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IN THE SUPREME COURT OF FLORIDA

CROSLEY A. GREEN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 77,402

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

CROSLEY A. GREEN, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 77,402

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On June 20, 1989, the grand jury in and for Brevard County, Florida returned an indictment charging Appellant with one count of first-degree felony murder in violation of Section 782.04(1)(a)(2), Florida Statutes (1989), two counts of robbery with a firearm in violation of Sections 812.13(1) and 812.13(2)(a), Florida Statutes (1989) and two counts of kidnapping in violation of Sections 787.01(1)(a)(2) and (3), Florida Statutes (1989). (R2483-85) On May 11, 1990, Appellant filed a motion to suppress the photo line-up identification and subsequent in-court identification of Appellant by Kim Hallock. (R2597-2600) On May 22, 1990, Appellant filed a motion to limit introduction of dog track evidence. (R2610-12)

On May 31, 1990, a hearing was held on Appellant's motion to suppress identification evidence before the Honorable

John Antoon, II, Circuit Judge. (R1992-2152) On June 7, 1990, the trial court entered its order denying Appellant's motion to suppress the identification testimony. (R2649-50)

Appellant proceeded to jury trial on the charges on August 27, 1990, with Judge Antoon presiding. (R1-1991) Following deliberations, the jury returned verdicts finding the Appellant guilty as charged on all counts. (R1977-78,2707-11) On September 27, 1990, the penalty phase was conducted. (R2173-2338) By a vote of eight to four, the jury returned an advisory recommendation that Appellant be sentenced to death. (R2333,2782)

On February 8, 1991, Appellant again appeared before Judge Antoon for sentencing. (R2422-60) Judge Antoon adjudicated Appellant guilty of all charges and sentenced Appellant to death for the first-degree murder conviction. (R2454) Judge Antoon also sentenced Appellant to four concurrent terms of 27 years in prison on the remaining charges to be served consecutive to the sentence imposed for first-degree murder. (R2455-56,2850-56) Judge Antoon filed written findings in support of the sentence of death. (R2837-47)

On February 8, 1991, Appellant filed a timely notice of appeal. (R2857) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R2864)

STATEMENT OF THE FACTS

A. FACTS AS TO THE MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

Some time around 11 p.m. on April 3, 1989, Kim Sue Hallock and Charles Flynn drove to Holder Park and parked under some trees near the dunes. (R2003-04) As they sat in Flynn's truck, the two talked and smoked some marijuana. (R2005) A short while later, a sheriff's car came through the area and shined its light but did not come up to the truck. (R2006) Hallock observed a black man walk towards the front of the truck and pass the driver's side. (R2006-07) As he walked by, the black man stated, "You all better watch out because there is a sheriff going through." (R2007) The man was wearing a green jacket. (R2007) They sat in the truck for a few more minutes and then Flynn got out of the truck to go to the bathroom. (R2008) There was no dome light in the truck but there was a light in the floor board. (R2008) While Flynn was out of the truck, Hallock heard him say "Wait a minute. Hold on man. Calm down." (R2009) Hallock retrieved a gun from the glove box and put it under some jeans on the front seat of the truck. (R2010) Hallock turned around and saw the black man who had previously walked past the car had now walked behind Flynn. (R2010) The black man had a gun. (R2010) The black man got between Flynn and the driver's side door to the truck and told Flynn to get down. (R2011) The man looked in the truck and saw some tennis shoes which he threw at Hallock and told her to take out the shoe laces. (R2013) Hallock did so and gave the shoe lace to the man who used it to tie Flynn's hands

behind him. (R2013) After tying up Flynn, the man asked if they had any money. (R2014) Hallock gave the man five dollars but Flynn told him he did not have his wallet. (R2014) The man forced Flynn to stand up and pulled out his wallet. (R2015) The man threw the wallet to Hallock and told her to count the money in the wallet. (R2015) There was $185 in the wallet which Hallock gave to the man. (R2016) The man ordered both Hallock and Flynn to get in the car with Flynn on the passenger side and Hallock in the middle. (R2016-17) The man then got in the truck and drove away, telling Flynn and Hallock to keep their heads down. (R2017-18) During this ride, Flynn was able to grab the gun which Hallock had placed under the jeans. (R2018)

