IN THE SUPREME COURT OF FLORIDA

KONSTANTINOS X. FOTOPOULOS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 77,016

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida, Criminal Division.

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TABLE OF CONTENTS

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PRELIMINARY STATEMENT

Appellant was the Defendant and the Appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida. In this Brief, the Appellee will be referred to as the State, and the Appellant as the Appellant or Mr. Fotopoulos.

The following symbols will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

The Appellant, Konstantinos X. Fotopoulos, was indicted, and charged with two (2) counts of first degree murder, one (1) count of conspiracy to commit first degree murder, two (2) counts of solicitation to commit first degree murder, two (2) counts of attempted first: degree murder, and one (1) count of burglary of a dwelling while armed. Specifically, the Indictment charged the Appellant with: Count I, on or about October 20, 1989, the Appellant and Deidre Hunt committed premeditated first degree murder of Mark Ramsey; Count II, on or about November 4, 1989, the Appellant and Deidre Hunt committed premeditated first degree murder of Bryan Chase. (R. 3394); Count III, on or about October 1, 1989 through and including November 4, 1989, the Appellant, Hunt, Teja James, and Lori Henderson conspired to commit first degree murder of Lisa Fotopoulos (R. 3395); Count V, on or between October 31, 1989, and November, 1989, the Appellant, Hunt and Henderson solicited Teja James to commit first degree murder of Lisa Fotopoulos. (R. 3397). The Appellant, Hunt, Henderson and James were also charged by Information, Case No. 90-6668 with attempted first degree murder of Lisa Fotopoulos on November 1, 1989. (R. 3400). In Case No. 90-1995, the Appellant along with others, was charged with on or about November 4, 1989, burglary of a dwelling while armed. (R. 3398); Count 11, the Appellant, Hunt, and Bryan Chase were charged with attempted first degree murder of Lisa Fotopoulos on or about November 4, 1989. (R. 3398); and in Count 111, the Appellant and Hunt were charged with soliciting Bryan Chase to commit first degree murder of Lisa Fotopoulos on or about November 1, through November 4, 1989. (R. 3399).

On January 9, *1991,* the Appellant appeared before the Honorable S. James Foxman, Circuit Court Judge with retained counsel, Tom Motts. Mr. Motts requested the court to permit him to withdraw, and to have the Appellant declared indigent and counsel appointed. (R. *3992).* During this hearing, the State over the Appellant's objections conducted extensive cross-examination of the Appellant's financial status. (R. *3992-4028).* The trial court ultimately declared the Appellant indigent, (R. 3466), and appointed Carmen F. Corrente, Esquire, to represent him. (R. *3467).*

Various pre-trial motions were filed and heard on June *4-5,* 1990, August 10, 1990, August *31,* 1990 and October 5, 1990. One motion filed was Motion for Severance of Offenses, wherein the Appellant sought to sever Count I of the Indictment, the first degree murder of Kevin Ramsey, from the remaining charges, including Count 11 of the Indictment, the first degree murder of Bryan Chase. (R. *3794-3796).* This Motion was originally heard by the court on June *4,* 1990. (R. *2867).* The State gave a lengthy **proffer** as to the anticipated testimony in support of keeping the charges together. (R. *2874-81).* The Appellant disputed the proffer maintaining there was an insufficient connection between the murders of Mr. Ramsey and Mr. Chase. (R. 2882-3). Based upon the proffer by counsel, the Motion to Sever Offenses was denied. (R. 2885). Thereafter, the Appellant: filed a renewed Motion for Severance, (R. 3842-43), and an amended Motion for Severance. (R. 3916-18). These motions were likewise denied by the court. (R. *3206, 3892).*

Jury selection began on August 1, *1990,* in Putnam County pursuant to trial court's granting of the Appellant's Motion for Change of Venue. (R. *3783-3786, 3835-3836).* During voir dire, the Appellant objected to the State using peremptory challenges in a racially discriminatory matter. (R. *229, 434).* The objections were overruled. (R. *230-231, 435-436).*

At the conclusion of the State's case in chief, the Appellant moved for a judgment of acquittal. (R. *2021-2027).* The motion was denied. (R. *2027).* The Appellant renewed his motion at the close of all evidence. (R. *2479-2480,* 2569-*2570).* Again, the motions were denied. (R. *2480, 2570).*

The jury returned verdicts of guilty as to all offenses as charged. (R. 2817-2819). The Appellant was adjudicated guilty of all offenses. (R. 2821).

The penalty phase commenced on October 29, 1990. The jury recommended the death penalty as to Count I, (Kevin Ramsey), by a vote of eight (8) to four (4). As to Count 11, (Bryan Chase), the jury also recommended death by a vote of eight (8) to four (4). (R. 3332).

On November 1, 1990, the trial court conducted a sentencing hearing. The trial court entered a written order sentencing the Appellant to death for the Ramsey murder. (R. 3390-91, 3936-39). The court also sentenced the Appellant: to death for the Chase murder. (R. 3391-92, 3940-3944). As to the Ramsey sentence, the trial court found three (3) statutory aggravating circumstances: 1) the Appellant was previously convicted of another capital felony or felony involving the use of threat or violence to the person; 2) capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and 3) capital felony was a homicide and committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. (R. 3936-3937). The trial court found no statutory mitigating Circumstances had been established, but did find five non-statutory mitigating factors: 1) the Appellant was good son; 2) the Appellant came from a good family; 3) the Appellant was hard working; 4) the Appellant had good manners and he had a good sense of humor; 5) the Appellant did complete his education through the masters level. (R. 3938-3939). As to the Chase murder, the trial court found five (5) aggravating circumstances. In addition to the three (3) found and noted above as to the Ramsey case, the court also found 4) the capital felony was committed while the Appellant was engaged or was an accomplice in the commission or an attempt to commit a burglary; 5) the capital felony was committed for pecuniary gain. (R. 3940-3941). The trial court did not find that any statutory mitigating factors had been establishedby the evidence, but found the same non-statutory mitigating factors as found in the Ramsey case. (R. 3942-3943). As to the remaining convictions, the trial court sentenced the Appellant to concurrent life sentences. (R. 3390).

The Appellant's Motion for New Trial was denied. (R. 3961-3963). A timely Notice of Appeal was filed. (R. 3970). Thereafter, a Stipulation for Substitution of Appellate Counsel was filed wherein Douglas N. Duncan and Philip G. Butler, Jr., are attorneys of record for the Appellant. This appeal follows:

STATEMENT OF THE FACTS

Those facts necessary for consideration of the issues raised herein on appeal will be discussed:

Sergeant Larry Lewis of the Daytona Police Department testified that on November 7, 1989, he and other officers went out to an area known as the Strickland Shooting Range located in Volusia County pursuant to information they had obtained from Mr. Teja James about a homicide. (R. 575). They were unable to locate a body. (R. 573-574). Later that same day, Deidre Hunt took Lewis and other law enforcement officers back out to the shooting range. With Hunt's assistance a badly decomposed body was discovered. It was estimated that the body had been left for a couple of weeks. (R. *584).* The remains were later stipulated as those of Kevin Mark Ramsey. (R. 576-77, 602). The **body** appeared to have three (3) bullet wounds to the chest. (R. 594). It appeared to the officers that he had been tied up at one point. (R. 591, 594). He was wearing a Harley Davidson tee shirt. (R. 594).

Dr. Arthur J. Botting, District Medical Examiner in and for Volusia County, testified without objection as an expert in forensic pathology that on November 8, 1989, he performed the autopsy on Mr. Ramsey. (R. 623, 627-28). The body was in an advanced stage of decomposition. (R. 628). During the autopsy, the doctor recovered two (2) small caliber bullets from the trunk (chest) area, and a third from the cranial cavity. (R. 629). **The** three (3) bullets had "the appearance of .22 caliber bullets." (R. 639). Dr. Botting testified that the .22 caliber shot to the skull was the fatal wound, (R. 668, 673), and this shot would have rendered Ramsey brain dead (R. *644)* and immediately unconscious. (R. 667). Within a reasonable degree of medical certainty, Dr. Botting opined that the cause of Mr. Ramsey's death was multiple gunshot wounds to the chest and head.

(R. *638).* Subsequent *to* his initial autopsy, Dr. Botting viewed a video tape of the Ramsey shooting. Based upon this viewing, he concluded there was an additional gunshot wound to the chest area. (R. *629).* **Also**, subsequent *to* his initial autopsy, Dr. Botting was asked whether there was a possibility of a second gunshot wound present in the skull, and in particular whether such wound was caused by a high velocity type ammunition. (R. *640).* Dr. Botting was shown Mr. Ramsey's skull which had been cleaned **up,** and reconstructed. (R. *640).* He also consulted with Dr. Peter Lipkovich, Medical Examiner for Duvall County, Florida. (R. *640).* In re-examining the skull, Dr. Botting concluded that there was a second gunshot wound to the skull which was consistent with a high powered weapon such as an *AK-47* using military full metal jacketed round ammunition. (R. *642, 643-644).* This second examination was conducted on July **31,** 1990. (R. *672).*

Marjean Powell, the fiance of Mr. Ramsey, testified that she last saw him on October 20, 1989, at which time he was dressed in a Harley Davidson tee shirt. (R. **683).** She **saw** Ramsey with Mr. Fotopoulos, and later saw him talking to Deidre Hunt. (R. *684).* Ms. Powell acknowledged that a trespass warning **had** been issued at request of Mr. Fotopoulos prohibiting Mr. Ramsey from being at Fotopoulos' business establishment. (R. *688).*

Deidre Hunt testified that she arrived in Daytona Beach in July, *1989.* Sometime later, she obtained a job as a bartender at Mr. Fotopoulos' business, Top Shots. She developed a relationship with Mr. Fotopoulos. Over objection, Hunt was permitted to testify that Mr. Fotopoulos had threatened her with a pistol, (R. 735), threatened her friend James with a pistol (R. 719), had thrown a knife at her (R. 728), had slapped her, (R. 747), bound her hands with a coat hanger, and burned her breast with a cigarette. (R. 750). Additionally, Hunt was allowed to testify that Mr. Fotopoulos claimed to **be** an Israeli terrorist assassin, (R. 756) that he had killed many people, (R. 756), that he was a member of a Hunter and Killer Club, comprised of paid assassins to kill people, (R. 757), and was employed by the CIA. (R. *758).*

One day, mid to late October, 1989, Hunt testified that she was asked by Mr. Fotopoulos to look for Mr. Ramsey. (R. 774). Hunt, Ramsey and Mr. Fotopoulos went out to the Strickland Rifle Range, Hunt had not been told what was to happen. (R. 775). After arriving at the rifle range, according to Hunt, Mr. Fotopoulos told her she was going to have to shoot Ramsey or she would die. (R. 777). Hunt testified that she felt she had no choice but to shoot Ramsey. (R. 778-780). After Ramsey had been tied up to a tree, and lead to believe that he was being initiated into a club, (R. 781-782), Hunt testified that she shot Ramsey three (3) times in the chest, and then walked up to him and shot him once in the temple. (R. 783-784). She further claimed that Mr. Fotopoulos subsequently shot Ramsey once in the head with his AK-47. (R. 785-787). Hunt testified that Mr. Fotopoulos video taped the shooting. (R. 783). According to Hunt, Mr. Fotopoulos told her that "if she ever tried to run" that the video tape would be turned over to the police. (R. 791).

According to Hunt, the next time she saw Mr. Fotopoulos he told her that she would have to kill his wife. If she did not cooperate, Mr. Fotopoulos advised he would turn over the video tape of the Ramsey shooting to the police. (R. 792-793). Later, Hunt claimed Mr. Fotapoulos brought up a plan where Hunt would hire someone else to kill Lisa Fotopoulos. (R. 794). Hunt testified that Mr. Fotopoulos wanted his wife killed for the $700,000.00 available insurance money (R. 794-795). Thereafter, Hunt approached Michael Cox and offered him $10,000.00 to kill Lisa Fotopoulos. The plan was for Cox to make it look like a robbery at the Joyland Amusement Center, Mrs. Fotopoulos' business. (R. 795-797). Hunt next approached J.R. Newman to kill Mrs. Fotopoulos. Like Cox, this plan never materialized. (R. 802-803). Hunt testified that she then approached Teja James, the boyfriend of her best friend Lori Henderson. (R. 804-805). The plan devised for Mr. James was to stab Mrs. Fotopoulos at a nightclub on Halloween night. (R. 812-814). This plan fell through. (R. 817). Thereafter, Hunt, Henderson and James located a .22 semi-automatic gun. (R. 818-819). The new plan was for James to shoot Mrs. Fotopoulos' at work and make it look like a robbery. (R. 822). On November 1, 1989, James went to Mrs. Fotopoulos' place

of business where his attempt to kill Mrs. Fotopoulos failed, (R. 825). Hunt testified that Bryan Chase was next approached. He agreed to kill Mrs. Fotopoulos for $5,000.00 (R. 828). Hunt gave Chase the same silver .22 semi-automatic pistol that Mr. James had located, which would jam after the first fired shot. (R. 833). On November 4, 1989, Hunt was aware that Chase went to the Fotopoulos residence located at 2505 North Halifax Drive to commit the murder. (R. 893). Later, Hunt testified she heard from Mr. Fotopoulos from the hospital that his wife had been shot, but was alive. According to Hunt, Mr. Fotopoulos told her that he shot Chase. (R, 894-895). Hunt testified that eventually she went to the police voluntarily with her story. (R. 901). Hunt testified that she had pleaded guilty to first degree murder of Kevin Ramsey and Bryan Chase. (R. 1066). She was sentenced to death. (R. 1076). She acknowledged that she had previously refused to give a statement to Mr. Fotopoulos' lawyer and only a few days prior to her appearing and testifying she had given a deposition. (R. 1077).

Detective William Adamy of the Daytona Beach Police Department testified that on November 22, 1989, he along with other officers conducted a search at the Fotopoulos family residence. In the garage area, he located a brown bag, which contained a tape later identified as a videotape of Hunt killing Kevin Ramsey. Also contained on the tape was an unknown voice. (R. 1208-1213). Discovered in the barbecue pit area was a black vinyl bag containing an AK-47, .22 caliber pistol, along with bullets and other paraphernalia. (R. 1310-1315).

Garry Rathman, firearms expert with the Florida Department of Law Enforcement, testified that the three (3) fired bullets recovered from Mr. Ramsey's body during the autopsy were fired from the .22 caliber pistol recovered above. He also matched an expended AK-47 shell casing discovered in Mr. Fotopoulos' car with the AK-47 weapon. (R. 1931, 1934, 1939).

Ed Ross, Secret Service assigned to the video operations section in Washington, D.C., testified as an expert in the field of video reproduction, editing, authentication and lighting. (R. 1224-1228). In reference to the tape discovered by Detective Adamy, Mr. Ross testified that the tape was an original

and there had been no editing. (R. *1232-1234).* The tape was played in slow motion for the jury.

Joseph Gallagher, an investigator with the State Attorney's Office, testified that he prepared a voice identification line-up utilizing the unknown voice from the Ramsey murder tape with voices of seven (7) other Greek men volunteers. (R. 1381). This voice identification line-up was presented to Lisa Fotopoulos, Dino Paspalakis, Tony Calderoni and Holly Ayscue. All four *(4)* people identified the unknown voice on the Ramsey murder tape as that of Mr. Fotopoulos. (R. *1397-1400).* The voice line-up was also presented to Wendy Ayscue and two (2) Daytona Beach Police officers who had had contact with Mr. Fotopoulos because his business was located in the area where the officers patrolled. (R. *1402-1403).* The officers and Ayscue were unable to make an identification, (R. 1411, *1412).* The voice identifications that were made, were all done after Mr. Fotopoulos had been arrested. (R. *1414).*

Anthony Holbrook, retired professor of communications, was permitted over objection to testify as an expert in the field of speaker identifications. (R. 1438). He testified that in comparing a known voice exemplar of Mr. Fotopoulos with the unknown voice on the Ramsey murder tape he was of the opinion that the unknown voice was Mr. Fotopoulos. (R. 1463)

Teja James, eighteen (18) years old, (R. 1737), testified that Deidre Hunt had told him that she and Mr. Fotopoulos had taken Ramsey out to the Strickland Firing Range where she shot Ramsey. (R. *1740).* Hunt told James she shot Ramsey because "he was complaining all the time he was hungry." (R. *1740).* Hunt also told James Ramsey was killed because he was trying to blackmail Mr. Fotopoulos. (R. 1741). James acknowledged on cross-examination that Deidre Hunt had never told him that Mr. Fotopoulos had threatened or forced her to shoot Ramsey. (R. *1772).* Mr. James testified that he was present when Ms. Hunt asked Mr. Fotopoulos why he had video taped her murdering Kevin Ramsey. Mr. Fotopoulos allegedly replied that it was his insurance policy, to keep Hunt's mouth shut from going around telling everyone about his business. (R. 1820).

James Calderoni testified that he worked at Mr. Fotopoulos' business, Top Shots. (R. 1855). He testified that he had had conversations with Mr. Fotopoulos trying to get him to separate and end his relationship with Deidre Hunt. He told Mr. Fotopoulos that Hunt "had quite a bit" on him, in that Mr. Fotopoulos had sex with her, paid her bills, put her up in an apartment, etc.. Mr. Fotopoulos allegedly responded that Hunt could never blackmail him because he had a video tape of her killing someone. (R. 1860).

