to ask how much time he actually served, the court sustained the State's objection. Jones then admitted that the prosecutor testified on his behalf at sentencing, but he persisted in denying that he got a break on his sentence. (R1000)

Defense counsel next asked whether Jones had testified for the State in another murder case. (R1000) When the prosecutor objected, defense counsel explained that Jones had in fact testified as an important State witness in another murder case about a year later and that he had more pending charges at that time. Counsel argued that this information was relevant to Jones' credibility. (R1000-1001) The prosecutor responded, "Your Honor, he was sentenced after he testified in Smith and Clinton Jackson. So whatever deal he got was based on both." (R1001) This constituted an admission by the State that Jones had in fact received some sort of deal in exchange for his testimony against Appellant at his original trial and for his testimony against Clinton Jackson in another murder trial. Yet the court refused to permit defense counsel's inquiry and directed him to proffer the testimony. (R1001)

Defense counsel resumed his cross-examination of Jones before the jury and elicited his admission that he had told Det. San Marco an inaccurate account of what he had seen when Songer was shot. (R1002-1004) This occurred after he tried to make a deal with San Marco, but the only thing he was offered was to serve his sentence in a prison for convicted police officers. (R1003-1005)

On redirect examination, the prosecutor elicited Jones' testimony that he wrote the letter to the State Attorney because he had heard a rumor that Appellant was trying to put all the blame on Johnson, and he thought that was "totally wrong." (R1008) Thus, the prosecutor not only failed to reveal the specifics of Jones' deal with the State, he deliberately reinforced Jones' claim that he was motivated to testify by his own sense of justice and fair play rather than by any deals he made for a reduced sentence.

Defense counsel later proffered Jones' testimony about his role as a witness in the other murder case. In the proffer, Jones testified that in 1984 he was a State witness in the trial of Clinton Jackson for the robbery and murder of the owner of a hardware store. Jones and Jackson were working together when Jackson told him he was going to rob the store. Jones also saw Jackson going toward the store and then coming away from it at the time of the shooting. (R1053-1056) Jones claimed he could not remember whether he had any charges or violations of probation pending when he testified against Jackson, but he agreed that it was possible. (R1056) After Jackson's conviction was reversed on appeal, Jones refused to respond to a subpoena to testify at

Jackson's retrial in 1987. (R1057) Jones claimed that he did not know whether there were any pending charges or warrants against him at that time. (R1057-1058)

Defense counsel argued that this testimony was relevant to Jones' credibility and his claim that he did not expect any benefit from testifying against Appellant. (R1058-1059) The prosecutor responded that no promises had been made to Jones for his testimony at Appellant's retrial and that Jones had already testified that he got a deal or a break after Appellant's first trial: "He's gotten out the point that is appropriate. He got a deal for his testimony and that's before the jury." (R1060) The court did not allow defense counsel to present the proffered testimony to the jury. (R1061)

Despite the prosecutor's admissions that Jones had in fact received a deal for his testimony, he never revealed the specific terms of the deal. Instead, he did his best to prevent the jury from learning about Jones' past dealings with the State and to bolster Jones' claim that he was motivated by a desire to reveal the truth in Appellant's case without regard to any personal benefit. The prosecutor's conduct in this case came perilously close to the knowing use or concealment of perjured testimony condemned in Napue v. Illinois, 360 U.S. 264, 268, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221 (1959); and Alcorta v. Texas, 355 U.S. 28, 31-32, 78 S.Ct. 103, 2 L.Ed.2d 9, 11-12 (1957).

Under the Sixth Amendment as construed in Davis v. Alaska, Appellant was entitled to reveal to the jury all of the facts

pertaining to Jones' past dealings with the State in exchange for his testimony because these facts would have enabled the jury to more accurately assess Jones' credibility, bias, and motive for testifying. See, e.g., Lusk v. State, 531 So.2d 1377, 1382 (Fla. 2d DCA 1988) (impeachment evidence of State witness's past violent character was relevant to show his lack of truthfulness regarding his violent nature, and evidence of offense for which witness was on probation was admissible because it tended to show his possible bias in attempting to curry favor with the State); Patterson v. State, 501 So.2d 691, 692 (Fla. 2d DCA 1987)(defendant had absolute right to cross-examine witness regarding pending charges to show his reason for testifying for the State); Mendez v. State, 412 So.2d at 966 (defendant entitled to cross-examine police officer about prior investigations of his conduct and resulting suspensions to show bias or possible motive in present case).