The man drove the truck to an open spot surrounded by woods where he stopped and yanked Hallock out of the truck. (R2018-19) Flynn moved over to the driver's side and prevented the man from closing the truck door by using his foot. (R2019) The man told Flynn to stay in the truck. (R2019) Hallock was able to yank away from the man and ran behind the truck. (R2020) When she got to the passenger door, Hallock opened it and had one foot inside the truck when the man caught her and yanked her back out causing her to fall slightly to the ground. (R2020) The man put the gun to Hallock's head, called her a slut, and said she would do what he wanted or he would blow her brains out. (R2021) When Hallock looked up, Flynn was at the passenger door and shot at the man, causing him to let Hallock go. (R2021) Flynn dove out of the truck to the ground. (R2021) Hallock jumped in the

truck and locked the doors. (R2021) Hallock heard Flynn yell to her to go so she drove off. (R2021) Hallock drove to Flynn's best friend's house and called the police. (R2021)

Later that day, Hallock was at the police station and looked at between 60 and 80 photographs. (R2022,2086,2102) Although Hallock was unable to make any identification, she did pick out two or three pictures which showed some characteristics similar to that of her assailant. (R2086,2022,2102) After looking at all these photographs, Hallock assisted the officers in making a composite sketch of the suspect. (R2024,2087,2103) In checking the composite sketch, Hallock thought that everything was fine except the hair. (R2025)

On the following day, a photo line-up was compiled using a recent picture of Appellant obtained from the Department of Corrections. (R2008) The first photo line-up had to be changed because Appellant's picture was so much darker than the other photos in the line-up. (R2107,2093) Hallock went down to the police station and was shown the photo line-up. (R2027,2077,2089,2103) When the officer gave the line-up to Hallock, she was told that the suspect was included in the photo pack. (R2027,2052,2078) Hallock looked at all the photos and eventually selected photo number 2. (R2028,2079,2090) The officers asked Hallock if she was sure and intitially she said she thought she was and eventually told the officers that she was positive. (R2029,2042,2090)

Hallock testified that the only time she got a good

look at the man was during the initial encounter at Holder Park. (R2034-39) After they left Holder Park, Hallock never looked at him again. (R2043) Hallock testified that the person who committed these crimes had a permanent in his hair which was greasy. (R2049)

B. FACTS ADDUCED AT TRIAL

On the evening of April 3, 1989, Kim Sue Hallock was at her home watching television when her ex-boyfriend, Charles Flynn came by. (R564-65) Flynn and Hallock watched a movie until about 11 o'clock p.m. when Flynn asked Hallock if she wanted to go for a ride. (R568-69) Hallock agreed and they left in Flynn's truck and stopped at a Jiffy Store. (R569) Afterwards, Flynn drove to Holder Park and stopped near the dunes. (R570) Hallock and Flynn had been there on several occasions prior to this. (R570) Flynn parked the truck and the two of them talked and smoked some marijuana. (R575) A sheriff's car drove near the area shining a spot-light on things. (R575)

After the deputy went past, a black man walked in front of the truck and passed the driver's door. (R576-77) Hallock could not see the person's face but did observe that he was wearing a green jacket. (R577) When the man got to the driver's window, he said, "You guys better watch out. There's a cop going through." (R578) The black man walked away and Hallock and Flynn talked for a few more minutes after which Flynn exited the truck to go to the bathroom. (R579) Flynn was standing near the truck with his back towards Hallock when all of a sudden she

heard him say, "Hold on. Wait a minute man. Hold on. Put it down." (R580-81) Because Flynn sounded nervous, Hallock retrieved his gun from the glove box and placed it under some jeans which were on the seat next to her. (R581) Hallock turned and saw the black man who had previously passed the truck come up between Flynn and the driver's side door. (R582) The man told Flynn to get down on his knees. (R583) The man told Hallock to scoot over to the driver's seat which she did. (R584) The man asked them if they had any money and Flynn said he did not have his wallet. (R584) Hallock had five dollars in her purse and she gave it to him. (R585) During this time, the black man was holding a gun to Flynn's head. (R585)