On November 4, 1989, police officers were dispatched to the Fotopoulos family residence located at 2505 North Halifax Drive, Daytona Beach, Florida in reference to a break in and shots fired. (R. 1254). A statement was taken from Mr. Fotopoulos who advised that he had been sleeping when he heard a gunshot, and saw a silhouette standing next to the bed. He picked up his gun and fired five (5) shots at the silhouette. Subsequently, he got out of bed and the assailant moved, so he shot again. (R. 1283). After the officers entered the residence, they located Mrs. Lisa Fotopoulos lying in her bed, who had been shot once in the head, but was alert and conscious. (R. 1137, 1144). The man on the floor still had in his hand a small silver automatic .22 caliber pistol. (R. 1140). Located inside the person's wallet was an Ohio driver's license identifying the individual as Bryan Chase. (R. 1149-1150). It was stipulated as well that the individual was Bryan Chase. (R. 1190).

Dr. Botting, was recalled by the State, and testified that he performed the autopsy of Mr. Chase. He testified that the cause of death was multiple gunshot wounds. (R. 1831).

The defense presented the testimony of Ken Pfarr, U.S. Secret Service Agent. (R. 2238). He testified that he had been requested to conduct a voice identification exam, i.e., compare Mr. Fotopoulos' voice with the unknown voice on the Ramsey murder tape. (R. 2250). His opinion was there were sufficient dissimilarities so that he was unable to draw a positive conclusion whose voice it was on the tape. (R. 2255).

Mr. Fotopoulos testified in his own defense. Immediately prior to testifying, defense counsel advised the court that he was unclear of Mr. Fotopoulos' prior record, and requested a copy of his record. (R. *2264).*

Mr. Fotopoulos testified that he was thirty-one (31) years of age. He was first introduced to Deidre Hunt by Mr. Calderoni at his pool hall. Thereafter, they developed a relationship where he gave her money, place to live, clothes. He admitted to having sexual relations with her. (R. **2266, 2268).** He testified that he loaned his partner's video camera to Hunt, as she said she had a surprise for him. (R. 2279-2280). He denied hiring anyone to kill his wife. (R. *2343).* He admitted to shooting Chase, but denied that it was the result of his knowing that Chase was coming to his home to shoot his wife. (R. *2344).* He denied being present when Ramsey was shot and killed. (R. 2357). He advised that Hunt had given him a tape, but he had never looked at it. He stated he did not have a video camera to view it. (R. 2356-2357). He denied being a terrorist, (R. 2348), but admitted he had buried weapons because some were illegal, (R. 2273-*74).*

On cross-examination, the following exchange took place between Mr. Fotopoulos, and the State Attorney, Mr. Tanner:

> MR. TANNER: Mr. Fotopoulos, not counting this case, anything connected with charges that you are here for, have you ever previously been convicted of a felonious offense?
>
> MR. FOTOPOULOS, I believe it is a felonious offense I was at one time convicted of **six** *(6)* counts.
>
> MR. CORRENTE: That's all he has to say, your Honor if I may.
>
> THE COURT: Yes, I don't think you should interfere with him when he **is** responding to counsel. You may proceed.
>
> MR. TANNER: Is that all you want to **say?**
>
> MR. FOTOPOULOS: I just want to mention it was non-violent.
>
> MR. TANNER: Six prior felonies?
>
> MR. FOTOPOULOS: Yes sir, one incident that was compounded.
>
> MR. TANNER: Well, that is not really correct, is it, it's not just one incident?

> MR. FOTOPOULOS: It was done at one time, just like these charges are all piled up.
>
> MR. TANNER: Isn't it true though that you plead guilty to six different felonies covering a period over several years?
>
> MR. FOTOPOULOS: No, all the incidents happened within a year and a couple of months, I believe. The Indictment was covering a few years, Mr. Tanner. It was not an Indictment, I plead guilty because I have done it. (R. *2359-3460).*

Thereafter, the jury was excused. The State argued that Mr. Fotopoulos had "opened the door" to questions concerning the exact nature of his prior convictions. (R. *2361).* Mr. Fotopoulos' defense counsel responded that he had not represented him on his federal cases, and even if Mr. Fotopoulos was incorrect about the dates of his convictions, that information could be corrected without going into the nature of the crimes. (R .2362-2363).

The trial court held, "I think once he goes beyond admitting to being convicted of a felony and how many times, the door is open." The State thereafter questioned Mr. Fotopoulos repeatedly about his federal counterfeiting charges. (R. 2366, *2387-88, 2390, 2413,* 2417, *2434, 2448,* 2467).

The court also ruled that in light of Mr. Fotapoulos' direct examination answer admitting that he had buried some illegal weapons, that he also opened the door to the State's questioning of buried counterfeit money and grenades. (R. 2366-2370).

The State Attorney questioned Mr. Fotopoulos whether he recalled having testified back on January 9, 1990, in regard to his financial abilities. (R. 2373). The State started to refer to a transcript of the proceedings whereupon Mr. Fotopoulos' trial counsel immediately replied: "I do not have a copy of that your Honor. That was never provided." Whereupon the following discussion took place:

> MR. DAMORE (Prosecuting Attorney): If it please the court, that is an official court record and it was available to counsel through the court. Counsel is aware that his client was in court on January 9th, and he was represented by counsel at that time. I am sure that the clerk could provide him with a copy of the transcript.

MR. CORRENTE (Defense Attorney): Just for the record, Your Honor, I was not his counsel that day.

THE COURT: You are talking about Florida Circuit Court?

MR. DAMORE: Yes, sir, in fact, it was before Your Honor regarding the status of the Defendant's bond and his counsel.

THE COURT: I don't know if we can provide anything quick out of this court file. Give us a second and we will try and find it.

MR. TANNER (Prosecuting Attorney): Your Honor, it's the January 9, 1990 hearing before yourself.

MR. DAMORE: May the record reflect that counsel does have it in his hand at this time, Your Honor.

MR. CORRENTE: That is correct, Your Honor.

THE COURT: Go ahead. (R. *2373-2374).*

Thereafter, the State cross-examined Mr. Fotopoulos on statements he had made during the January *9,* 1990 hearing. (R. *2374-2382).* The transcript of this hearing is thirty-nine (39) pages in length. (R. *3990-4029).*

The State's cross-examination included questions about homemade hand grenades. (R. *2416);* "affairs with other women, (R. *2391);* and photographs of nude women, the of women Mr. Fotopoulos dated prior to his marriage as well as prior to the events involved in the instant case. (R. *2391-2392).* Reference was also made to automatic weapons (R. *743,* 2414), Uzi Machine Guns (R. 588-589, *1721,* 1875), illegal silencers (R. *1121, 1875).*

Finally, during the cross-examination of Mr. Fotopoulos, the State Attorney asked: "you participate in this trial, don't you, you help your lawyer?"..."and you tell him when you want questions asked?"..."you have met with your attorney..." (R. *2470-2474).* Thereafter, the State Attorney proceededto ask Mr. Fotopoulos why he had not asked his lawyer to ask certain questions of certain witnesses. (R. *2470-2475).* Mr. Fotopoulos was further asked to comment on the testimony of several State witnesses. (R. *2418, 2420, 2422, 2441, 2417).*

During closing argument, the State made twelve (12) references to the counterfeiting activity of Mr, Fotopoulos. (R. *2637-8, 2650, 2651, 2663, 2681,* 2682). Additionally, repeated references to automatic weapons, silencers and grenades were made. (R *2643,* 2681).

The State called two (2) witnesses during the penalty phase. Teja James testified that he had had conversations with his friend, Kevin Ramsey, who told him that he knew things about the Appellant, and he was going to blackmail him. (R. 3232-3233).

Lori Henderson testified that Kevin Ramsey had told her he was going to blackmail the Appellant for money and get his job back at Top Shots. (R. 3241).

Mr. Fotopoulos called three (3) witnesses. Lydia Kouracos testified that she had know Mr. Fotopoulos for approximately four and a half (41/2) years. (R. 3249). She described him as being very helpful, and a caring individual. (R. 3251). Peter Kouracos testified that he trusted Mr. Fotopoulos, and would work with him again. (R. 3269). James Constant testified that he considered Mr. Fotopoulos like a brother. If he had a sister, he wouldn't mind him marrying her. He also testified that he would willingly and gladly open his home up to Mr. Fotopoulos. (R. 3273-3277).

The trial court admitted Mr. Fotopoulos' high school diploma, B.A. diploma, his master's degree, a letter from a pastor, letter from a mayor in Greece, pictures of him growing up. (R. 3290, 3293).

The penalty jury was instructed on five (5) aggravating circumstances for both the Ramsey and Chase murders. (R. 3325). The jury was also instructed on three (3) statutory mitigating circumstances. (R. 3326).

SWMMARY OF THE ARGUMENT

GUILT PHASE

POINT I

The State exercised two (2) peremptory challenges on prospective black jurors. Mr. Fotopoulos objected that the challenges were based on race. First, the trial court erred in questioning the standing of a white defendant to object to peremptory challenges of black jurors. Secondly, the trial court erred in finding that the State had provided racially neutral reasons for their peremptory challenges. Mr. Fotopoulos is entitled to a new trial.

POINT II

The indictment charged Mr. Fotopoulos with two counts of first degree murder as well as a number of other offenses. The first murder involved Mark

Ramsey who was shot in a rural section of Volusia County of October 20, 1989. The second murder involved Bryan Chase who was killed by Mr. Fotopoulos on November 4, 1989 at the residence of his in-laws after Bryan Chase had shot Mr. Fotopoulos' wife.

Prior to trial Mr. Fotopoulos filed separate motions to sever seeking severance of the charge involving Mark Ramsey from the remaining counts.

At trial the evidence reflected that the two murders were two separate, unconnected episodes. As such, the refusal of the trial court to grant the various motions to sever was reversible error.

POINT III

At trial Mr. Fotopoulos testified. On cross-examination Mr. Fotopoulos was asked whether he had been previously convicted of a felony. Mr. Fotopoulos responded that he had been convicted of six felony offenses. The prosecuting attorney was permitted to inquire into the specific nature of the prior offenses and to enter into evidence certified copies of the convictions.

The State then coupled the evidence of the prior offenses with other evidence of prior misconduct by Mr. Fotopoulos to embark on a course of character assassination that permeated the entire cross-examination as well as the final argument of the prosecutor.

POINT IV

A pretrial hearing was had to determine whether Mr. Fotopoulos was indigent for the purposes of court appointed counsel. The State cross-examined Mr. Fotopoulos extensively about his finances. Thereafter, counsel was appointed for Mr. Fotopoulos.

At trial Mr. Fotopoulos testified on his ownbehalf. The prosecutor sought to impeach Mr. Fotopoulos on the basis of his testimony at the earlier hearing. The impeachment was permitted even though the prosecuting attorney did not proffer the testimony; did not permit Mr. Fotopoulos to read the prior testimony; and did not provide a copy to counsel for Mr. Fotopoulos in order that counsel could challenge the voluntariness of the prior testimony.

POINT V

The State failed to provide a copy of the prior testimony (Point IV) in response to a Demand for Discovery. The trial court permitted the State to proceed without conducting a Richardson hearing. This was per se reversible error.

POINT VI

The cumlative guilt phase errors deprived Mr. Fotopoulos a **fair** trial mandating that he be given a new trial.

PENALTY ISSUES

POINT VII

The trial court's error in denying Mr. Fotopoulos' Motion to Sever the Ramsey murder charge from the Chase murder resulted in extreme prejudice to Mr. Fotopoulos during the penalty phase. The penalty phase jury was instructed as to the Ramsey murder on five (5) aggravating circumstances, when at best only three (3) arguably applied.

POINT VIII

The trial court erred in permitting the State to introduce during the penalty phase hearsay statements of the deceased, Kevin Ramsey, through State witnesses Teja James and Lori Henderson. Mr. Fotopoulos did not have a fair opportunity to rebut such testimony

POINT IX

The trial court erred in not instructing the jury pursuant to this Court's decision in Jackson **v.** State, 502 So.2d *409* (Fla. 1986), that the jury must find that the Appellant killed or attempted to kill or intended that a killing take place before a sentence of death could be recommended.

POINT X

The trial court erred in finding the aggravating circumstance of cold, calculated, premeditated and without a pretense of moral or legal justification (CCP) as to the Ramsey homicide wherein Mr. Ramsey was already dead or at least unconscious at the time the final shot was fired.

POINT XI

The trial court's error in not severing the Ramsey and Chase homicides precluded Mr. Fotopoulos from receiving a fair sentencing hearing as to the Chase murder.

POINT XII

The trial court erred in finding that the Chase murder was committed while Mr. Fotopoulos was engaged in the commission of a burglary wherein a non-consenual entry was not established beyond a reasonable doubt.

POINT XII

The trial court improperly doubled its consideration of the pecuniary gain and cold, calculated and premeditated aggravating factors.

POINT XIV

The trial court improperly doubled its consideration of the pecuniary gain and witness elimination aggravators.

POINT XV

The aggravating circumstance of cold, calculated and premeditated murder is unconstitutional.

POINT XVI

Florida's death penalty statute is unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO USE PEREMPTORY CHALLENGES TO EXCLUDE BLACK PROSPECTIVE JURORS.

Article I, §16 of the Florida Constitution guarantees a criminal defendant an impartial jury, State v. Neil, *457* So.2d *481* (Fla. 1984), clarified sub nom, State v. Castillo, *486* So.2d 565 (Fla. 1985), and clarified, State v. Slappy, 522 So.2d 18 (Fla.), cert. den., *487* U.S. *1219, 108* S.Ct. *2873 (1988).* As a consequence, a prosecutor may not attempt to utilize a peremptory challenge in a criminal case to exclude from a jury panel cognizable racial groups. Blackshear v. State, 521 So.2d 1083, *1084* (Fla. *1988).*

In the instant case the State used two (2) peremptory challenges to exclude black prospective jurors from the jury. They were Mrs. Bostic and Mrs. Gordon.

As more fully developed below, the trial court erred in permitting the State to exclude these two (2) prospective jurors.

A party claiming discriminatory use of peremptory challenges has the burden to: (a) make a timely objection to the challenge; (b) demonstrate that the challenged person is a member of a distinct racial group; and (c) show that there is a strong likelihood that the challenge has been exercised because of impermissible bias. Thompson v. State, 548 So.2d 198, 200 (Fla. 1989).

Trial courts must exercise their discretion to provide "broad leeway in allowing parties to make a prima facie showing that a likelihood of discrimination exists." State v. Slappy, supra; McKinnon v. State, 547 So.2d 1254, 1255 (Fla. 4th DCA 1989). Any doubt as to whether the complaining party objecting to the use of peremptory challenges based on race has met its initial burden should be resolved in that party's favor:

> [W]e resist the temptation to craft a bright line test...since racial discrimination itself is not confined to any specific number of forms or effects...the spirit and intent of Neil was not to obscure the issue...but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exist, Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question...we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all. it must be in the way least likely to allow discrimination. State v. Slappy, 522 So.2d at 21-22. (emphasis added).

Once the objecting party has met his initial showing, the burden shifts and the challenging party must demonstrate "a clear and reasonably specific racially neutral explanation" for the peremptory challenge. Roundtree v. State, 546 So.2d 1042, 1044 (Fla. 1989); State v. Slappy, 522 So.2d at 22. The proffered reasons should not be merely accepted at face value by the trial court, but must be evaluated as a disputed issue of fact. Slappy, supra. The reasons given must be supported by answers provided during voir dire or otherwise disclosed on the record itself. Tillman v. State, 522 So.2d 14, 17 (Fla. 1988); State v. Slappy, 522 So.2d at 23; Hill v, State, 547 So.2d 175, 177 (4th DCA 1989). In Slappy, supra, five (5) factors were listed which would tend to show that the asserted

reasons for a peremptory challenge are either not supported by the record or are impermissible pretext:

> We agree that the presence of one or more of these factors will tend to show that the State's reasons are not actually supported by the record or are an impermissible pre-text: 1) alleged group bias not shown to be shared by the juror in question; 2) failure to examine the juror or a perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror; 3) singling the juror out for special questioning designed to evoke a certain response; 4) the prosecutor's reason is unrelated to the facts of the case; and 5) a challenge based on reasons equally applicable to juror(s) who were not challenged. 522 So.2d at 22.

If any one (1) of the Slappy factors are present, and the State fails to rebut the inference convincingly, a court must find that the State's reason is a pre-text. Slappy, Id.; Parrish v. State, 540 So.2d 870, 872, f.n. 2 (Fla. 3d DCA), rev. den., 549 So.2d 1014 (Fla. 1989).

Florida Courts have also uniformly held that the discriminatory striking of a single potential juror based on race is sufficient to raise a "Neil" objection, shifting the burden to the challenging party to justify its peremptory strike. State v. Slappy, 522 So.2d at 21; Tillman v. State, supra; Floyd v. State, 511 So.2d 762, 764 (Fla. 3d DCA 1987), pet. rev. den., 545 So.2d 1369 (Fla. 1989). Furthermore, the mere fact that the State has accepted one or more members of the minority group does not "isolate the State from a Neil challenge." Thompson v. State, supra, at 200, f.n. 1. This issue is whether any juror has been discriminatorily excused, independent of any other. State v. Slappy, 522 So.2d at 21; Tillman v. State, supra.

Applying the above authorities to the instant case, the trial court reversibly erred in permitting the State to use peremptory challenges to exclude two (2) prospective black jurors.