The trial court's refusal to allow defense counsel to cross-examine Jones about his prior dealings with the State as a witness in another case coupled with the prosecutor's concealment of the terms of Jones' deal to testify against Appellant at his first trial violated Appellant's right to confront and cross-examine the witnesses against him. The violation of a defendant's constitutional rights is subject to harmless error review under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1965); and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As explained in DiGuilio, 491 So.2d at 1135, the harmless error test places the burden on the State to prove beyond a reasonable doubt that the

error did not contribute to the conviction. This burden cannot be satisfied in this case because the violation of Appellant's right to confront and cross-examine Melvin Jones prevented defense counsel from fully developing his attack upon Jones' credibility as a crucial State witness. Had the jurors disbelieved Jones' testimony, the State's entire case against Appellant may have collapsed.

The United States Supreme Court has accorded special recognition to the harmfulness of any curtailment of the defendant's right to effective cross-examination, declaring that it "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis v. Alaska, 415 U.S. at 318, 39 L.Ed.2d at 355. The violation of Appellant's state and federal constitutional rights to confront and cross-examine one of the State's key witnesses requires reversal of Appellant's conviction and remand for a new trial.

ISSUE V

THE DEATH SENTENCE IS DISPROPORTIONATE TO THE CHARACTER AND RECORD OF THE APPELLANT, THE CIRCUMSTANCES OF THE OFFENSE, AND OTHER CAPITAL CASES IN WHICH DEATH SENTENCES WERE VACATED.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1, 9 (1982); U.S. Const. amends VIII and XIV. This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 408 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

This Court has consistently followed a policy of reviewing death sentences to determine whether they are proportionate to the circumstances of the offense and to the sentences imposed in other capital cases. "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). The death penalty must be reserved for only the most aggravated and least mitigated murders. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); State v. Dixon, 283 So.2d 1 (Fla. 1973); cert.denied sub

nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

This case does not qualify as one of the most aggravated murders. The trial court found only two statutory aggravating circumstances to apply. First, pursuant to section 921.141(5)(d), Florida Statutes (1991), the murder was committed while Appellant was attempting to commit a robbery. Second, pursuant to section 921.141(5)(b), Appellant was previously convicted of a violent felony, the robbery of Marcel DeBulle. (R231-232)

Nor does this case qualify as one of the least mitigated murders. The court found one statutory mitigating circumstance pursuant to section 921.141(6)(a), Appellant had no significant history of criminal activity because his prior offenses were all non-violent. (The robbery of Mr. DeBulle was committed after the murder.) (R232) This Court has given considerable weight to this mitigating factor, especially when combined, as in this case, with nonstatutory mitigators. McKinney v. State, 579 So.2d 80, 85 (Fla. 1991); Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987); Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985). The trial court in this case also found several nonstatutory mitigating circumstances relating to Appellant's background, character, and record established by the testimony of defense witnesses. (R233-235)

Because the trial court's summary of the testimony of the defense witnesses was somewhat cursory, this Court must review the actual record to determine the full nature and extent of the miti-

gating evidence. See Parker v. Dugger, 112 L.Ed.2d at 826. Counsel for Appellant has presented a more complete and accurate summary of the testimony of each of the defense witnesses during the penalty phase of the trial before the jury and at the sentencing hearing in sections D. and E. of the Statement of the Facts, supra. That testimony established a number of relevant mitigating circumstances which must be considered in determining whether the death penalty is appropriate in this case.