The man observed some tennis shoes in the truck and ordered Hallock to take the laces out and give them to him which she did. (R586) The man took the shoe lace and tied Flynn's hands behind him. (R587) During this time, Hallock was able to see the side of the man's face and a couple of times she was able to see the front of his face when he looked at her. (R589) The truck had no dome light in it but did have a light under the dashboard although Hallock was not sure that it was working. (R590) While the man was tying Flynn's hands, his gun went off. (R590) The man then pulled Flynn up from the ground, took his wallet from his pocket, and threw it to Hallock. (R590) The man told Hallock to count the money in the wallet which she did. (R591) There was $185 in the wallet which she gave to the black man. (R591-2) The man then told Hallock to get into the truck

and to start it up which she did but then got back out of the car and stood behind Flynn. (R592-3) Flynn told the man to let Hallock go and just take him and the truck. (R593) The man told Hallock and Flynn to get into the truck. (R593) Flynn got in first and sat on the passenger side and Hallock sat in the middle. (R593) The man then got in the driver's side and backed the truck out. (R594) While they were driving, the man told Hallock and Flynn to keep their heads down. (R597) While they were riding, Flynn found the gun which Hallock had placed under the jeans and was trying to maneuver behind Hallock in an attempt to shoot at the man. (R597-8) The man drove into an orange grove where he stopped the truck, grabbed Hallock by the arm, opened the door and yanked Hallock out. (R598-99) Flynn moved over to the driver's side and kept the man from closing the truck door by putting his foot out of the truck. (R599) At one point, Hallock was able to yank away from the black man and ran around the truck. (R599) Hallock got to the passenger side door, opened it, and got one foot in the door. (R615) The man grabbed Hallock out of the truck and to the ground. (R615) The man then put his gun to Hallock's head, told her she was a slut and told her she would do as he wanted or he would blow her brains out. (R615) Hallock looked up from the ground and saw that Flynn had the gun behind him and he shot at the black man. (R615) Flynn shot one time causing the man to let go of Hallock. (R616) Flynn dove out of the truck onto the ground and Hallock jumped in the truck, shut the door and locked it. (R616) Hallock turned and saw the man

shoot the gun. (R616) Flynn yelled to Hallock to leave so she did. (R616-17) Eventually, Hallock drove to U.S. 1 and proceeded to the house of Flynn's best friend, David Stroup, from where she called the police. (R617)

The police arrived and took Hallock with them so she could direct them to the location where Flynn was last seen. (R618,518) Hallock directed the officers to the orange grove. (R519) When they got to the area, the officers found a white male lying on his stomach with his hands bound behind his back. (R522-23) The person was Charles Flynn. (R522) Flynn was still conscious when the officers arrived and told them to "Get me out of here. I want to go home." (R524) There was blood on Flynn but no injury could be immediately observed. (R524) A .22 revolver was found nearby. (R525) The gun was fully loaded with nine cartridges of which three had been fired. (R525-6) On several occasions while the officers waited for the paramedics to arrive, Flynn stopped breathing and had to be resuscitated. (R528) When the paramedics finally arrived, Flynn was not breathing, had no pulse, his pupils were dilated, and non-reactive to light. (R849) Although there was a very faint heartbeat, Flynn was clinically dead. (R849) All attempts to revive Flynn failed. (R850-51) An autopsy was performed on Flynn revealing a single gunshot wound to the chest. (R2829) The bullet entered the right chest and went through the right lung. (R829) Flynn's right chest cavity filled with blood resulting in his death. (R829) The entire area at Holder Park as well as at

the orange grove were processed for evidentiary purposes. Numerous shoe prints were found at Holder Park heading in a northerly direction from the dune area. (R901-02) A video tape was made of the scene at Holder Park. (R918) Other shoe prints were also found in the Holder Park area aside from those leading from the dune area. (R928,931)