The State first exercised a peremptory challenge on prospective black juror Mrs. Bostic. Mr. Fotopoulos timely objected to the State's challenge, and noted that Mrs. Bostic is black. (R. 229). The trial court questioned the standing of a white defendant such as Mr. Fotopoulos to challenge the State's striking of a prospective black juror:

> THE COURT: Let me say a few things. We have a white Defendant and four *(4)* black jurors. Do you want to give me some type of initial reaction how that is prejudicial; the mere fact that he exercised a peremptory challenge to a black juror? (R. *229).*

Defense counsel correctly noted that [legally] it did not matter. (R. 229). In Kibbler v. State, *546* So.2d 710, 712 (Fla. 1989), this Court held that under Article I, §16 of the Florida Constitution, that a white defendant has standing to object to the discriminatory peremptory challenge of a black prospective juror. See. also, Holland v. Illinois, __U.S.___, 110 S.Ct. **803,** 806 (1990).

The State volunteered two **(2)** reasons for striking Mrs. Bostic: 1) first, the State had previously accepted two (2) black jurors and 2) that Mrs. Bostic's son had previously been prosecuted by their (State Attorney's) Office:

> MR. TANNER: Mrs. Bostic has a son who has been involved in the criminal justice system, the juvenile portion in my office since 1987. She has indicated this child has been involved in at least two (2) commitments by the State Attorney's Office and he has been charged with at least two **(2)** felonies and as many as seven (7) or eight (8) other related offenses and we feel her extensive exposure to the impact of dealing with the State Attorney's Office where we have prosecuted her son almost continuously over the period of the last two **(2)** years leads us to feel that it would be difficult for her to maintain impartiality and it may even cut the other way. We have the aspect of her trying to please the State and I am not comfortable with that. (R. 230) (emphasis added).

In response to the State's reasons, Mr. Fotopoulos' trial counsel noted that several other [white] jurors, particularly Mr. Grisham, have children who have been involved with the law, and none of those white jurors had been excused peremptorily by the State. (R. 230).

The trial court ruled that Mr. Fotopoulos had not made the required "initial showing of any prejudice," and that the State had presented neural reasons for the peremptory challenge. (R. 230-231).

The trial court's finding that Mr, Fotopoulos had not met his initial burden was undoubtedly influenced by the court's erroneous belief that a white defendant lacks standing to make a "Neil objection." As noted above, this Court has ruled a white defendant has standing. Kibbler v, State, supra. In Barwick v. State, *547* So.2d 612 (Fla. 1989), this Court reversed a first degree murder

conviction and sentence wherein the trial court had mistakenly concluded a white defendant lacked standing to make a "Neil objection," and the record did not demonstrate that the court had made a "conscientious evaluation of the Neil claim." Id. Likewise, in the instant case, the record does not demonstrate the required "conscientious evaluation."

It also appears from the record that the trial court placed undue reliance upon the fact that the State had previous to Mrs. Bostic accepted two (2) black jurors[1], and that therefore the Appellant failed to show prejudice. The seating of two (2) black jurors "approved" by the State does not isolate the State from a "Neil" challenge. Thompson v. State, supra, at 200, f.n. 1. Additionally, under Neil, and State v, Slappy, there is no requirement that the improper use of peremptory challenges be "systematic." One (1) improper excusal is sufficient. State v. Slappy. Again, the trial court's statements questioning how the striking of one (1) black juror would in essence require a "Neil" inquiry leads to the inescapable conclusion that the trial court erroneously believed that Neil is applicable only if there is systematic exclusion of prospective black jurors. This, of course, is not the law in Florida. State v. Neil, supra; State v. Slappy, supra. The trial court erred in concluding that Mr. Fotopoulos had not established his initial showing.

The trial court also erred in concluding that the State established race neutral reasons supported by the record. The first reason offered by the State, was that it had previously accepted two (2) black jurors. This, however, does not demonstrate that the challenge of Mrs. Bostic was not discriminatory. See, Thompson v. State, supra. In Mayes v. State, 550 So.2d 496, 498 (Fla. 4th DCA 1989), the State argued on appeal that because two (2) members of the sworn jury panel were black, the exclusion of one (1) black juror foreclosed any "Neil"

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[1]The two (2) black jurors accepted by the State were Mr. Harris and Mr. Johnson. Mr. Harris is a Correctional Officer with the Florida Department of Corrections. (R. 95-96). Mr. Johnson, who when first questioned by the court about the death penalty responded that upon a first degree murder conviction he felt the death penalty must automatically be imposed. Through subsequent questioning by the court, Mr. Johnson modified his opinion. (R. 85-87).

objection. The Fourth District rejected the State's argument, relying on Slappy and Tillman.

In reference to the State's second reason for striking Mrs. Bostic, Mr. Eotopoulos' trial counsel noted that other [white] jurors accepted by the State also had friends or family who had been involved with the law and who had been arrested and prosecuted. (R. 230). Mrs. Daley testified that her son had been prosecuted for theft by the State Attorney's Office. (R. 66). He subsequently pleaded guilty. The State accepted Mrs. Daley for the jury. (R. 229). Mr. Knowles acknowledged that he had a cousin in jail for murder. (R. 63). The State accepted Mr. Knowles for the jury. (R. 231). Another juror, Mr. Grisham testified that his stepson had been arrested for grand theft, was presently out on parole and in a rehab center. The stepson had "several cases." (R. 67-68). Additionally, Mr, Grisham testified his stepdaughter was presently in jail for grand theft, forgery, and Mr. Tanner's office was prosecuting her. (R. 74). Mr. Grisham was accepted for the jury by the State. (R. 229).

In response to the trial court's questions, Mrs. Bostic stated that her juvenile son had been placed by the juvenile court in a home in Jacksonville. She advised that the State Attorney's Office had handled her son's case fairly, "everyone did an excellent job under the circumstances." (R. 67). At no time did Mrs. Bostic indicate that she could not be fair to the State.

The record sub judice demonstrates that the State's reason - Mrs. Bostic's son's legal problems - was a mere pretext. A challenge based on reasons equally applicable to jurors who were not challenged (factor #5 in Slappy), and not sufficiently rebutted convincingly, as was not done, requires this Court to find the State's reason was a pretext. Parrish v. State, supra at 872, f.n. 2.

Even more revealing of the pre-textual nature of the State's explanation is the State's failure to ask Mrs. Bostic a single question about her son's case. (R. 133-162). The failure to question Mrs. Bostic on the grounds alleged for a challenge renders the State's explanation for the challenge "immediate suspect," and does not meet the State's burden in proving the reason offered was

not a pre-text hiding discriminatory intent. See, Slappy, 522 So.2d at 23. (factor #2 in Slappy's list of factors).

In addition the State's characterization of Mrs. Bostic's son's involvement as "ongoing," involving "several charges" and that" she might try to please the State," are not supported by the record.

As noted above, reasons given for a peremptory challenge must be racially neutral and supported by the voir dire examination testimony or the record itself. Tillman v. State, **supra,** at 17; Hill v. State, supra, at 177. If the challenging party's factual assertion is not supported by the record, a new trial must be awarded. In Fox v. State, 573 So.2d 962 (Fla. 4th DCA 1991), the State asserted that it had excused a juror because he had testified that he had served on a hung jury. The trial court accepted the State's reason without checking the record, and permitted the challenge. However, on appeal, the record revealed that the juror had not testified about being on a hung jury. The State's reason was therefore not supported by the record, and the Fourth District ordered a new trial.

Likewise, the State's allegations that the Bostic boy had extensive involvement with the criminal justice system is not supported by the record. Mrs. Bostic related that her son was in a juvenile home. She never said anything about multiple cases over a two (2) year period, The State Attorney's representations were not evidence, as what a lawyer says is not evidence upon which an evidentiary ruling can be made.[2] See, Leon Shaffer Golnick Advertising v. Cedar, 423 So.2d 1015 (Fla. 4th DCA 1982). The absence of record support for

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[2]Based upon the record responses by Mrs. Bostic, it appears that the State's recitation to the matters outside the record (R. 230) were based upon the juvenile records of the Bostic young man. In Thompson v. State, 565 So.2d 1311, 1313-1314 (Fla. 1990) this Court questioned the fairness of the State having access and use of criminal arrest records of prospective jurors, not equally available to the defendant. However, the record was insufficient for any determination. The record sub judice is somewhat clearer in that the information alluded to by the State as to youn Bostic is not found within the record itself. Juvenile records are confidentiaf by statute. See, F.S., 39.12 (1990). The State's use of such records - if true - not only contravenes the confidentiality rule, but gave an unfair advantage to the State. Also if the State had the Bostic record, it is reasonable to believe they may also had other prospective jurors's records for use during jury selection. Mr. Fotopoulos of course, did not have access ability to such records.

the peremptory challenges requires that the Appellant be awarded a new trial. See, Fox v. State, supra.

Lastly, as to Mrs. Bostic, the State's concern that she might "try to please the State" is completely unfounded and highly speculative at best. A "feeling" about a juror does not satisfy the "Neil" test. Slappy, 522 So.2d at 23; Floyd v. State, supra. Furthermore, other white jurors were just as likely, if not more so, apt to try and please the State. The State Attorney had personally spoke with Mr. Grisham in the past about the prosecution of his stepson's cases. Mr. Grisham testified that after speaking with Mr. Tanner, "immediately things happened." (R. 413-415). The State did not oppose Mr. Grisham sitting on the jury out of concern that he might want to please the State for which there was at least record support. Again, challenges based on reasons equally applicable to jurors who were accepted shows the peremptory challenge was pre-textual. Slappy, supra.

The Appellant acknowledges that the involvement of a juror's close family member with the law can be a valid reason for a peremptory challenge. Gonzalez v. State, 569 So.2d 782 (Fla. 4th DCA 1990). However, in considering this reason, it is incumbent upon the trial court to heed this Court's admonition in State v. Slappy, that when a given reason is equally applicable to other jurors not similarly struck, it renders such explanation suspect. As noted above, there were other white jurors who the State accepted for the jury who according to the record evidence had family members equally involved with the law, and in the case of Mr. Grisham more involved than Mrs. Bostic's son. It is also interesting to note that the other black juror peremptorily excused by the State, Mrs. Gordon, the State also relied upon the fact that her grandson had a pending criminal charge as a reason for their peremptory challenge of her. (R. 435). In Kibbler v. State, supra, at 714, this Court held that "eliminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge," " but counsel must nonetheless provide non-racial reasons for challenging black jurors instead of white jurors to make room on the jury." See. also, Foster v. State, 557 So.2d 634, 636 (Fla. 3d DCA 1990). In Kibbler, and Foster, the State

failed to show non-racial reasons, and despite a potential legitimate reason, this Court and the Third District Court of Appeal reversed and remanded for new trials. Similarly, in the instant case, the State failed to provide non-racial reasons for the striking of Mrs. Bostic

The State also exercised a peremptory challenge of black prospective juror Mrs. Gordon. (R. *434).*[3] Mr. Fotopoulos' trial counsel timely objected noting that Mrs. Gordon was black. (R. *4334).* The trial court requested the State out of an abundance of caution to respond which they did as follows:

> MR. TANNER: She gave an answer that she was categorically, unequivocally opposed to the death penalty. That alone would be sufficient for me to peremptorily excuse her regardless of her race. I would have the same reservations about her ability to force that personal holding that she has from her ability to vote as to guilt or innocence.
>
> In addition, when she answered, she indicated that yes, if she found him guilty that would mean the death penalty or something to that effect, which causes me even greater concern because she by her answer does not seem to understand that a verdict of guilt would not necessarily carry the death penalty and you would have a recommendation so that makes her even more reluctant to. In addition, her grandson's legal problems are significant.
>
> He is presently facing a trial on drug trafficking and lives here in this community with her or near her and finally her automobile has at least questionably been seized through government action and as a result of that and for those reasons I feel like I need to exercise a peremptory challenge. (R. *435).*

The trial court denied Mr. Fotopoulos' objection ruling that there had been no showing of discrimination and substantial race neutral reasons were tendered by the State. (R. *435-36).* This was error.

First, as argued above in reference to Mrs. Bostic, the trial court's doubts about the standing of a white defendant to strike a black prospective juror, (R. 229), surely carried over to the "Neil" objection of Mrs. Gordon as well. Additionally, the trial court's conclusion that Mr. Fotopoulos had not satisfied his initial burden pursuant to "Neil" is without merit. As held by this Court in McCloud v. State, 530 So.2d 57 (Fla. 1988), a defendant challenging

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[3]Initially, the State accepted Mrs. Gordon, (R. *428)*

the State's removal of a prospective black juror is not required to demonstrate likelihood that removal occurred for racial reasons. The State's peremptory challenge of **Mrs.** Gordon was the second such challenge of a black prospective juror. The trial court overlooked this Court's admonition that any doubt as to whether a defendant has met his initial burden for a "Neil" objection should be construed in his favor, and "broad leeway" must be extended to a party in meeting his initial burden. State **v.** Slappy, 522 So.2d at 22. See, also, Samzlson v. State, *542* So.2d *434, 435* (Fla. 4th DCA 1989), (the prosecution exercised its first two (2) peremptory strikes on black jurors); McKinnon v. State, supra, (the prosecution struck two (2) black jurors peremptorily. The Fourth District found that Slappy's admonition to grant parties "broad leeway'' in meeting their initial burden meant that the defendants had met their burden. Id., at 1256); Eichelberger v. State, 562 So.2d 853 (Fla. 2d DCA 1990), (the State excused two (2) black jurors out of thirty **(30)** prospective jurors; this is sufficient to meet the "Neil" burden). Mr. Fotopoulos submits under a fair reading of State **v.** Slappy, that he met his initial burden.

The trial court's incorrect application of "Neil" requires the Appellant to be granted a new trial. In addition, the trial court erred in finding the State's offered race neutral reasons.

The State argued that Mrs. Gordon said she was "categorically, unequivocally opposed to the death penalty." (R. *435).* Mrs. Gordon testified **as** follows:

> MRS. GORDON: I am not for the death penalty, but I feel like --can I **say** the way that I feel?
>
> THE COURT: Absolutely.
>
> MRS. GORDON: I feel like a person that takes another person's life, he should be punished and in a way that he could be reminded of the crime that he committed and not take his life, because **he** soon forget what he did, but I believe he should be reminded each and every day of his crimes and punished accordingly.
>
> THE COURT: Are there any circumstances under which you could vote to recommend a death penalty?
>
> MRS. GORDON: Well, if he is found guilty.

THE COURT: Would you also consider recommending a life sentence?

MRS. GORDON: Yes,

THE COURT: I want to be careful not to be putting words in your mouth. Could you consider both possible penalties depending upon the circumstances.

MRS. GORDON: Yes.

THE COURT: You don't like that death penalty, right?

MRS. GORDON: No, I am not for it,

THE COURT: Is that concern about the death penalty going to interfere with you fairly determining guilt or innocence?

MRS. GORDON: No. (R. *365-366).*

Later, Mr. Tanner, the State Attorney, further questioned Mrs. Gordon's feelings about the death penalty.

MR. TANNER: Mrs. Gordon, let me ask you about that in a little bit more detail. You indicated that you were opposed to the death penalty; is that correct?

MRS. GORDON: Yes.

MR. TANNER: With that opposition is that opposition so firm and *so* absolute that you would never vote for the death penalty in any case.

MRS. GORDON: No.

MR. TANNER: Are you saying even though generally you oppose the death penalty there may be some cases that you would in fact consider and even vote for the death penalty?

MRS. GORDON: Yes. (R. 387-388).

The State's characterization of Mrs. Gordon being categorically, unequivocally opposed to the death penalty is therefore not supported by the record. If the State's argument was correct, the trial court would have been required to excuse Mrs. Gordon for cause. See, Randolph v. State, 562 So.2d 3331 (Fla. 1990).[4] Mrs. Gordon clearly stated that she would consider both

[4]Based upon Mrs. Gordon's answers, it would have been reversible error for the court to have excused Mrs. Gordon for cause. See, Gray v. Mississippi, 481 U.S. *648,* 107 S.Ct. *2045* (1987).

penalties, (R. 366), and the penalties would not interfere with her ability to determine guilt or innocence. (R. *366).*

Mr. Meek, a white juror accepted by the State had feelings similar to those of Mrs. Gordon in reference to the death penalty. Mr. Meek testified during voir dire as follows:

> THE COURT: Feelings about a possible penalty phase?
>
> MR. MEEK: I am not necessarily for the death penalty, but I not against it. It would have to be something serious for me to consider it.
>
> THE COURT: Do you feel that you tilt one way or the other as far as the penalty?
>
> MR. MEEK: No, not really. I would rather not, you know, if possible. (R. *438).*

Later, Mr. Tanner for the State made further inquiry of Mr. Meek on his feelings about the death penalty:

> MR. TANNER: Is there anything that you have been asked, specific questions that you would come out with a materially different answer than the folks that are still here?
>
> MR, MEEK: The only one, as I said, I am not that strong for the death penalty. I could vote for it if it is a serious thing.
>
> MR. TANNER: I think in real life settings, like in the jury room and in the courtroom most of us have reservations about the death penalty...
>
> MR. TANNER: I understand that you would consider it and if you were convinced it was the appropriate penalty, you would be able to vote to recommend the death penalty?
>
> MR. MEEK: Right, I believe the most murders are crimes of passion and stuff and a situation like that, I would probably not be *so* likely to vote for it.
>
> MR. TANNER: You won't be left with just kind of floating out there. The judge will give extensive instructions about the death penalty and among those instructions he will be advising you of what may be considered as aggravating circumstances and what may be considered as mitigating circumstances.
>
> MR. MEEK: Right. (R. *442-443).*

Mr. Meek's responses were thus more indicative of a reluctance to accept and recommend the death penalty than Mrs. Gordon's responses. Nonetheless, the State accepted Mr. Meek for the jury. (R. *451).* Again, this Court is reminded

of the principle set forth in State v. Slappy, Supra, that when the State proffers an explanation for peremptory striking of a black prospective juror that is equally applicable to a white juror who had been accepted, the explanation is suspect and indicative of being pre-textual.