First, Appellant suffered significant childhood trauma upon his mother's death when he was only eleven years old. (R1414,1417, 1424,1439) His father died when Appellant was only three or four years old, so he never really knew his father. (R1415,1438) He had a very close relationship with his mother. (R1439) When she died, Appellant felt that he was all alone in the world and blamed God for her death. (R1439) To make matters worse, the children had to leave their home in New Jersey and move to Florida to live with their great and uncle, Louise and Roy Cone, whom they had never known before. (R1414-1415,1425,1438,1440,1500-1501) Childhood trauma is recognized as a valid mitigating circumstance because of its lasting effect on the defendant's life. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988).

Second, Appellant's potential for rehabilitation was established in part by testimony showing his loving relationships with his family. Rodney Brown testified that Appellant was a father figure for his younger brothers and sisters; he looked out for

them, encouraged them, helped them with their problems, helped to discipline them, and gave them good advice. (R1415-1416) Louise Cone testified that Appellant was a really nice boy who did not give her any trouble at home, helped her take care of his brothers and sisters, and helped her with household chores and laundry. (R1426-1427,1431) Appellant's sister, Yolanda Brown testified that she remembered playing and talking with Appellant. The children were more comfortable with him that with their aunt and uncle. (R1501-1503) Appellant testified that he had a close relationship with his mother. (R1439) After his mother's death, his aunt provided him with love, principles, and discipline. (R1441) Appellant has a daughter, who was seven at the time of trial, with whom he maintained regular contact. (R1448) A background of close, loving family relationships has been recognized as mitigating. Harmon v. State, 527 So.2d 182, 188-190 (Fla. 1988); Perry v. State, 522 So.2d 817, 818 (Fla. 1988); Fead v. State, 512 So.2d 176, 178-179 (Fla. 1987); Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987).

Third, Appellant's potential for rehabilitation was also shown by evidence of his religious faith and involvement in church activities both as a child and in jail. When Appellant lived with the Cones as a boy he attended church on a regular basis and was actively involved in church activities; he sang in the choir, served as an usher, and played drums for a musical group. (R1417-1418,1428,1559-1563) He impressed Reverend Walker because he assumed a leadership role with the other children, he came to the

defense of another boy who was being harassed by the other children, and he expressed repentance for having blamed God for his mother's death. (R1560,1564-1565) Walter Gaulette testified that Appellant was a regular participant in his Bible study group in the county jail. (R1576-1581) Mr. Gaulette described Appellant as a "God-fearing man," a fine man whose character is very good. (R1580) Appellant understands the scriptures and helps explain them to others. "All he says now -- he talks is God. He lays in his bunk; he talks to God. And he -- he just puts it in God's hands." (R1581) Appellant testified that he returned to church to find peace of mind after he was incarcerated. (R1448,1449) While many inmates feign religious belief hoping for personal benefit, the evidence shows that Appellant's religious belief is genuine and a positive character trait which must be considered in mitigation. Songer v. State, 544 So.2d at 1012.

Fourth, the evidence demonstrated that Appellant has undergone a positive change in his personality and attitude while in prison. Walter Gaulette testified that Appellant caused problems when he first entered the Bible study group in jail. But his behavior improved dramatically after Gaulette and the chaplain had a talk with him. Appellant became "a changed man" and a devout believer in God. (R1577-1581) Appellant testified that he would try to better himself and help his brother, sisters, and daughter if he received a life sentence. (R1450) Defense counsel Richard Sanders testified that while Appellant is uneducated, he is smart and a good judge of other people. He now understands his situation, how

he got there, and accepts responsibility for it. (R1457) Appellant has a very strong desire to live and to better himself. (R1457-1458) Appellant has a good sense of humor and is easy to get along with once he trusts you. (R1458) Cynthia Teal testified that she had been Appellant's pen-pal for the past two years. She met him in person when he was transferred from state prison to the county jail. (R1504-1505) In her experience, Appellant was "a very caring, warm, sensitive person." She loved Appellant and felt that he was a "giving, sweet and understanding, compassionate person." (R1505) Evidence of a positive change in character and personality while in prison has been recognized to be a substantial mitigating circumstance. Songer v. State, 544 So.2d at 1012.