Kim Hallock went to the police station in the early morning hours of April 4, 1989, where she was asked to go through a box of photographs for the purposes of attempting to identify a suspect. (R619-20) Hallock was unable to make a positive identification but picked out several photographs which showed characteristics similar to that of her assailant. (R620) Hallock gave a description of her assailant including the fact that he was wearing a green army jacket, jeans, heavy shoes like work boots. (R621) She also stated that the man had a wide flaring nose, medium eyes, and average lips. (R622) The man also had his hair in a permanent with ringlets with a lot of grease in his hair. (R691,693) Hallock helped the police artist compose a sketch of her assailant. (R622)

On the following day, Hallock again went down to the police station where she was asked to view a photographic line-up containing six photographs. (R782,623) Before she was shown the line-up, an officer told Hallock "We have six pictures we want you to look at. We have a suspect within these six pictures. You can take as long as you want . . . if you can't identify him, fine." (R623) Hallock looked at the six photographs and told the

police that suspect number 2 was the assailant. (R624,783) Initially, Hallock told the officers that she was "pretty sure" that number 2 was her assailant. (R757) After being asked several times, Hallock finally said she was positive. (R757) The officers then told her that she had picked the right person. (R624) The person in photo number 2 was identified as Appellant. (R783)

At the Holder Park scene, the area was secured and Investigator Cockriel called for a canine officer to come to attempt a track. (R1025-6) Officer O'Dell Kiser responded to the scene with his dog Czar. (R1305-08) Czar had previously been utilized 700 to 800 times for scent work. (R1386) They responded to the Holder Park scene and immediately went to the dune area where a set of prints were observed. (R1396) Kiser released Czar and gave him a command to search. (R1396) Czar immediately picked up a scent on the footprints and conducted what they call a back-track which means they followed the tracks in the opposite direction from which they were made. (R1397-98) Czar picked up the scent and went from the dunes south on Glendale Boulevard for two-tenths of a mile. (R1398) Czar then turned right, onto Briarcliff way and continued to the house on the northeast corner of Briarcliff and Belvedere. (R1419) Czar then went from the sidewalk onto the front yard of the house. (R1419) There were other dogs in the driveway which started barking so Kiser stopped his dog at this point. (R1421) Kiser then returned to Holder Park and started his dog on a second track which went around the

ball fields. (R1422) The house on Briarcliff Way where the track terminated belonged to Appellant's sister. (R1492) Appellant had apparently stayed with his sister at some point. (R1198) On April 3, 1989, Appellant was seen at his sister's home on Briarcliff Way at 3 o'clock p.m. (R1225)

Several persons testified that Appellant was at Holder Park on the evening of April 3, 1989. (R1264-66,1284-87) Willie Hampton, an umpire at a little league game that evening, spoke with Appellant several times. (R1265) However when Hampton left the field at approximately 10 o'clock p.m., Appellant was not at the field. (R1267) All of the people who saw Appellant that night agreed that Appellant's hair was very short and was not greasy at all. (R1270,1290,1666,1688)

Appellant's sister Sheila Green, saw Appellant the day after the shooting and confronted him with the rumors she had heard that Appellant had shot the man. (R854-56) Sheila said that Appellant told her that he did not intentionally kill him but that the man had pulled a gun on him and told the girl to go for help. (R857) Appellant told Sheila that he struggled with the man and had to shoot him. (R858) Sheila Green was arrested for federal drug charges and was facing prison time. (R859) However she was told by the prosecutor that if she testified truthfully the prosector would go before the judge and ask for leniency for her. (R860) Sheila did not agree to testify until after she had been convicted. (R866)

Lonnie Hillery, who has known Appellant for five years,

testified that in the early morning hours of April 4, 1989, he saw Appellant near a bar-b-que stand in Mims. (R869-70) Appellant seemed shaken and scared so Hillery asked him what was up. (R872-3) According to Hillery, Appellant said "I fucked up man." (R873) When Hillery asked Appellant what he meant Appellant told that some people came through trying to buy something from him and they tried to get him. Appellant again repeated that he "fucked up." (R874) Hillery was also facing federal drug charges when the prosecutor approached him and said that they would drop charges against his girlfriend Sheila Green and also agree to drop his charges to state charges if he would testify. (R878-9) Hillery rejected the deal, went to trial and was found not guilty. (R879) The prosecutor again approached Hillery and asked him to testify in return for which they would help Sheila Green. (R879) Hillery stated that the prosecutor told him the date of the alleged incident for which Hillery had no independent knowledge. (R881) Hillery only came forward when it appeared that Sheila Green was going to prison. (R882)