The other reason set forth by the State was Mrs. Gordon's grandson had significant legal problems. (R. *435).* Mrs. Gordon testified that her grandson had been arrested for drug trafficking and was being prosecuted in Fort Lauderdale. (R. *364-365).* She answered the court's question that she felt that the charges were fair and "if he is guilty, he will have to pay for the crime." (R. *365).* Furthermore, in reference to her car being taken, she stated that she didn't feel good about that, "but it was my fault for letting him drive it, I guess." (R. *364).* Significantly, a prospective juror's family member's legal problems were relied upon the State to strike one other juror - another prospective black juror, Mrs. Bostic. (R. 230). As fully set forth in the discussion concerning the unlawful striking of Mrs. Bostic, there were several other white jurors who had family members involved in the criminal justice system who were not challenged. The State's reason was a pretext.

The State did not ask a single question of Mrs. Gordon about her grandson's legal problems. The failure to examine Mrs. Gordon further demonstrates the State's reason was a pretext. (this "failure to examine" is factor #2 listed in Slappy).

In conclusion the trial court erred in permitting the State *to* use two (2) peremptory challenges to excuse Mrs. Bostic and Mrs. Gordon. Mr. Fotopoulos' convictions and sentences must be reversed, and remanded for a new trial

POINT II

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REPEATED MOTIONS TO SEVER COUNT ONE FROM THE REMAINING COUNTS

Count One of the Indictment in the present case charged Deidre Hunt and the Appellant, Konstantinos Fotopoulos with the first degree murder of Mark Ramsey occurring on October 20, 1989. (R *3394)*

The remaining counts of the Indictment charged the Appellant and other named co-defendants with various crimes relating to the murder of Bryan Chase and the attempted murder of Lisa Fotopoulos, the Appellant's wife. Specifically, Count Two charged the Appellant and others with the first degree murder of Bryan Chase occurring on November 4, 1989. Count Three of the Indictment charged the conspiracy to murder Lisa Fotopoulos by the Appellant and other named defendants. Count Four of the Indictment charged the attempted murder of Lisa Fotopoulos occurring on November 1, 1989. This count was later replaced by direct Information in case no. 90-6668. (R 3400). Count Five of the Indictment charged solicitation to commit first degree murder of Lisa Fotopoulos.

In addition the State of Florida filed a direct Information charging Mr. Fotopoulos with other offenses related to the attempted murder of his wife. (R 3398). Count One of the Information charged the Appellant and others with burglary of a dwelling with intent to commit the first degree murder of Lisa Fotopoulos occurring on November 4, 1990. Count two of the Information charged attempted murder of Lisa Fotopoulos occurring on November 4, 1989. Count Three of the information charged solicitation of Bryan Chase to commit the first degree murder of Lisa Fotopoulos on November 4, 1989. (R 3399).

On May 30, 1990 a Motion for Severance of Offenses was filed on behalf of Mr. Fotopoulos. The Motion sought severance of Count One of the Indictment from the remaining offenses on the grounds that

> ...the indictment does not allege and the facts do not show any connection between the death of Mark Kevin Ramsey (count one) and that of Bryan L. Chase or the defendant's wife. (R 3794)

On June 4, 1990 a hearing was had on the Motion to Sever. (R 2858). At that time the prosecuting attorney gave a lengthy proffer as to the anticipated testimony at trial. (R 2860-65) The factual basis of the proffer was disputed by defense counsel. (R 2865-8) The court stated that it would withhold ruling until such time as the State presented evidence in support of the joinder of the counts. (R 2868)

The court decided later the same day to proceed by way of proffer rather than live testimony. (R 2873) The proffer by the State comprises eight pages of

transcript, and is too lengthy to reproduce. (R *2874-81).* However, the significant aspects of the proffer by the State were that the State would show during its case in chief that Deidre Hunt entered into a conspiracy prior to October 20, 1989 (the day Kevin Ramsey was killed) with Mr. Fotopoulos. The intent and purpose of the conspiracy was not specified by the State during its proffer. (R *2874)*

The State further proffered that Kevin Ramsey was taken by Deidre Hunt and Mr. Fotopoulos to a rural area of Volusia County where Ramsey was tied to a tree and shot four times by Deidre Hunt while Mr. Fotopoulos video taped the murder. (R *2874-6)*

The State further proffered that two days after the murder of Kevin Ramsey, Deidre Hunt was approached by Mr. Fotopoulos and recruited to assist him in a plan to murder his wife. (R *2876)* In order to obtain Deidre Hunt's cooperation, according to the State, the Appellant, Konstantinos Fotopoulos used physical intimidation and the threat of disclosure of the video tape to coerce Deidre Hunt to participate in the later plans *to* kill his wife.

Thereafter, from October 31, until November 4th Mr. Fotopoulos, Deidre Hunt and the other co-conspirators embarked on a plan to kill the wife of Mr. Fotopoulos. This plan culminated in the events of the morning of November *4, 1989* at which time Bryan Chase entered the residence of the Fotopoulos'; shot Mrs. Fotopoulos once in the head; and then was shot five times himself by Mr. Fotopoulos. (R 2879-80).

Defense counsel argued in response to the proffer that it was insufficient to show a connection between the murders of Kevin Ramsey and Bryan Chase. (R *2882-3)*

Based on the proffer by counsel the Motion to Sever Offenses was denied. (R 2885)

On July *27,* 1990 the Appellant filed a Renewed Motion for Severance seeking severance of the two murders. (R *3842)* The basis of the renewed motion was that Deidre Hunt, who had been listed as a State witness, now refused to testify at deposition, and as such, the State would be unable to introduce evidence during

its case in chief to support the proffer given in opposition to the earlier Motion to Sever.

On August 31, 1990 a hearing was had on the Renewed Motion for Severance. (R 3199) At the hearing the State conceded that a good deal of the earlier proffer depended on the anticipated testimony of Deidre Hunt which was now unavailable to the State. (R 3200) However, the State now argued that the "primary thrust" of their position was the "similarity in the nature of these offenses in the motive, scheme and plan and design". (R 3201)

The State also made an additional proffer based on the anticipated testimony of two other State witnesses, Teja James and Lori Henderson. In the proffer the State contended that Deidre Hunt killed Mark Ramsey in order to be inducted into a secret "Hunters/Killer" club and thereby qualify herself to be involved in the later murder of Mr. Fotopoulos' wife. (3201) The State also contended that the video tape of the earlier murder was used to coerce Teja James into participating in later efforts to kill Mr. Fotopoulos' wife. (Id.)

At the conclusion of the proffer the trial court advised the prosecuting attorney

> To State: (sic) I am accepting the facts as you have alleged them in your motion and witness' testimony (sic) has to bear that out, you know, because if they fail, you find yourself in a real predicament at trial, but based on the motions, the allegations, the proffer that I heard, the renewed motion for severance of counts is denied. (R 3206)

On October 8, 1990, while jury selection was ongoing, the Appellant filed an Amended Motion for Severance of Counts (R 3916-18). The basis of the amended motion was that Deidre Hunt had been deposed on October 6, 1990 and had contradicted in large measure the proffers previously made by the State in opposition to the earlier Motions to Sever. (Id.)

On October 8, 1990 the trial court heard argument on the Amended Motion to Sever (R *496).* At that time defense counsel specifically cited Garcia v. State, 568 So.2d *896* (Fla. 1990).

After hearing argument the trial court denied the Amended Motion for Severance. (R 503) In so doing the Court stated

> I agree with the State that surely after the Ramsey killing that several plots to kill Mrs. Fotopoulos were set in motion as well. I see them well connected. State, I hope the evidence at trial bears it out because after Garcia we need to be careful with that. (R 502)

At trial Deidre Hunt and Teja James testified on behalf of the State. Lori Henderson did not. Deidre Hunt testified that she had no idea that Mark Ramsey was going to be killed until moments before it happened. (R 776-7) She further testified that the sole reason she killed Mark Ramsey was because Mr. Fotopoulos threatened to kill her if she refused, not to qualify for participation in the plot to murder Lisa Fotopoulos, as previously contended by the State. (Id., 778) She further testified that no discussion or mention was had concerning killing the wife of Mr. Fotopoulos until after the murder of Mark Ramsey. (R 792) She also testified that Mr. Fotopoulos toldher after the murder of Mark Ramsey that the video tape would be turned into law enforcement if Deidre Hunt "...ever tried to run". (R 791)

Teja James testified that after the murder of Mark Ramsey he was told by Deidre Hunt that Mark Ramsey was killed because he threatened to blackmail Mr, Fotopoulos.

"Q. (Prosecuting attorney) What did Deidre Hunt tell you was the reason for Mark Kevin Ramsey being killed?

A. Me and Kevin knew some stuff about Kosta (Fotopoulos) that Deidra had told us and then Kevin was trying to blackmail Kosta." (R 1741)

The Appellant submits that the State failed to uphold its earlier assurances to the trial court that the evidence at trial would support the trial court's order denying the repeated motions to sever counts. Rather, the testimony of Deidra Hunt and Teja James clearly shows that there was no connection between the murder of Mark Ramsey and the later plot to kill Lisa Fotopoulos or the resulting murder of Bryan Chase.

The Appellant further submits that under the authority of Garcia v. State, 568 So.2d 896 (Fla. 1990), Mac Ray Wright v. State, 16 FLW S595 (August 29, 1991) and the cases cited therein, the trial court erred in denying the repeated motions to sever counts, and further, the trial court erred in denying the Motion

for New Trial which specifically raised this point following trial. (R *3961-2,* **3963)**

In Garcia this Court cited to Bundy v. State, *455* So.2d 330 (Fla. *1984)* and stated,

> The Court (in Bundy) explained that the joinder of 'connected acts or transactions' involves consideration of 'temporal and geographical association, the nature of the crimes, and the manner in which they where committed'. (568 So.2d at 898)

In Mac Ray Wright this court again recently discussed misjoinder of offenses and stated,

> Each episode involved separate offenses, different victims, different times and dates, different places and different circumstances. The only connection is the fact that the same person was accused of all the crimes. (16 FLW S597)

The Appellant submits that the language from this Court in Mac Ray Wright applies to the facts of the present case. Specifically, the murder of **Mark** Ramsey occurred in a rural area of Volusia County on October 20th. The attempted murder of Lisa Fotopoulos and the murder of Bryan Chase did not occur until two weeks later on November *4* in the home of the Appellant's in-laws where he lived with his wife. Further, the nature of the crimes, the manner in which the crimes where committed, and the motives for each crime were obviously dissimilar in every respect. According to the State's evidence, Mark Ramseywas killedbecause he was blackmailing Mr. Fotopoulos while the motive to murder Lisa Fotopoulos was to obtain insurance proceeds. The murder of Bryan Chase was done in order to insure that he would be unavailable to testify against Mr. Fotopoulos.

Most importantly, the two crimes where two singular, distinct episodes. Garcia at page *899.* In this regard, the State's evidence clearly showed that after the murder of Mark Ramsey, Deidra Hunt and Mr. Fotopoulos returned to Daytona Beach where Deidra Hunt went to several night spots and Mr. Fotopoulos presumably went home, thus ending the Mark Ramsey "episode". It was not until later that Deidre Hunt was contacted by Mr. Fotopoulos concerning the plot to murder his wife.

Under any analysis, the murder of Mark Kevin Ramsey should not have been tried together with the other counts.

However, the State will now come before this Court and vigorously argue that it should be excused from its failure to measure up to the repeated assurances given to the trial court that the State's evidence would show a sufficient connection between the crimes. The State, no doubt, will argue that there was a sufficient connection since the video of the murder of Mark Ramsey was used in part to coerce Deidre Hunt to participate in the plot to murder Lisa Fotopoulos. The State will further argue that the evidence of each murder would be admissible in the trial of the other murder as "Williams Rule" evidence pursuant to F.S. 90.404(2), and thus the joinder of the offenses was harmless error under the authority of Bundy, supra.

None of these arguments have merit. First, this anticipated argument confuses the joinder of offense with the admissibility of evidence. Just because the evidence of a separate offense is arguably admissible does not mean it automatically qualifies for joinder. For example, had Mr. Fotopoulos threatened Deidre Hunt with disclosure of a crime that occurred five years earlier, rather than two weeks earlier, the State would argue before this Court that the two could be joined for trial. Obviously, this is not the law.

Second, and more importantly, the argument is contrary to the authority of Garcia and the other cases cited therein. Clearly, if the admissibility of evidence of other crimes was the touchstone for the joinder of offenses, this Court would have said *so* in Garcia. Yet, it is not even mentioned as a factor in the unanimous decision of this Court.

The "Williams Rule" argument is equally without merit. The argument first assumes that the murders would constitute similar fact evidence within the contemplation of F.S. 90.404(2). Yet, the crimes are clearly dissimilar in terms of plan, scheme, motive and all other respects. Thompson v. State, *494* So.2d 203 (Fla. 1986); Peek v. State, *488* So.2d 52 (Fla. 1986); Drake v. State, *400* So.2d 1217 (Fla. 1981); Whitehead v. State, 528 So.2d *945* (Fla. 4th D.C.A. 1988);

Joseph v. State, 447 So.2d 243 (Fla. 3rd D.C.A. 1983). This fact alone distinguishes the present case from Bundy, supra.

Second, assuming arguendo that the evidence had some marginal relevance, the evidence would still be subject to close scrutiny under F.S. 90.403 since it has long been recognized that similar fact evidence carries a substantial risk of being received by the jury as evidence of the defendant's bad character or propensity to commit crimes. As this Court stated in Nickels v. State, 106 So. 479 (Fla. 1925),

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty. (106 So. at 488).

Similar fact evidence is further subject to the limitation that it not be made a "feature" of the trial. Williams v. State, 117 So.2d 473 (Fla. 1960). By any analysis this "feature" restriction was violated in the present case where the State spent three weeks repeatedly stressing every aspect of two heinous murders as well as a number of other offenses.

In the present case the trial court repeatedly cautioned the State that the evidence had better support the proffers and argument offered by the State in opposition to the various motions to sever or the State would find itself in a "real predicament". (R 3206) In spite of these admonitions the State expressed confidence. The State continued to express confidence even when the prosecution was uncertain as to whether Deidre Hunt would testify or what her testimony would reveal. Even in the face of the decision of this Court in Garcia the State continued to argue in favor of joinder with the full knowledge that it did so at its own peril.

The State should now be held accountable for its failure to introduce sufficient evidence at trial to support the joinder.

More importantly, the joinder of counts charging the murder of Mark Ramsey with the remaining counts was extremely prejudicial since the State was permitted repeatedly to go into the intimate details of the two murders. Indeed, Mr. Fotopoulos would submit that the unfair prejudice from misjoinder is so obvious

that this Court did not even see fit to discuss the harmless error doctrine in Garcia or Mac Ray Wright.

For the reasons and authorities cited herein the Appellant respectfully requests the Court to reverse the judgement and sentence as to each and every count and remand the case with instructions that the Motion for Severance of Counts be granted and a new trial be had on the alleged offenses.

POINT ILL

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO IMPEACH THE APPELLANT ON THE BASIS OF PRIOR MISCONDUCT BY THE APPELLANT.

During the course of the trial Mr. Fotopoulos; testified on his own behalf. No questions where asked on direct examination concerning his prior criminal convictions.

At the outset of the cross examination by the prosecuting attorney the following exchange occurred:

Q. Mr. Fotopoulos, not counting this case, anything connected with the charges that you are here for, have you ever previously been convicted of a felonious offense?

A. I believe it's a felonious offense.

I was at one time convicted of six counts.

(Defense Counsel) That's all he has to say, Your Honor, if I may.

THE COURT: Yes, I don't think you should interfere with him when he is responding to Counsel.

(To the State) You may proceed.

Q. Is that all you want to say?

A. I just want to mention it was non-violent.

Q. Six prior felonies?

A. Yes, sir, one incident that was compounded.

Q. Well, that's not really correct, is it, it's not just one incident?

A. It was done at one time, just like these charged are all piled up.

Q. Isn't it true though that you pled guilty to six different felonies covering a period over several years?

A. No, all of the incidents happened within a year and a couple of months, I believe. (R. 2359-60)

The State then requested leave of the Court to go into the details of the prior convictions on the basis that the Appellant had "opened to door" by stating that the offenses had occurred at one time. (R. 2361, 2363) The request was granted over the objection of defense counsel (R 2366). The Court stated:

> I think once he goes beyond admitting to being convicted of a felony and how many times, the door is open. (Id.)