Fifth, Appellant personally addressed the court to express his remorse for his crime. (R1520) The trial court considered this factor in mitigation. (R235) This Court has acknowledged that genuine remorse is a compelling mitigating circumstance. Nibert v. State, 574 So.2d at 1062; Songer v. State, 544 So.2d at 1011.

Sixth, Appellant testified that he had a history of drug abuse preceeding the homicide. He began smoking marijuana when he was thirteen or fourteen years old. His drug use caused him to lose interest in and stop attending school. He began using cocaine when he was nineteen. (R1444-1445) A history of drug abuse is recognized to be a valid mitigating factor. Buford v. State, 570 So.2d 923, 925 (Fla. 1990); Carter v. State, 560 So.2d 1166, 1169 (Fla. 1990); Songer v. State, 544 So.2d at 1011.

Seventh, Appellant was only twenty years old at the time of the offense. (R233) The trial court expressly rejected this statutory mitigating circumstance under section 921.141(6)(g), Florida Statutes (1991), because Appellant was mature and had a good family background. (R233) But Appellant's youth at the time of the offense should be considered in relationship with the other circumstances of his family and social background. While he displayed early maturity both at home and at church, his character changed for the worse when he began associating with the wrong group of boys, using drugs, and getting in trouble for juvenile offenses. (R1429,1432-1435,1442-1447,1569-1570) But after his incarceration, Appellant displayed positive changes in his character, renewed his religious faith, became remorseful for his crimes, and sought to better himself and help others, as set forth above. Thus, when his age of twenty at the time of the offense is viewed within the over-all context of his life and personal development, it must be deemed a valid mitigating circumstance because it is very unlikely that he would have committed so serious an offense at any time of his life except during late adolescence and his early adult years. See Freeman v. State, 547 So.2d 125, 129 (Fla. 1989) (age of 22 combined with dull-normal intelligence, a history of drug abuse, and psychological inability to cope with stress were mitigating factors supporting jury life recommendation); Songer v. State, 544 So.2d at 1011-1012 (age of 23 in combination with mental disturbance, impaired capacity, remorse, history of drug abuse, positive character change in prison, and

religious beliefs were significant mitigating factors rendering death penalty disproportionate).

When this case is compared to other capital cases with similar aggravating and mitigating circumstances, it becomes apparent that the death penalty is disproportionate. Livingston v. State, 565 So.2d 1288 (Fla. 1988), involved the same aggravating circumstances -- previous conviction of violent felony and committed during an armed robbery. The mitigating circumstances were similar to those in this case -- childhood abuse; youth, inexperience, and immaturity; marginal intellect; and a history of cocaine and marijuana abuse. This Court found that the death penalty was disproportionate and directed the trial court to resentence Livingston to life. Id., at 1292.

In other cases involving murders committed during the course of a violent felony, this Court has ruled that this aggravating circumstance was outweighed by the defendant's lack of any significant history of prior criminal activity, especially when this statutory mitigator was combined with other, nonstatutory mitigating factors. McKinney v. State, 579 So.2d at 85; Lloyd v. State, 524 So.2d at 403; Proffitt v. State, 510 So.2d at 898; Caruthers v. State, 465 So.2d at 499.

The mitigating circumstances in this case also outweighed the aggravating circumstances. The death sentence imposed by the trial court is disproportionate to the circumstances of the offense, the character and record of the Appellant, and in comparison with other, similar crimes. The death sentence is therefor arbitrary

and capricious and violates the cruel and unusual punishment prohibitions of both the Eighth Amendment and the Florida Constitution. U.S. Const. amends. VIII and XIV; Art. I, § 17, Fla.Const. The death sentence must be vacated, and the case must be remanded to the trial court with direction to impose a life sentence.

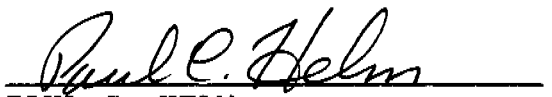
CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and remand this case to the trial court for a new trial, or in the alternative, to vacate the death sentence and remand with directions to impose a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 1st day of July, 1992.

Respectfully submitted,



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