Alan Murray testified that one afternoon he was hanging on a street corner with a group of guys when Appellant came up and said he had just killed a man. (R1231) Appellant then said "I'm going to disappear." (R1231) However, on this afternoon, Murray had been drinking very heavily and was under the influence of alcohol. (R1234) Murray had drunk a 12 pack of sixteen ounce malt liquor beer. (R1257) Although Murray claimed to have been with a group of people, he could not remember a single name of

any of the men. (R1259) At some point Murray was arrested on a misdemeanor warrant but the prosecutor went to the judge and arranged to have Murray released on bond. (R1237)

Numerous items were found at the scene including a wallet, beer bottles, and bullets. The items were all processed for latent prints but no good prints were lifted. (R1100-01) Flynn's truck was also processed for fingerprints and 16 latent prints were lifted from the truck. (R1125) Of the 16 prints, six were not usable and five matched Kim Hallock's prints. (R1125-26) The five remaining prints were all usable but none of them matched Appellant's prints. (R1123,1128)

Appellant's sister, Celestine Peterkin, lives at 3658 Briarcliff Way. (R1718) At the time of this incident, Appellant was not staying with Peterkin. (R1721)

James L. Carn was employed at North Hydro in Rockledge, Florida. (R1674) On April 3, 1989, Carn worked until 11 p.m. (R1675) Carn was dating Carlene Brothers who lived in Mims. (R1675) Carlene and Appellant are cousins. (R1676) When Carn got off work that evening he drove to Carlene's house arriving at approximately 11:45 p.m. (R1679) Carlene had another man at her house which resulted in Carlene and Carn getting into a fight. (R1680) They argued for approximately 20 minutes when Carlene ran to her friend Aretha's house. (R1682) Carn followed Carlene to Aretha's where they argued for another ten to fifteen minutes. (R1683) Finally, Carn convinced Carlene to come with him back to her house. (R1684) Once back at Carlene's house, Carn and she

started arguing again. (R1685) Appellant arrived at Carlene's house at approximately 12:40 a.m. (R1685) Appellant asked them what was going on because he could hear them arguing from outside. (R1687) Appellant came inside and sat down with them and watched television. (R1687) Appellant arrived at the house before 1:00 a.m. and was still at the house when Carn went to bed at 1:45 a.m. (R1699)

C. FACTS ELICITED AT PENALTY PHASE

In 1976, when Appellant was still a minor, he was convicted of armed robbery in Albion, New York. (R2207-09) When Appellant was released from prison he returned to New York and was on parole. (R2192) While Appellant was in prison, his father killed his mother and then shot himself. (R2220-21)

Appellant has a small son with whom he has a loving relationship. (R2223) On one occasion, several years ago, Appellant saved his friend Damon Jones from drowning. (R2227)

SUMMARY OF ARGUMENTS

POINT I: Although evidence of dog scent tracking is admissible, there must be a showing that such evidence was made at a time and under circumstances which indicates that the person being tracked is the guilty party. In the instant case, tracking evidence was admitted but there was no evidence to tie these tracks to the defendant other than the fact that they went from Appellant's sister's house to the scene. There was no showing that it was Appellant who made these tracks and there was no showing as to when the tracks were made. This evidence was therefore irrelevant and its admission was erroneous.

POINT II: It is error to admit evidence of identification where the procedures employed were unduly suggestive and therefore result in a substantial likelihood of misidentification. In the instant case, the five prong test for admissibility set forth in Grant v. State, 390 So.2d 341 (Fla. 1980) was not met. Further the actual photo line-up itself was unduly suggestive and therefore should have been suppressed.