Thereafter, the prosecuting attorney was permitted to question Mr. Fotopoulos in detail about the facts involved in the six separate convictions. The jury heard details of Mr. Fotopoulos' conviction for "...conspiring and agreeing to defraud, to possess, conceal or pass counterfeit U.S. currency" (R 2368); "passing or uttering counterfeit notes" on three separate occasions (R 2368-70)[5]; "transferring or delivering counterfeit notes" (2369-70); and "harboring or concealing individuals from federal arrest". (R 2370).

The prosecuting attorney also marked as an exhibit (6-S, R 2361) and later introduced into evidence certified copies of the judgement and sentence from the federal conviction. (Exhibit 136, R 2505) This exhibit, which later went with the jury during deliberations, contained a detailed account of the *six* convictions. (R *4450)*

The Appellant respectfully submits that the trial court erred in permitting the State to introduce evidence and to cross examine Mr. Fotopoulos on the basis of the facts underlying the federal convictions.

F.S. 90.608 permits a witness to be impeached on the basis of prior felony convictions. However, the law restricts the inquiry to the existence of **a** prior conviction and the number of prior convictions. If the witness responds truthfully, all further inquiry must stop. As the Court stated in Leonard v. State, *386* So.2d 51, 52 (Fla. 2nd D.C.A. 1980),

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[5] On two of the counts the prosecuting attorney was permitted to read the allegations from the indictment into the records.

> The rule in Florida has long been established that a defendant who testifies on his own behalf may be asked on cross examination whether he has ever been convicted of a crime and, if so, how many times. Unless the defendant answers untruthfully, the prosecution inquiry along this line must stop. Fulton v, State, 335 So.2d 280 (Fla. 1976); McArthur v. Cook, 99 So.2d 565 (Fla. 1957); Mead v. State, 86 So.2d 773 (Fla. 1956); Whitehead v, State, 279 So.2d 99 (Fla. 2nd D.C.A. 1973).

The Appellant further relies on the authority of Gavins v. State, _____ So.2d _____, 16 FLW 2318 (Fla. 1st D.C.A. September 4, 1991) wherein the Court stated,

> If the defendant admits the number of prior convictions, the prosecutor is not permitted to ask further questions regarding prior convictions, nor question the defendant as to the nature of the crimes. If, however, the defendant denies a conviction, the prosecutor can impeach him by introducing a certified copy of the conviction. (16 FLW at 2318-19)

The Court in Gavins then reversed the defendant's conviction where the defendant accurately disclosed his prior convictions and yet the prosecuting attorney "...named the specific offenses on cross and recross-examination and during closing argument." (16 FLW 2319)

In the present case the Appellant responded that he had been convicted of a felony and further said that he was "...at one time convicted of six counts". (R 2359)

The accuracy of this testimony by Mr. Fotopoulos is not in dispute. As such, all further inquiries should have stopped. Indeed, defense counsel sought to limit further inquiry.

"That's all he has to say, Your Honor, if I may". (R 2359-60).

Counsel's efforts to limit the inquiry were met by an admonishment by the trial court that counsel should not interrupt the State during their cross examination of Mr. Fotopoulos. The State was then directed to proceed with the line of questioning. (R 2359)

The Appellant submits that the trial court was clearly in error in overruling defense counsel's effort to restrict further inquiry and directing the State to proceed with the line of questioning.

Further, the Appellant submits that, for a number of reasons, the trial court erred in ruling that the Appellant opened the door thereby permitting the State to proceed.

First, the responses given by the Appellant that purportedly opened the door where given in response to questions improperly propounded by the State after defense counsel sought to limit the inquiry.

Q. Is that all you want to say?

A. I just want to mention it was non-violent.

Q. Six prior felonies?

A. Yes, sir, one incident that was compounded. (R 2359)

These questions propounded by the State that invoked the response from the Appellant should never have been permitted in the first place, particularly in light of defense counsel's effort to limit the inquiry.

Second, the case authority permitting further inquiry into the nature of the prior convictions involves situations where the defense counsel, not the prosecutor, has elicited testimony in an effort to lessen the impact of prior convictions. McCrae v. State, 395 So.2d 1145 (Fla. 1981); Pavne v. State, *426* So.2d 1296 (Fla. 2nd D.C.A. 1983). In Payne the Court stated,

> The mere fact that defense counsel went beyond (very slightly) eliciting the bare fact and number of defendant's prior conviction did not give the State carte blanche to delve into the specifics of defendant's prior offense. One 'opens the door' to an otherwise proscribed area or topic by asking questions relating to that area. (original emphasis) (426 So.2d at 1300)

There is no authority that permits the prosecution to open the door through improper questions propounded to the defendant on cross examination and then proceed to impeach the defendant with the details of the prior conviction, and further, to later introduce into evidence exhibits specifying the exact nature of conduct.

Third, the Appellant submits that the time frame of the conduct underlying the prior convictions has little or no relevance if one considers the purpose of permitting impeachment by prior convictions. Specifically, impeachment by prior convictions is based on the premise that a person who commits a felony or a

crime involving dishonesty will be less inclined to honor an oath, C. Ehrhardt, Florida Evidence, Second (section 610.1, page *334)* Thus, while the time frame of the convictions is perhaps important, the added information of the time frame of the underlying activity would add little, if anything, to the impact of the impeachment by prior convictions. Further, whatever limited relevance the time frame of the underlying conduct might have, inquiry into the matter should have been strictly scrutinized under F.S. *90,403.* Clearly, under any analysis the unfair prejudice resulting from the prosecutor reading the Indictment from the federal conviction outweighed whatever limited relevance was obtained through showing the time frame of the underlying conduct.

Fourth, and perhaps most importantly, assuming that the "door" was somehow opened by the Appellant, the issue was the time frame of the conduct underlying the convictions. No "door" was ever opened with respect to the nature of the offenses. Thus, under any analysis it was absolute error to permit the State to cross examine Mr. Fotopoulos on the basis of the actual offense underlying the conviction.

In this regard defense counsel argued before the trial court that it would be possible to explain the time frame of the convictions without going into the details of the individual offenses. (R 2362-3) The trial court was obviously not persuaded. (R 2366)

The error in permitting the State to present the details of the offenses underlying the federal convictions was compounded by the fact that the State was also permitted to introduce evidence and to cross examine Mr. Fotopoulos on the basis of other unrelated prior misconduct. First, Mr. Fotopoulos was shown photographs of nude women found in his residence during the execution of a search warrant. (R 2391) Over objection, the State was permitted to describe the contents of the photographs in the presence of the jury and then cross examine Mr. Fotopoulos concerning the photographs even though the photographs where never admitted into evidence. (R 2392) More importantly, the photographs were indisputably taken years prior to the events involved in the present case. (Id.)

Second, Mr, Fotopoulos was cross-examined on the basis of questions propounded by his attorney to several State witnesses.

"Q. You participate in this trial don't you, you help your lawyer?

A. I tell him the side of my story.

Q. And you tell him when you want questions asked?

A. Sometimes, yes. (R *2471)*

Q. In fact, you didn't ask your lawyer to *see* if Teja James was promised anything did you?"

After defense counsel's objection was overruled, (R *2472-3)*; the State continued:

Q. Did you **ask** your lawyer to ask Lori Henderson if she was given any deals? (R 2472)

Thereafter the State continuedto cross-examine Mr. Fotopoulos on the basis of conversations with his attorney and questions propounded by **his** attorney. (R *2473-*74)

These questions were clearly improper impeachment. More importantly, the questions were in direct violation of the attorney-client privilege. F.S. 90.502(2) Yet, the objection was overruled by the trial court.

Third, Mr. Fotopoulos was asked questions about a false loan application:

"Q. And you make out false loan applications with virtual lies in them; that's dishonest, isn't it?

A. Not really...." (R *2448)*

The State's effort to impeach Mr. Fotopoulos on the basis of the false loan application was clearly improper under F.S. *90.404* and F.S. 90.610 where the alleged conduct would constitute a criminal offense (Cf. Title 18 U.S.C. Section 1014) for which Mr. Fotopoulos had never been indicted nor convicted.[6]

Last, the State was permitted to introduce into evidence, over objection, that the Appellant possessed automatic weapons (R *743, 2414);* Uzi machine guns (R *588-9,* 1721, 1875); illegal silencers (R 1121, 1875) and hand grenades. (R

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[6] Another defense witness, Peter Kouracs, was also questioned about the alleged false loan applications by Mr. Fotopoulos. (R 2213-5)

2416, 2434 and *2437).* The evidence consisted of testimony as well as photographs. (Exhibit 137, page *4457).* Not only did defense counsel object repeatedly, but he also moved in limine to exclude any reference to the items as well as the counterfeit money. (R *1503-4)*

This evidence was introduced even though it had absolutely no relevance to the issues before the jury. Indeed, when the state sought leave of the Court to cross examine Mr. Fotopoulos on these matters, the State gave no indication as to the possible relevance of the evidence, only that the Appellant, once again, had "opened the door" during his direct examination. (R 2366) More importantly, the trial court made no effort to weigh the possible relevance of the testimony with the unfair prejudice as mandated by F.S. *90.403.* (R 2366-7)

After the trial court permitted the State to introduce evidence of the illegal weapons and grenades, the State then coupled this evidence with the evidence of counterfeiting to set out to assassinate the character of Mr. Fotopoulos in direct violation of F.S. *90.404.*

First, the Appellant was asked on cross examination why he refused to disclose ownership of the illegal silencers and automatic weapons when first questioned by law enforcement, (R *2408-2409)'* He was next asked whether he had discussedwith various individuals his counterfeiting activities. (R *2413)* He was asked about the various illegal weapons he owned. (R 2416) After he was shown pictures of hand grenades, the prosecuting attorney asked him,

"Q. They are also illegal weaponry, are they not?

A. I believe so.

Q. What are they?

A. They are homemade grenades.

Q. For blowing things or people up?

A. If you really want to know, its for fishing.

Q. For fishing?

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[7] This line of inquiry bordered on, if not exceeded, an improper commit on Mr. Fotopoulos' right to remain silent when interrogated by law enforcement officers. Unfortunately, there was no objection to this line of inquiry.

A. That's why they have a fuse which is waterproof." (R *2416)*

Later, the following exchange occurred,

"Q. I thought hand grenades where meant for blowing **up** people or objects and they are meant for fishing, according to you?

A. That may be what you use them for.

Q. What kind of fish do you catch with hand grenades?

A. Everything, you throw it in the water and whatever comes up.

Q. You do this regularly?

A. No I don't.

Q. When is the last time you fished with hand grenades?

A. I would say at least two years ago.

Q. About the time that you gave up counterfeiting?

A. Probably before that." *(2434)*

After another reference to "blowing up fish with hand grenades" (R *2437)* the prosecuting attorney then turned to the counterfeiting activity.

"Q. You have no regard for honesty?

A. How do you know, you never met me before.

Q. You pass counterfeit money. That is dishonest, isn't it?

A. No, it is fun. So I made a mistake, I am paying for it." (R *2448)*

The final blow was delivered during recross examination when the prosecutor asked,

"Q. You mother's diamond ring, you paid sixteen thousand dollars for it. Did you pay for that with counterfeit or real money?

A. I paid for it with real money." (R *2468)"*

The character assassination continued into the final argument. During closing argument the State made twelve separate references to the counterfeiting activity of Mr. Fotopoulos. Two of the references had to do with the testimony elicited on the cross examination that Mr. Fotopoulos found it "fun to counterfeit". (R 2637, 2651)

In another comment concerning Mr. Fotopoulos' honesty, the prosecutor stated,

> He lies to each and every merchant that he passed a counterfeit one hundred dollars bill to as he took their property that the money was lawful.... (R 2650)

Further, the prosecuting attorney stated,

> (He) talks about the seventy thousand dollars he made of his counterfeit operation and seems proud to let you know that he brought a ring for his mother that he claims was sixteen thousand five hundred dollars with the proceeds that he gained from his counterfeiting operation.... (R 2637-8)

The prosecuting attorney coupled these arguments with repeated references to automatic weapons, silencers and grenades. These reference were epitomized by the following passage,

> The tape was up there all the time where Kosta worked making his bullets, where Kosta worked making his silencers, the silencers that he probably went out in the woods with *so* he could sneak up surreptitiously on where these little poor rabbits ran and not scare them to death when he shot them. (R *2674)* [8]

Clearly, such rhetoric has no place in a court of law. Nor should a prosecution stoop to a campaign of character assassination in order to obtain a conviction.

In the present case the Appellant was the principle witness in his own defense. With the exception of Diedre Hunt, Mr. Fotopoulos was the only individual in a position to have personal knowledge of the events set forth in the Indictment. Thus, the verdict, in large measure, turned on the jury's assessment of the credibility of Mr. Fotopoulos.

Where the State was permitted, over repeated objections, to mount a wholesale assault on the character and credibility of Mr, Fotopoulos, there is no question but that the admission of this evidence was reversible error.

POINT IV

> THE TRIAL COURT ERRED IN PERMITTING THE STATE TO IMPEACH THE TESTIMONY OF THE APPELLANT ON THE BASIS OF PRIOR TESTIMONY BY THE APPELLANT

The Appellant was initially charged by Information with one count of "Solicitation to Commit Murder in the First Degree". After his arrest on this

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[8] There is no mention whatsoever during the entire trial of rabbit hunting by Mr. Fotopoulos or anyone, with or without a silencer.

charge the family of Mr. Fotopoulos retained counsel, Thomas Mott, Esquire who filed an appearance on his behalf. (R *3405)*

On January *8, 1990* Mr. Mott filed a Motion to Withdraw seeking to withdraw from representation of Mr. Fotopoulos on all charges. (R *3464)*

On January 9, *1990* a hearing was had on the Motion to Withdraw filed by Mr. Mott. (R *3990)* At that time Mr, Mott advised the Court that Mr. Fotopoulos was indigent and was unable to retain private counsel. Mr. Mott further advised the court that an affidavit to that effect had been filed with the Court. (R *3992)*

The Court then permitted the State to make inquiry of Mr. Fotopoulos to determine whether he qualified for court appointed counsel. (R 3995) The exhaustive inquiry by the State covers twenty-five pages of transcript and invoked a number of objections (R *3996, 4001, 4002, 4005, 4008, 4015* and *4017)* as well as the invocation of the right against self-incrimination (R *4003, 4008* and *4013).*

Following the hearing the Motion to Withdraw by Mr. Mott was granted. (R *3466)* On January 12 an order was entered appointing Mr. Corrente as counsel for Mr. Fotopoulos. (R *3467)*

At trial Mr. Fotopoulos testified on his own behalf. During cross examination the prosecuting attorney sought to impeach Mr. Fotopoulos on the basis of the testimony given by him at the hearing on January *9, 1990.* At the time the prosecutor asked the first question based on the prior testimony, the following colloquy occurred,

"Mr. Corrente: I do not have a copy of that, Your Honor. That was never provided.

Mr. Damore (prosecuting attorney): If it please the Court, that is an official Court record and it was available to Counsel through the Court. Counsel is aware that his client was in Court on January 9th and he was represented by Counsel at that time. I am sure that the Clerk could provide him with a copy of the transcript.

Mr. Corrente: Just for the record, Your Honor, I was not his counsel that day....

Mr. Damore: May the record reflect that counsel does have it in his hand at this time, Your Honor.

Mr. Corrente: That is correct Your Honor

The Court: Go ahead" (R *3273-4)*

The Appellant submits that the trial court erred in permitting the State to use the testimony of January 9 to impeach Mr. Fotopoulos where the State failed to provide a copy of the statement to counsel, and where counsel was not afforded an opportunity to challenge the voluntariness of the statement.

In Nowlin v. State, *346* So.2d 1020 (Fla. 1977) this Court set forth the conditions where the State may use prior statements of the accused to impeach his testimony. This court stated,

> We reaffirm Crawford[9] to the extent that it requires that incriminating statements be voluntarily made before they be used for impeaching the credibility of a defendant who testifies at trial. *(346* So.2nd at *1024)*

Further, the comments of Justice Overton in **his** concurring opinion are particularly applicable in the present case.

> Prosecutors should proffer to the trial court any impeachment examination of a defendant concerning prior inconsistent statements outside the presence of the jury.... The proper predicate for the impeachment requires the State to advise the defendant of the substance of the prior inconsistent statement and the time and place it was made as well as the person or persons to whom it was made. Although this rule does not require perfect precision, the predicate for impeaching the testimony must be such that the defendant cannot be taken by surprise. Further, an opportunity must be afforded the defendant to refresh his memory to make intelligent answers, and to offer such explanations as he may desire. *(346* So.2nd at 1025)

In the present case the State violated each and every procedural requirement set forth by Justice Overton: the State did not proffer the statements out of the presence of the jury; the State did not provide a copy of the statement to Mr. Fotopoulos or his counsel;[10] and the State did not show Mr.

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[9] Crawford v. State, 70 Fla. 323, 70 *So. 374* (1915).

[10] The record reflects that the transcript of the January 9th hearing was prepared on January *24,* 1990 and filed the following day. (R *4029, 3990)* Since counsel for Mr. Fotopoulos had never seen the transcript, it is apparent that the transcript was prepared at the request of the State, and thus was in the State's

Fotopoulos a copy of the prior testimony before seeking to impeach him. By any measure the State's use of the prior testimony was a complete and utter surprise within the definition set forth in the opinion by Justice Overton.

The decision in Nowlin requires the trial court to make a factual determination of the voluntariness of a statement upon proper request by the accused. Clearly, no such request was made on behalf of Mr. Fotopoulos in the present case. However, the Appellant submits that it was impossible for counsel to challenge the voluntariness of the prior statements where he was unaware of the existence of the prior statements and the circumstances surrounding the making of the prior statements.[11]

The Appellant submits that the specific error in the present case was the court's direction to the State to "Go ahead" where it was clear that defense counsel had just received a copy of thirty-eight page transcript. At the minimum the trial court should have afforded both Mr. Fotopoulos and counsel the procedural safeguards described by Justice Overton. That is, the court should have permitted both Mr. Fotopoulos and counsel to read and review the transcript so that Mr. Fotopoulos could refreshhis recollection and counsel could challenge the voluntariness of the statement.

The Appellant submits that there was at least an arguable basis for defense counsel to seek exclusion of the prior testimony had he been given an opportunity to do so. Specifically, the testimony in question was given at a hearing to determine whether Mr. Fotopoulos qualified for court appointed counsel under the Sixth Amendment and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). Presumably, if Mr. Fotopoulos had not responded to the questions propounded by the State, his request for court appointed counsel would have been denied and he would have been compelled to represent himself.

Under these circumstanced the logic of Simmons v. United States, *390* U.S. 377, 88 S.Ct. 967 (1968), would arguably mandate exclusion of this testimony.

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possession well before trial.

[11] The trial court's error in failing to conduct a "Richardson" hearing as to the discovery violation is discussed in Point Four below.

Indeed, this Court recently applied the logic of Simmons to testimony given at a hearing to protect the defendant's Fifth Amendment rights. Hayes v. State, 581 So.2d 121 (Fla. 1991) Further, this Court in Haves cited with approval to United States v. Gravatt, 868 So, 2d 585 (3rd Cir. 1989) wherein the Court held that testimony of the defendant at a hearing to determine indigency would be excluded from evidence at a subsequent trial on tax evasion charges.

Obviously, this argument based on Simmons was not presented to the trial court. But the point here is that the failure of the trial court to require the prosecution to follow the mandate of Nowlin deprived counsel for Mr. Fotopoulos from presenting this argument.

This error was perhaps not sufficient to require reversal of Mr. Fotopoulos' conviction. However, the Appellant submits that when this error is considered in conjunction with the other errors committed during the cross-examination of Mr. Fotopoulos, he is entitled to a new trial.

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A "RICHARDSON HEARING" AFTER BEING ADVISED OF A DISCOVERY VIOLATION

As previously noted the State sought to impeach the testimony of Mr. Fotopoulos on the basis of a transcript of his testimony at a hearing held on January 9, 1990. At the time the State first made reference to the testimony, counsel for Mr. Fotopoulos advised the court that he had never been provided with a copy of the prior testimony.[12] The State did not dispute defense counsel's contention that he had never received a copy of the transcript.

The Appellant submits that the trial court had an absolute duty to conduct an inquiry pursuant to Richardson v. State, 246 So.2d 771 (Fla 1971) when advised by defense counsel of a possible violation of Rule 3.220(b)(1)(iii).[13] This

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[12] The record reflects that on January 30, 1990 counsel for Mr. Fotopoulos filed a "Demand for Discovery'' requesting, inter alia, that the State provide "Any written or recorded statements...." of Mr. Fotopoulos. (R 3483)

[13] Rule 3.220(b)(1)(iii) requires the prosecuting attorney to provide to the defendant "any written or recorded statement of the accused...." within the state's possession or control.

inquiry, now memorialized as a "Richardson" hearing, requires the court to inquire as to whether a violation has occurred; whether the violation was inadvertent or willful; whether the violation was trivial or substantial; and what effect the violation had upon the ability of the party to prepare for trial. Further, the burden is upon the trial court, not the parties, to initiate the requisite inquiry. Brazell v. State, 570 So.2d 919, 912 (Fla. 1990)

In the present case counsel for Mr. Fotopoulos clearly advised the court that the State had failed to provide a copy of the prior testimony of Mr, Fotopoulos. This statement by counsel, coupled with the colloquy that immediately followed, was clearly sufficient to alert the trial court to the necessity of a Richardson hearing.

In this regard the Appellant relies on Copeland v. State, 566 So.2d 856 (Fla. 1st D.C.A. 1990) wherein the court stated,

> Where a trial court is reasonably apprised of a discovery violation, the court must conduct a full inquiry into all of the surrounding circumstances....There are no exact 'magic words' or phases which must be used by the defense in order to necessitate the inquiry but only the fact that a discovery request has not been met. (566 So.2d at 858)

This court has repeatedly held that it is per se reversible error for the trial court to fail to conduct a Richardson hearing when alerted to a possible discovery violation. Crumbie v. State, 345 So.2d 1061 (Fla. 1977); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Smith v. State, 500 So.2d 125 (Fla. 1986).

Based on this authority the Appellant submits that the trial court erred in failing to conduct a Richardson hearing, and as such, the judgement and sentence of the court: should be reversed.

The State no doubt will contend that there was no discovery violation, and hence no need for a Richardson hearing, where the transcript of the prior hearing was filed with the clerk of the Court.

The first, simple response to this contention is that there is no way for this court to determine whether a discovery violation occurred because the trial court did not make the requisite inquiry. Indeed, the first step in a Richardson

hearing is for the trial court to determine, if in fact, a discovery violation has occurred.

In the present case we have only the bare assertion of the prosecuting attorney that the transcript was filed with the clerk of the court. What is lacking is the requisite finding by the trial court that the transcript had been filed and was accessible to defense counsel.

On a more fundamental level, this anticipated argument by the State misconstrues the purpose of the discovery rules. Rule 3.220 requires more of the prosecuting attorney than to disclose information that is not available from some other source. Rather, the Rule requires the prosecuting attorney to disclose all information within his possession or control.

Furthermore, the prosecuting attorney well knew that Mr. Corrente was not counsel of record at the time of the hearing on January 9, 1990, and thus, there would be no reason for Mr. Corrente to be on notice that his client had testified or that a transcript of his client's testimony had been prepared and filed with the court. Cf. Lavigne v. State, 349 So.2d 178 (Fla. 1st D.C.A.); Witmer v. State, 394 So.2d 1096 (Fla. 1st D.C.A. 1981); Raffone v. State, 383 So.2d 761 (Fla. 4th D.C.A. 1986); Walker v. State, 573 So.2d 1075 (Fla. 4th D.C.A. 1991).

Under the facts and circumstances of the present case the Appellant respectfully submits that it was per se reversible error for the trial court to fail to conduct a Richardson Hearing. As such, the judgement and sentence of the lower court should be reversed and the case remanded with instructions that he be granted a new trial,

POINT VI

THE CUMULATIVE ERRORS COMMITTED REQUIRE THAT MR. FOTOPOULOS BE AWARDED A NEW TRIAL.

Mr. Fotopoulos has raised several issues herein alleging errors requiring a new trial. Assuming arguendo that each issue considered individually may not require reversal of his convictions and sentences, the cumulative effect of these errors and others did operate to deny Mr. Fotopoulos a fair trial.

The most important fundamental right of an accused in a criminal case is that his trial be fair. Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert, den., 386 So.2d 642 (Fla. 1980). This Court may consider the cumulative effect of the errors committed, even those errors non-objected to, in determining whether Mr. Fotopoulos' fundamental right to a fair trial has been affected, Pope v. Wainwright, 496 So.2d 798, 801, f.n. 1 (Fla. 1986).

Prior to trial, counsel for Mr. Fotopoulos moved to exclude Deidre Hunt as a witness as she had refused to submit to a pre-trial deposition. (R. 3882-83, 3124). The trial court initially granted the motion, (R. 3131), but later reserved ruling on the motion. (R. 3135-36). Subsequently, Ms. Hunt submitted to a seven (7) to nine (9) hour deposition (R. 944) on Saturday before the State called her as a witness on Tuesday.[14] (R. 921). It is undisputed that Ms. Hunt was the major witness for the State. It was impossible for defense counsel to properly review the deposition transcript in the short time between the deposition and trial. The instant case was a complex trial, and it involved the State seeking the death penalty. The ability to prepare properly for the cross-examination and follow-up investigation of the deposition answers of Hunt deprived Mr. Fotopoulos a fair trial.[15] Contra, See, Thompson v. State 565 So.2d 1311, 1315-1317 (Fla. 1990).

The trial court erred in permitting the State to elicit irrelevant background history of Deidre Hunt. Specifically, Hunt testified that her father had refused to accept her, her mother wasn't well, (R. 694), her boyfriend use to beat her up (R. 696), her boyfriend was violent, and even when she was pregnant, he beat her (R. 697). This information was totally irrelevant to any issues, and was obviously introduced by the State to engender jury sympathy for Ms. Hunt as well as accept her as a credible and believable witness. In United States v. Solomon, 686 F.2d 863 (11th Cir. 1982), the Eleventh Circuit held the

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[14]Hunt testified beginning on Tuesday, October 9, 1990. (R. 691); her deposition was October 6th. (R 3916-18).

[15]Trial court denied as part of Mr. Fotopoulos' Motion for New Trial the denial of his Motion to Exclude Hunt as a witness. (R. 3961-62).

trial court properly precluded questions of the defendant as to how many children he had and whether he had previously been a member of the armed forces." The court held such questions were irrelevant. Id., 873-874.

The trial court erred in permitting repeated references to weapons, hand grenades, silencers, automatic weapons. Such evidence was irrelevant, and even if somehow relevant, the relevancy was outweighed by the prejudice. See, F.S., 590.403. In Jackson v. State, 522 So.2d 802, 806 (Fla. 1988), this Court found that the trial court erred in admitting references to the defendant possessing various weapons and bullet proof vests. However, unlike Jackson, the error in the instant case was not harmless as repeated references were made to this evidence by the State so that it became a "feature of the trial."

The State improperly injected the issue of homosexuality by questioning and suggesting through defense witnesses that Mr. Fotopoulos and Peter Kouracos had a homosexual relationship. During the State's cross-examination of Lydia Kouracos, mother of Peter, (R. 2117), the State questioned Mrs. Kouracos that her son is thirty-four (34) years of age, lives at home, is not married, and had been found in Lisa Fotopoulos and Mr. Fotopoulos' bed on the morning of November 5, 1989. Defense counsel's objection was sustained. (R. 2130). Nonetheless, during the cross-examination of Peter Kouracos, he too was questioned about being in bed with Mr. Fotopoulos within twenty-four (24) hours of Mrs. Fotopoulos being shot. (R. 2218-2220). This time, defense counsel's objection was overruled, (R. 2219).

In United States v. Gillespie, 852 F.2d 475, 479 (9th Cir. 1988) the Ninth Circuit held that the Government's references and interjection of evidence of homosexuality to be reversible error as it unfairly prejudiced the defendant's credibility and character in the eyes of the jury. In so ruling, the court held:

> Evidence of homosexuality is extremely prejudicial Cohn v. Papke, 655 F.2d 191, 194 (9th Cir. 1981) (introduction of evidence of homosexuality creates a "clear potential that the jury may had been unfairly influenced by whatever biases and stereotypes they might hold in regard to homosexuals"); United States v. Birrell, 421 F.2d 665, 666 (9th Cir. 1970) (conviction for theft reversed because the trial court admitted evidence of homosexuality).

The State in the instant case made a feature of Mr. Fotopoulos' sexual life. In addition to the homosexual references, the State also accused Mr. Fotopoulos of having numerous affairs with women.[16] (R. 2391). There was no proof to support the State's allegation. While nude photographs of various women were introduced, (R. 2391-2392), it was undisputed that the photographs were of women that Mr. Fotopoulos had dated prior to his marriage. Clearly, this line of attack by the State was designed to inflame the passions and prejudices of the jury against Mr. Fotopoulos. It was improper cross-examination. Fulton v. State, 335 So.2d 280 (Fla. 1976).

The State improperly attacked Mr. Fotopoulos' character by asking/stating: "you made out false loan applications with virtual lies on them..." (R. 2448).[17] Evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. See, Farinas v. State, 569 So.2d 425 (Fla. 1990). In Hepler v. State, 510 So.2d 1006 (Fla. 4th DCA 1987), the State introduced evidence that the defendant had made false representations on employment applications. The Fourth District held such evidence constituted an improper character attack as the State used the evidence to establish the defendant was a liar and therefore guilty. Id. Likewise, the State sub judice used the false loan application evidence for their argument that Mr. Fotopoulos was dishonest. (R. 2448).

The State's cross-examination of Mr. Fotopoulos amounted to a short course in improper impeachment. As presented in Point III, supra, the State improperly went into the nature of Mr. Fotopoulos' convictions, (R. 2368-2370), and then hammered home the counterfeiting charges over and over again. (R. 2387-2388, 2390, 2413, 2417, 2434, 2448, 2467, 2468). The State impeached with: evidence of particular acts of alleged misconduct. (R, 2391, 2392, 2416); involuntary pre-trial statements, (R. 2373-2380); and invaded the attorney-client

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[16]Admittedly, the relationship with Deidre Hunt was admissible.

[17]The State also improperly questioned defense witness Peter Kouracos about falsifying a loan application. (R. 2213).

relationship, by making inquiries of Mr. Fotopoulos as to his discussions with his lawyer concerning what questions would be asked of various witnesses.

Admittedly, some of the errors complained of herein were not objected to. However, as noted earlier, Peterson v. State, suora, the cumulative effect of these errors may nonetheless be considered.

Mr. Fotopoulos' defense centered on the jury believing him. The unfair and highly prejudical attacks on his credibility destroyed his right to **a** fair trial.

Based upon the arguments and authorities cited in each of the Points, supra, well as those issues herein Mr. Fotopoulos respectfully requests a new trial based **upon** the cumulative errors.

PENALTY ISSUE CLAIMS

A) THE RAMSEY MURDER

POINT VII

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SEVER THE RAMSEY HOMICIDE FROM THE CHASE HOMICIDE WHICH DENIED THE APPELLANT DUE PROCESS DURING THE ADVISORY SENTENCING PROCEEDINGS.

As fully set forth in Point 11, supra, the trial court erred in denying the Appellant's repeated Motions for Severance of the Ramsey murder charge from the Chase murder charge. This error was compounded during the advisory sentencing proceedings wherein the trial court instructed the jury as to the Ramsey case on five (5) aggravating circumstances wherein only three (3) aggravators, at best, arguably applied.[18]

Specifically, the sentencing jury was instructed:

> Ladies and Gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the Defendant, Konstantinos X. Fotopoulos for the first degree murder of Mark Kevin Ramsey and Brian Chase.
>
> * * * *
>
> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

[18]The Appellant renewed **his** severance motion argument at sentencing. (R. 3360).

1) The defendant has previously been convicted of another capital offense or of a felony involving the use or threat of violence to some person;

a) the crime of murder in the first degree is a capital felony;

b) the crime of attempted murder in the first degree is a felony involving the use of violence to another person.

2) The crime for which the defendant is to be sentenced was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit burglary.

3) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody;

4) The crime for which the defendant is to be sentenced was committed for financial gain.

5) The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 4538) (emphasis added).

Juries in capital sentencing proceedings must be guided by proper jury instructions. Shell v. Mississippi, ___U.S.____, 111 S.Ct. 313 (1990).

The Constitution requires accurate jury instructions in Florida's sentencing proceedings. See, Proffit v. Florida, 428 U.S. 242, 256, 96 S.Ct. 2960 (1976). The Eighth Amendment to the United States Constitution requires a higher standard of definiteness with respect to jury instructions in capital cases. Great care must be taken in defining the applicable aggravating circumstances for the jury. See, Maynard v. Cartwright, ___U.S.___, 108 S.Ct. 1853.

This Court has held that a trial court should instruct only upon those aggravating for which evidence has been presented and applicable to the case. To do otherwise is confusing and improper. See, Floyd v. State, 569 So.2d 1225 (Fla. 1990); Stewart v. State, 549 So.2d 171, 174 (Fla. 1989), cert. den., ___U.S.____, 110 S.Ct. 2194 (1990).

In the instant case the trial court instructed the jury on five (5) aggravating circumstances. Based upon the instructions given, the jury was lead

to believe (or at least left to believe) that they could apply all five (5) aggravators in recommending a sentence for the Ramsey and the Chase murders. Clearly, two (2) aggravators (F.S., $921.141 (5)(d)) (F.S., $921.141 (5)(f)) did not apply to the Ramsey murder.[19] Instructing on aggravating factors that do not apply results in undue confusion, Floyd, suura; Stewart, suura, and inadequate guidance. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950 (1974).

This Court reversed a death sentence and remanded for a re-sentencing wherein one (1) improper aggravating circumstance was presented to the jury. In Omelus v. State, 16 FLW S455 (Fla. June 13, 1991), the jury recommended death by vote of eight-to-four. The trial court followed the recommendation. On appeal, this Court reversed for a re-sentencing finding that the heinous, atrocious and cruel circumstance had been improperly argued to the jury.

Likewise, in the instant case improper submission of two (2) aggravating factors that clearly did not apply for the jury's consideration denied the Appellant a fair sentencing hearing. The sentence of death must be set aside and a re-sentencing hearing ordered.

POINT VIII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE DURING THE PENALTY PHASE HEARSAY STATEMENTS FOR WHICH THE APPELLANT DID NOT HAVE A FAIR OPPORTUNITY TO REBUT AND SUCH TESTIMONY WAS UTILIZED BY THE TRIAL COURT TO FIND AN AGGRAVATING FACTOR SUPPORTING THE SENTENCE OF DEATH.

Florida Statutes, $921.141 (1) (1990) provides in pertinent part that all legally obtained probative evidence, including hearsay is admissible during the penalty phase, "provided that the defendant is accorded a fair opportunity to rebut any hearsay statements." (emphasis added).

During the penalty phase, the State called two (2) witnesses, Teja James (R. 3231), and Lori Henderson. (R. 3241). Mr. James testified that his friend

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[19]The improper joinder also resulted in a hastily drafted sentencing order by the trial court. In this Order "IV Discussion" the trial court erroneously noted that the Court had found beyond a reasonable doubt five (5) aggravating circumstances. (R. 3939). However, the Order itself only found three (3) aggravators. (R. 3936-37).

Mr, Ramsey told him that he knew things about the Appellant, and he was going to blackmail the Appellant. (R. 3232-3233).

Similarly, Lori Henderson testified that Ramsey advised her he was going to blackmail the Appellant for money, and get his job back at Appellant's business. (R. *3241).*

Based upon the hearsay statements of Mr. Ramsey, the State argued that Kevin Ramsey was killed because of the blackmailing and the aggravating factor of witness elimination was established. (R. *3307).* The trial court also relied upon the hearsay evidence in finding that Ramsey **was** killed for the purpose of avoiding or preventing a lawful arrest pursuant to F.S., §921.141 (5)(e). The court noted in his sentencing order:

> This factor was established by the evidence. Ramsey knew of the Defendant's illegal activities and planned to blackmail the Defendant. One of the dominate motives behind killing Ramsey was elimination of a witness hostile to the Defendant. **The** theme of witness elimination runs through this case, starting with Ramsey and ending with Chase. (R. *3937).*

As noted above, F.S., §921.141 (1) provides that hearsay evidence may be admissible in a penalty proceeding. However, such evidence is admissible only if the accused is accorded a fair opportunity to rebut the hearsay statements. Dragovich v. State, 492 ***So.2d*** 350 (Fla. *1986).* The statements of Mr. Ramsey obviously could not be rebutted as he was dead. In Engle v. State, *438* So.2d *803, 814* (Fla. 1983), cert. den., 465 U.S. 1074, 104 S.Ct. *1430* (1984), this Court stated:

> The Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the Fourteenth Amendment to the United States Constitution. Pointer v. Texas, *380* U.S. *400, 85* S.Ct. 1065 (1965). The primary interest secured by and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209 **(1967).**

In Rhodes v. State, 547 So.2d 1201, *1204* (Fla. 1989), during the penalty phase the State presented the testimony of a deputy sheriff from the State of Nevada who introduced certified copies of the defendant's judgment and sentence

of the offenses of battery with a deadly weapon and attempted robbery. The deputy sheriff was also permitted to play a tape recorded statement of the victim of these offenses. This Court held that it was error for the trial court to have permitted the tape recording in that it denied the defendant an opportunity to confront and cross-examine the witness.

Likewise, in the instant case, permitting the State to introduce the statements of the deceased, Ramsey, as to the alleged blackmail activities deprived the Appellant of his constitutional right to confront and cross-examine the witness. The James and Henderson testimony was highly prejudicial as the State relied upon it in its argument to the sentencing jury to recommend the death penalty, (R. 3307), and as noted above, the trial court actually relied upon the testimony for the finding of aggravating factor F.S., $921.141 (5)(e).

The trial court also overlooked the other testimony offered explaining Ramsey's death, and the applicable caselaw defining F.S., §921.141 (5)(e).

The Appellant's trial counsel objected to the admissibility of the Ramsey hearsay statements during the guilt phase. (R. 1809). The trial court itself properly recognized that such testimony was in fact hearsay. (R. 1810, 1812). Based upon other testimony, there were conflicting "theories" as to why Mr. Ramsey was killed. According to Mr. James' guilt phase testimony, Deidre Hunt killed Mr. Ramsey because she didn't like him (R. 1803), and she was "sick of his complaining about not having enough food." (R. *1740).* Additionally, the State's theories included one the Appellant planned for Deidre Hunt to shoot Mr. Ramsey, video tape it, and then have sufficient leverage over Hunt to get her to participate in the attempted killing of the Appellant's wife (R. 2874-76), 561); secondly, that the Appellant wanted to see if Hunt could kill someone and become part of the "Hunter - killer" Club. (R. 3201); thirdly, the State argued Ramsey was going to blackmail the Appellant. (R. 3202).

Florida Statutes, §921.141 (5)(e), provides it shall be an aggravating factor if the capital felony was committed for the primary purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. In Reilly v, State, 366 *So.* 2d 19, 22 (Fla. 1978), this Court held that in order for this

aggravating factor to be found, the mere fact of a death is not enough when the victim is not a law enforcement officer. Instead, it must be clearly shown that the dominate or only motive for the murder was the elimination of the witness. Perry v. State, 522 So.2d 817, 820 (Fla. 1988); See. also, Livineston v, State, 565 So.2d 1288 (Fla. 1988). Thus, when there are one of several explanations for the murders, this aggravating factor is not properly found. See, Jackson v. State, 502 So.2d *409*, 411 (Fla. 1986).

Consequently, the trial court erred in allowing unrebuttable hearsay, and then relying upon this evidence. Additionally, because there was more than one possible explanation/motive for the murder of Mr, Ramsey, the trial court incorrectly found this aggravating factor to have been provenbeyond a reasonable doubt.[20]

POINT IX

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY AS TO THE RAMSEY MURDER PURSUANT TO THIS COURT'S DECISION IN JACKSON V, STATE, 502 So.2d *409* (FLA. 1986).

Diedre Hunt testified that she personally shot Mr. Ramsey three (3) times in the chest with .22 caliber gun, and then grabbed Ramsey by the hair and fired a fourth shot to his temple. (R. *784).* The State properly noted in their opening statement that Hunt's fourth shot was a "coup-de-grace" shot. (R. *541).* According to Hunt the Appellant fired a fifth shot to Ramsey's head with an "Ak-*47*" weapon. (R. 786-87).

Dr. Arthur Botting, District Medical Examiner for Volusia County (R. 623), testified that he conducted the autopsy of Mr. Ramsey. (R. 627-628). He testified that a shot to the skull would render a person unconscious. (R. 637). He further testified on cross-examination, that Mr. Ramsey was brain dead after the .22 caliber shot. (R. 673).

In Jackson v. State, 502 So.2d *409*, 413 (Fla. 1986), cert.den., *482* U.S. 920, 107 S.Ct. 3198 (1987), this Court mandated:

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[20]Appellant's trial counsel properly objected to the trial court's finding only one motive for the Ramsey killing. (R. 3361).

> The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed. No special interrogatory jury forms are **required.** However, trial court judges are directed when sentencing such a defendant to death to make an explicit written finding that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, including the factual basis for the finding, in its sentencing order. Our holding here mandating this procedure will only be prospectively applied. Past failures of trial courts to follow this procedure will not be considered reversible error, (emphasis added).

It was error for the "Jackson" mandated jury instruction not to have been given. Hunt was the trigger person. While she testified that the Appellant fired in essence a fifth shot this testimony along with the medical examiner's testimony demonstrates that Mr. Ramsey was already dead. Additionally, the Appellant denied having anything to do with the Ramsey killing. (R. 2357). Admittedly, Appellant's version **was** rejected by the jury's guilty verdict. Nonetheless, this fact does not relieve the trial court in a penalty proceeding from correctly instructing the jury as to the law. The issue of who was the triggerman is extremely relevant in the penalty phase of a capital trial. See, Downs **v. State,** 572 So.2d 895, *899* (Fla. 1990).[21] Proper adequate guidance must be given to juries charged with the duty of recommending sentence in a capital case. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950 (1974).

The failure of the trial court to instruct the jury pursuant to Jackson, supra at *413,* requires that Appellant be awarded a new sentencing hearing.

POINT X

> THE TRIAL COURT IMPROPERLY FOUND THAT THE RAMSEY HOMICIDE WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

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[21] In Downs, during original guilt phase State's witness testified it was Downs **who** was the shooter. At new penalty phase hearing Downs nonetheless continued to attempt to show he was not the triggerman.

In finding that the killing of Mr. Ramsey was cold, calculated and premeditated (CCP), the trial court stated: "while Ramsey was apparently still alive the defendant administrated a coupe de grace with an AK-47." (R. 3937) (emphasis added). The standard for finding the existence of an aggravating factor is proof beyond a reasonable doubt, See, State v. Dixon, 283 So.2d 1 (Fla. 1973); Clark v. State, 443 So.2d 973 (Fla. 1974); Eutzy v. State, 458 So.2d 755 (Fla. 1984). Speculation is insufficient.

A sentencing order which reveals that the trial court employed the wrong standard in finding an aggravating factor is "fatally defective." Carter v. State, 560 So.2d 1166 (Fla. 1990). As evidenced above, the trial court clearly applied the wrong standard in that "apparently" is not the equivalent of proof beyond a reasonable doubt.

Also, as noted in Point IX, the trial court's speculation is not consistent with the medical examiner's testimony that Mr. Ramsey was alive at the time the shot fired by the Appellant was discharged. (R. 673). Because the evidence does not establish beyond a reasonable doubt that Mr. Ramsey was alive at the time the Appellant allegedly shot him, the CCP factor was improperly found. As in the situation dealing with the aggravating factor heinous, atrocious and cruel (HAC), this Court has repeatedly held that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. Jackson v. State, 451 So.2d 448 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Furthermore, HAC does not apply where the decedent is semi-unconscious. See, Cochran v. State, 547 So.2d 928, 931 (Fla. 1989).

Similar reasoning should apply equally to CCP. In that the evidence did establish beyond a reasonable doubt that Mr. Ramsey was still conscious or alive at the time the Appellant allegedly shot him, the trial court erred in finding CCP.

Lastly, as set forth more fully below, the cold, calculated and premeditated aggravating factor is unconstitutional. See, Creech v. Arave, 928 F.2d 1481 (9th Cir. 1991) (Idaho's aggravating circumstance - "defendant

exhibited utter disregard for human life" unconstitutionally vague). Contra, Brown v. State, 565 So.2d *304* (Fla. 1990).

B) THE CHASE MURDER

POINT XI

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SEVER THE CHASE HOMICIDE FROM THE RAMSEY HOMICIDE.

As previously argued, the trial court erred in denying the Appellant's repeated Motions for Severance of the two (2) murder charges. Also, as previously argued, this error was compounded during the advisory sentencing proceedings wherein the jury was not properly instructed on the applicable aggravating circumstances. For the same reasons previously argued in Point VII, the Appellant must be awarded a re-sentencing hearing for the Chase murder.

POINT XII

THE TRIAL COURT ERRED IN FINDING THAT THE CHASE MURDER WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN COMMISSION OF A BURGLARY.

In his sentencing order, the trial court held that the aggravating factor, F.S., §921.141 (5)(d) was established as the Appellant had been found guilty of burglary (R. *3941).* This was error.

As argued by Appellant's trial counsel during the guilt phase, (R. 2022), as well as during the penalty phase the Appellant could not be guilty of burglary as he lived in the house. The essential element of non-consent was lacking. (R. *3366-67)*.

Section 810.02, Florida Statutes, provides that the State must prove beyond a reasonable doubt that the accused burglar "did not have permission or consent" to enter the premises. Hence consent is an affirmative defense to a charge of burglary. See, State v. Hicks, 421 So.2d 510 (Fla. 1982).

The State's argument in support of the burglary was that the Appellant had solicited Mr. Chase to enter his house and kill his wife. The fatal flaw in the State's case, however, is the element of consent. Assuming arguendo that Chase was solicited by the Appellant he was nonetheless "invited" onto the premises. There was no burglary, and the trial court erred in finding the aggravating

factor, F.S., §921.141 (5)(d). Contra, K.P.M. v. State, *446* So.2d 723 (Fla. 2d DCA 1984).

POINT XIII

THE TRIAL COURT IMPROPERLY DOUBLED ITS CONSIDERATION OF THE PECUNIARY GAIN AND COLD, CALCULATED, PREMEDITATED AGGRAVATORS.

In Provence v. State, **337** So.2d **783**, 786 (Fla. 1976), this Court found error in considering the aggravators that the defendant committed the killing during the course of a robbery and for pecuniary gain as separate circumstances, Both refer to the same aspect of the defendant's crime. A murder with the purpose to avoid arrest and committed to disrupt or hinder law enforcement is another example of improper doubling of the same aspect of the offense. See, Bello V. State, *547* So.2d *914*, 917 (Fla. *1989)*; Thomas v. State, *456* So.2d *454* (Fla. 1984).

The purpose of the doubling rule is to protect against giving undue weight, by repetition, to the same aspect of the offense. Provence v. State, supra, at 786 (virtually every defendant who committed robbery murder would have two (2) aggravating circumstances automatically). Unreasonable weighing of the same aspect of the offense also violates due process and the heightened reliability required in death sentences by the Cruel and Unusual Punishment clauses as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

The trial court improperly doubled consideration of the same aggravating aspect of **the** offense, that the Appellant allegedly plotted a killing of his wife for insurance money. **The** trial court's sentencing order provided:

> 4. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN. This factor was established. The Defendant killed Chase immediately **after** Chase had shot the Defendant's wife per the Defendant's plan. The Defendant hoped **his** wife's death would result in him receiving a large amount of **life** insurance proceeds and ocher assets. (R. *3941).*
>
> 5. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. Heightened premeditation is a theme that runs through this case. The murder of Chase was carefully

> choreographed to make it appear that Chase was killed while he was burglarizing the Paspalakis home. During the burglary Chase would kill Lisa Fotopoulos. The Defendant would accomplish his goal of killing his wife while at the same time casting blame on Chase who would be eliminated during the same scheme. Chase was in fact executed by the Defendant after he shot the Defendant's wife. This final episode was the culmination of several schemes and plots to kill Lisa Fotopoulos. (R. 3941-42).

This Court has defined pecuniary gain to apply only when the killer has "a pecuniary motivation for the murder itself." Simmons v. State, 419 So.2d 316, 318 (Fla. 1982); See, Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988). In Scull, the fact that Scull stole the car did not show he had committed the murder in order to steal; he could have taken the car to get away. In Hardwick v. State, 521 So.2d 1071 (Fla. 1988), evidence suggested the defendant killed for drugs; this Court struck pecuniary gain, holding it applied only when "the murder is an integral step in obtaining same sought-after specific gain." Id., at 1076; See, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This definition of the pecuniary gain circumstance - a killing planned for financial gain - means it entails the heightened degree of premeditation which makes a homicide a cold, calculated, and premeditated one. See, Rogers, **supra**, at 533-34; Reedv. State, 560 So.2d 203, 207 (Fla. 1990).

Consequently, virtually every defendant who kills for pecuniary gain starts out with two (2) aggravating circumstances weighed against him. As noted above, this Court in Provence v. State held this result unfairly doubles the same aspect of the offense. Hence, the trial court erred in doubling up the factors. The Appellant must be awarded a re-sentencing hearing. Contra, Echols v. State, 484 So.2d 568, 574-575 (Fla. 1985), cert. den., 479 U.S. 871, 107 S.Ct. 241 (1986) (pre-Rodgers definition of CCP).

POINT XIV

THE TRIAL COURT IMPROPERLY DOUBLED ITS CONSIDERATION OF THE PECUNIARY GAIN AND WITNESS ELIMINATION AGGRAVATORS.

Aggravating Circumstances referring to the same aspect of the crime can constitute only one factor. Provence v. State, 337 So.2d 783 (Fla. 1976).

In the instant case the trial court improperly used the same aspects of the crime to conclude that the killing of Mr. Chase occurred for the purpose of avoiding arrest/eliminating witness pursuant to F.S., 921.141 (5)(e), (R. 3941), and for pecuniary gain pursuant to F.S., §921.141 (5)(f). (R. 3941).[22]

Aggravating factor of avoiding arrest/eliminating a witness requires proof beyond reasonable doubt that the dominant or only motive was the elimination of witnesses. Perry v. State, 522 So.2d 817, 820 (Fla. 1988). Likewise, the aggravating factor of pecuniary gain applies only where financial gain is the primary motive for the killing. See, Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988).

The trial court found that the primary motive for the murder of Chase was to eliminate him as a witness and for the primary purpose of financial gain, but each cannot be the "dominate" or "primary" motive. One must cancel the other. The trial court accordingly improperly doubled them.[23]

POINT XV

THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED MURDER IS UNCONSTITUTIONAL.

Aggravating circumstance (5)(i) of Section 921.14, Florida Statutes, is unconstitutionally vague, over broad, arbitrary, and capricious on its face and as applied in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §29 and 16 of the Florida Constitution. This circumstance is to be applied when,

> the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

This circumstance was adopted in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances."

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[22]As noted above, a doubling also was done with pecuniary gain and CCP.

[23]Unfortunately, the jury was never properly instructed on the Provence rule regarding the improper doubling. Juries in capital sentencing must be guided by proper instructions to ensure the necessary heightened reliability required in death cases. See, Shell v. Mississippi, ___ U.S. ____, 111 S.Ct. 313 (1991).

See, Barnard, Death Penalty (1988 survey of Florida law), 13 Nova L. Rev. 907, 936-37 (1989).

The due process rule of lenity, which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190 (1979). It requires that a statute be strictly construed in favor of the defendant.

The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971). See. also, Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932 (1972). This principle applies to criminal enactments. See, State v. Walker, 461 So.2d 108 (Fla. 1984). Thus, a criminal statute "must bear a reasonable relationship to the legislative objective and must not be arbitrary." Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State v, Potts, 526 So.2d 63 (Fla.), cert.. den., 488 U.S. 870, 109 S.Ct. 178 (1988).

An aggravating circumstance violates the Eighth Amendment where it does not channel and limit the sentencer's discretion in imposing the death penalty. See, e.g., Mavnard v. Cartwright, ___U.S.___, 108 S.Ct. 1853, 1858 (1988). Creech v. Arave, 928 F.2d 1481 (9th Cir. 1991)(Idaho's aggravating circumstance - "defendant exhibited utter disregard for human life" unconstitutionally vague).

The instant aggravating circumstance, (CCP), violates these constitutional principles. It has not been strictly construed to conform to its legislative purpose. The standard construction is that it "ordinarily applies in those murder cases which are characterized as executions or contract murders, although that description is not intended to be all inclusive." E.g., McCray v. State, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" saps the circumstance of power to narrow the class of death eligible persons, and permits application to situations far removed from the intent of the Legislature. It has been applied in ways which make virtually synonymous with simple premeditation. See,

Herring v. State, 446 So.2d 1049 (Fla. 1984). It has not been strictly construed. It fails to genuinely narrow the class of persons eligible for the death penalty. It is not rationally related to its purpose. Hence, it is unconstitutional.

The trial court's finding of CCP for both the Ramsey and Chase murders must be vacated. Contra, Brown v. State, 565 So.2d 304 (Fla. 1990).

POINT XVI

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL.[24]

A death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty andnarrows application of the penalty to the worst defenders. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). Florida's Death Penalty Statute, §F.S., §921.141, et. al., has failed to meet these requirements and therefore is unconstitutional,

1. THE JURY

a) Standard Jury Instructions.

The jury plays a crucial role in capital sentencing. Its penalty verdict is to be overridden only where no reasonable person could agree with it. Tedder v. State, 322 So.2d 908 (Fla. 1975). Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict:

Heinous, Atrocious, or Cruel

Pope v. State, 441 So.2d 1073 (Fla. 1984) forbids jury instructions limiting and defining the meaning of the "heinous, atrocious or cruel" aggravating factor under State v. Dixon, 283 So.2d 1 (Fla. 1973). This assures its arbitrary application of this aggravating circumstance in violation of the dictates of Proffitt and Maynard v. Cartwright, ___U.S.___, 108 S.Ct. 1853 (1988).

Cold, Calculated, and Premeditated

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[24]Appellant acknowledges the arguments made herein have been made in virtually all death appeals, for which proper credit is acknowledged, and the arguments have been routinely denied. Henry v. State, ___So.2d___, 16 FLW 5593 (Fla. August 29, 1991); Sochor v. State, 580 So.2d 595 (Fla. 1991).

Likewise, the standard instruction regarding the "cold, calculated and premeditated" aggravating factor is similarly infirm. ***See***, e.g., Creech v. Arave, 928 F.2d 1481 (9th Cir. 1991). It simply tracks the vague terms of the statutes. Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. The Appellant is aware that this Court has concluded that Maynard v. Cartwright does not apply to this aggravating circumstance. In Brown v. State, 565 So.2d 304, 308 (Fla. 1990), this Court wrote:

> Based on Maynard v. Cartwright, 108 S.Ct. 1853 (1988), Brown also argues that the standard instruction on the cold, calculated and premeditated aggravating circumstance is unconstitutional. In Maynard, the court held that the Oklahoma instruction on heinous, atrocious and cruel is unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found Maynard in opposite of Florida's death sentencing regarding this State's heinous, atrocious and cruel aggravating factor. Smalley v. State, 546 So.2d 720 (Fla. 1989). We find Brown's attempt to transfer Mavnard to this State and to different aggravating factor is misplaced. (citations omitted).

This issue merits more analysis than it has received. In Smalley, this Court did not write that Maynard, does not apply to Florida. It rejected a jury instruction claim on the ground that the issue is not preserved in the trial court, and wrote that Florida's heinous aggravator was not facially unconstitutional under Maynard because this Court had given it a narrowing construction. Smalley **does** not hold that the judge need not instruct the jury correctly on the law in a capital sentencing proceeding. The Cruel and Unusual Punishment Clauses of both the State and Federal Constitutions require accurate jury instructions during the sentencing phase of a capital case. See, Hitchcock v. Dugger, __U.S.__, 107 S.Ct. 1821, 1824 (1987) (sentence improper where "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

Since the Constitution requires accurate instructions, the questionbecomes whether the Florida standard jury instruction on cold, calculated and premeditated satisfies the stringent requirements of the cruel and unusual punishment clauses. Again, the standard instruction simply tracks the statute.

This Honorable Court has been misled by the **vague** statutory language in applying the circumstance too broadly. See, Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction is *too* broad). The standard instruction thus invites arbitrary and uneven application.

Likewise, the standard jury instructions on avoiding arrest - elimination of witnesses, and pecuniary gain, are similarly improper.

b) Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the due process and Cruel and Unusual Punishment Clauses.

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, the Appellant argues that the Florida right to jury[25] must be administered in a way that does not violate due process. Cf., Anders v. California, 386 U.S. 736, 87 S.Ct. 1396 (1969) (although there is no constitutional right to appeal, State law right to appeal must be administered in compliance with due process.)

A guilty verdict by **less** than a "substantial majority" of a twelve (12) member jury is *so* unreliable as to violate due process. See, Johnson v. Louisiana, *406* U.S. *356*, 92 S.Ct. 1620 (1972); Burch v, Louisiana, *441* U.S. 130, 99 S.Ct. 1623 (1979). It stands to reason that the same principle applies to capital sentencing *so* that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote. In Burch, in deciding that a verdict by a jury of **six** *(6)* must be unanimous, the Supreme Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an unanimous practice violates due process. Similarly, in deciding cruel and unusual punishment claims, the Court will look to the practice of various states. See, e.g., Solem v. Helm, *463* U.S. 277, *103* S.Ct. 3001 (1983); Thompson v. Oklahoma, ___U.S.___, 108 S.Ct. 2687 (1988).

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[25]The right to a jury in capital sentencing pre-dates the 1968 constitution and is therefore incorporated into Article I, §22, Florida Constitution. Cf, Carter v. State Road Dept., 189 So.2d 793 (Fla. 1966).

Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

c) Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is not advised that their penalty verdict will be overridden only if no reasonable person could agree with it. Instead, in violation of the teachings of Caldwell v. Mississippi, *472* U.S. 320, 105 S.Ct. 2633 (1985), the jury is told that its verdict is just "advisory."

2. **COUNSEL**

Almost every capital defendant, including the Appellant, has a court appointed attorney. The choice of the attorney is the judge's - the defendant has no say in the matter. The defendant becomes the victim of the ever defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970s through the present. A complete list of counsel's errors could *go* on for pages. Quality of counsel is ***so*** sadly strained that this Court has excoriated appellate capital attorneys as a class for failing to serve their clients by filing briefs containing "weaker arguments." Cave v. State, *476* So.2d 180, 183 n.1 (Fla. 1985).

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. Failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. THE TRIAL JUDGE

a) The Role Of The Judge

The trial judge has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under e.g., Tedder **v.** State, 322 So.2d 908 (Fla. 1975). On the other hand, it is considered the ultimate sentencer ***so*** that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, *546* So.2d 720 (Fla. 1989). (Absence of objection allows penalty instruction violating Eighth Amendment).

This ambiguity and like problems prevent evenhanded application of the death penalty.

As noted, since the trial judge is largely bound by a jury's recommendation, the great likelihood of error built into the penalty verdict procedure (improper standard instructions and the lack of competent attorneys to challenge them) becomes a great likelihood of error by the judge bound by the jury's verdict. For example, if the trial court gives the vague standard instruction on cold, calculated and premeditated, and defense counsel (as is typical) fails to object, there is substantial likelihood of jury error in the application of these standards to situations to which they should not apply. Yet, the trial judge is pretty much bound by a resulting improper death verdict.

That our law forbids special verdicts as to the theory of homicide and as to the aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of what factors the the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of Premeditated murder (so that a sentencing order of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate). See, Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment. See, e.g., Lowenfield v. Phelps, __U.S.__, 108 S.Ct. 546 (1988).

b) The Florida Judicial System

Like other Southern states, Florida has an unfortunate history of racial discrimination in the judiciary resulting in racially discriminatory application of the law.

Florida's system of electing circuit judges and circuit wide races was first instituted in Florida in 1942; before this time, judges were selected by the Governor and confirmed by the Senate. 26 Fla. Stat. Ann. 609 (1970),

Commentary. At large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See, Rogers v. Lodge, *458* U.S. **613** (1982); Connor v. Finch, *431* U.S. *407* (1977); White v. Regester, *412* U.S. 755 (1973).

The history of elections of black circuit judges in Florida shows that the system has purposely excluded blacks from the bench. See. Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990.[26]

When the decision maker in a criminal trial is purposely selected on racial grounds, the right to a fair trial, due process and equal protection require that the conviction be reversed and sentence vacated. See, State v. Neil, *457* So.2d *481* (Fla. 1984); Batson v. Kentucky, *476* U.S. 79 (1986). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, Florida's death penalty statute is unconstitutional.

4. **APPELLATE REVIEW**

a. Proffitt

In Proffitt v. Florida, *428* U.S. *242,* 96 S.Ct. 2960 (Fla. 1976), a plurality upheld Florida's capital punishment scheme in part because State law required a heightened level of appellate review. However, history **has** demonstrated that intractable ambiguities in Florida's death penalty statute have prevented the evenhanded application of appellate review and the independent reviewing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused),

[26]In Volusia County there are no black circuit court judges.

which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, *447* U.S. *381, 100* S.Ct. *2247,* 65 L.Ed. 2d *205* (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, *442* U.S. 100, *112, 99* S.Ct. 2190, *60* L.Ed.2d *743 (1979).* Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the cold, calculated, and premeditated (CCP) and heinous, atrocious or cruel (HAC) aggravating circumstances. Hence, these aggravating circumstances are unconstitutional because they do not narrow the class of death eligible persons, or channel the discretion of the sentencer. See, Lowenfieldv. Phelps, 108 S.Ct. *546, 554-55 (1988).* Florida's aggravating circumstances mean pretty much what one wants them to mean. The statute is therefore unconstitutional. See, Herring v. State, *446* So.2d 1049 (Fla. *1984).*

For example, as to the cold, calculated and premeditating factor, one compares Herring, supra, with Rogers v. State, *511* so.2d *526* (Fla. *1987)* (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schaffer v. State, 537 So.2d 988 (Fla. 1989) (re-entering Herring).

In reference to heinous, atrocious and cruel aggravating factor, compare Raulerson v. State, *358* So.2d *826* (Fla. *1978)* (finding HAC), with Raulerson v. State, 420 So.2d *567* (Fla. 1982) (rejecting HAC on same facts).

Similarly the "great risk of death to many persons" aggravating factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d *315, 320* (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have reasonably foreseen that the fire would pose a great risk) with King v. State, *514* So.2d *354* (Fla. *1987)* (rejecting aggravator on same facts) with White v. State, *403* So.2d 331, *337* (Fla. *1981)* (factor could not be applied "for what might have occurred" but must rest on "what in fact occurred."

Similar comparison and arguments exist as to the other Florida aggravating factors.

c) Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt. Such matters are left to the trial court. See, Smith v, Sate, *407* So.2d *894,* 901 (Fla, 1981) ("the decision of whether a particular mitigating circumstance and sentencing is proven and the weight to be given it rest with the judge and jury.").

d) Procedural Technicalities

Through the use of contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing. See, e.g., Rutherford v. State, *545* So.2d 853 (Fla. 1989) (absent of objection barred review of use of improper evidence of aggravating circumstances); Grossman v, State, 525 So.2d **833** (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley **v.** State, *546* So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Use of retroactivity principles work similar mischief.

e. Tedder

The failure of Florida appellate review process is heightened by the Tedder v. State, 322 So.2d 908 (Fla. 1975) cases. As noted in Tedder, a life verdict may be overridden only where "the facts suggesting a sentence of death are **so** clear and convincing that virtually no reasonable person could differ. Id., at 910. As this Court admitted in Cochran v. State, *547* So.2d 928, *933* (Fla. 1989), it has proven impossible to apply Tedder consistency. This frank admission strongly suggest that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. OTHER PROBLEMS WITH THE STATUTES

a) Lack of **Special** Verdicts

Our law provides for the trial court review of the penalty verdict. Yet the trial court is in no position what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. This necessarily leads to double jeopardy and collateral estoppel problems where the

jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

b) No Power To Mitigate

Unlike someone serving the sentence for anything ranging from a life felony to a misdemeanor, a condemned death sentence inmate cannot ask the trial judge to mitigate his sentence because Florida Rule Criminal Procedure 3.800 (b) forbids mitigation of a death sentence. Whatever the reason for this provision, it violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, §9, 16, 17 and 22 of the Florida Constitution, and the Fifth, Sixth and Eight and Fourteenth Amendments to the Federal Constitution.

c) Presumption of Death

Florida law creates a presumption of death where but a single aggravating factor appears. This creates a presumption of death in every felony murder case and almost in every premeditated murder case (depending on which of several definitions of the premeditated aggravating circumstance is applied to the case). See, Herring v. State, *446* So.2d *1049, 1058* (Fla, *1984)* (dissenting opinion) Justice Ehrlich). Under Florida law, once one of the aggravating factors is present, there is a presumption of death to be overcome only by mitigating evidence *so* strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption. This presumption of death does not square with the Eighth Amendment requirement that capital punishment be applied only to the worst offenders. See, Furman v. Georgia, *408* U.S. 238, *92* S.Ct. 2726 (1972). Contra, Blystone v, Pennsvlvania, ___U.S. , 110 S.Ct. 1078 (1990) (rejecting a similar agrument).

6. THE BURDEN OF PROOF FOR MITIGATION IS UNCONSTITUTIONAL

The trial court instructed the jury during the penalty phase that "a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exist you may consider it as established. (R. 1540).

If not reasonably convinced the evidence establishes circumstance, then the evidence is to be ignored. Ignoring evidence not meeting the reasonably convinced standard is the law in Florida for both juries and judges See, Fla. Std. Jury Instr, (Crim.) Penalty Proceedings - Capital Cases; Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986); Lamb v. State, 532 So.2d 1051 (Fla. 1988). In Adamson v. Ricketts, 856 F.2d 1011, 1041 (9th Cir. 1988) (en banc), the court struck down an Arizona statute forbidding consideration of mitigating evidence unless the defendant proved by a preponderance of the evidence the existence of a mitigating factor. Contra, Walton v. Arizona, __U.S.____, 110 S.Ct. 3047 (1990) (plurality of opinion said states may impose this burden).

The jury instruction given in the instant case operates as a restriction of mitigating evidence. Restricting consideration of mitigating evidence is fundamental error. See, Riley v. Wainwright, 517 So.2d 656, 660, f.n. 2 (Fla. 1988). "Whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979); See, Mills v. Maryland, 486 U.S. 367, 375-6, 108 S.Ct. 1860 (1988). When there is a reasonable likelihood, a standard of certainly greater than a possibility but less than more - likely - then - not, that the jury has construed the instruction to preclude consideration of mitigating evidence, such instructions violates the Eighth Amendment. See, Boyd v. California, __U.S.____, 110 S.Ct. 1190, 1198 (1990). Instructing juries that they must be reasonably convinced makes juries disregard much of the evidence vital for individualized sentencing. Hence, the Florida law unconstitutionally restricts consideration of mitigating evidence.

7. ELECTROCUTION IS CRUEL AND UNUSUAL

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution, Article I, $17 of the Florida Constitution. Malfunctions in the electrical chair cause unspeakable torture. See, Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 f.n. 2 (1947); Buenoano v. State,

565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

Death by lethal injection is more humane. The chances of extremely painful error are smaller: a mistake will not cause the painful burning as an electrocution. It does not depend upon complicated machinery. Lethal injection does not mutilate the body and so reduces the emotional anguish of the condemn's family and the condemned himself. All together now approximately eighteen (18) states have adopted lethal injection, making it the favored method of execution among those jurisdictions which have condemned persons to death.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See, Wilkerson v. Utah, 99 U.S. 130, 136, (1878); Coker v. Georgia, 433 U.S. 584, 592 - 96 (1977). A punishment that was constitutionally permissible in the past becomes unconstitutionally cruel and less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J. concurring), 430 (Powell, J., dissenting), electrocution violates the Eighth Amendment and Florida Constitution, for it has now become nothing more than the purposeless and needless imposition of pain and suffering. The improvement in methods of execution over time have made this Court's last consideration of this issue in Ferguson v. State, 105 S.Ct. 840 (Fla. 1925), appeal dismissed, 273 U.S. 663 (1927) obsolete.

Based upon all of the above arguments, Florida's Death Penalty Statute is unconstitutional.

CONCLUSION

Based upon the arguments and authorities cited herein, Mr. Eotopoulos respectfully requests this Court to reverse his convictions and sentences, and remand for a new trial and any other appropriate relief this Court deems fit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished by mail to Kellie Neilan, Esquire, Office of the Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 20th, day of September, 1991.

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