POINT III: Section 918.05, Florida Statutes (1989) provides for a jury view of the place where an offense is alleged to have been committed. While a decision to grant a jury view is left to the sound discretion of a trial judge, in the instant case a jury view was essential to assist the jury in analyzing and applying the evidence of identification presented at trial. The denial of the requested jury view was error.

POINT IV: Although this Court has approved the giving of an

instruction on flight as a circumstance to be considered in determining an accused's guilt, such instruction is permitted only in limited circumstances where there is significantly more evidence against the accused than flight. In the instant case the evidence supporting the flight instruction was extremely tenuous and therefore it was error to give an instruction.

POINT V: It is error to consider as two separate aggravating circumstances the fact that the murder was committed for pecuniary gain and that the murder was committed during the commission of a felony when the felony relied upon, kidnapping, requires as an element the intent to commit a robbery.

POINT VI: The murder of Charles Flynn was not heinous, atrocious or cruel. There were no additional acts accompanying the actual murder so as to set this case apart from the norm of capital felonies. Additionally, since as a matter of law heinous atrocious or cruel did not apply, it was error to instruct the jury on this aggravating factor.

POINT VII: The trial court erred in refusing to find the existence of mitigating circumstances which by its own admission were established by the preponderance of the evidence. While a trial court is free to denote whatever weight it chooses to the various mitigating circumstances, it is not free to refuse to find the mitigating circumstances in existence.

POINT VIII: Under the totality of the circumstances in this case, the imposition of the death penalty is proportionately unwarranted. There exists but two valid aggravating

circumstances and numerous valid mitigating circumstances. When considered on a whole, the instant case is not "the most aggravated and unmitigated of most serious crimes."

POINT IX: The statutory aggravating factor of heinous, atrocious and cruel is unconstitutionally vague under the federal and Florida Constitutions.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE DOG SCENT TRACKING WHERE INSUFFICIENT PREDICATE HAD BEEN PRESENTED.

Appellant filed a pre-trial motion to limit introduction of evidence of dog scent tracking evidence. (R2610-12) At trial the state called as a witness Officer O'dell Kiser who is the canine handler for the Brevard County Sheriff's Department. (R1305) Defense counsel objected to the admissibility of the testimony and the trial court conducted a proffer of the testimony. At the conclusion of the proffer the trial court ruled that the dog was reliable and that sufficient predicate had been laid. (R1358-59) Defense counsel countered that even if the evidence was admissible it was still so prejudicial that any probative value was far outweighed. (R1360-61) The court further noted that defense counsel was contending that the evidence should not come in because there was no showing that the track that was being scented had been made by the defendant and therefore the evidence was irrelevant. (R1369) The trial court ultimately admitted the evidence. (R1380) Appellant contends that the admission of this evidence was error.

Florida has recognized the admissibility of dog trailing evidence to prove identity of an accused in a criminal prosecution. Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937); Ramos v. State, 496 So.2d 121 (Fla. 1986). However,

before such evidence may be admissible there must be a sufficient predicate laid to support its admissibility. In State v. McLeod, 196 N.C. 542, 146 S.E. 409 (1929), the court adopted the following criteria in determining whether such evidence is admissible in a criminal case:

> (1) That they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) That they possess these qualities, and have been accustomed and trained to pursue the human track; (3) That they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party (who) . . . was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

Id at 545, 146 S.E. at 411. It has been noted that the circumstances surrounding the trailing are of as much importance as the qualifications of the dog in laying a foundation for the admission of dog scent evidence. In this connection, it must be shown, at least, that the dog was put on the track at a time and under circumstances which tend to show it was the track of the accused. See Annot., 18 A.L.R.3d 1221 (1968)

In State v. Grba, 196 Iowa 241, 194 N.W. 250 (1923) it was held that the trial court had committed reversible error in admitting evidence of the conduct of bloodhounds that had allegedly trailed the defendant from the scene of the murder to the clay pits where he was employed. The court pointed out that a prior attempt to follow a trail from the scene of the crime had

failed and that only after a second start had the dogs accomplished their purpose. It was also noted that the evidence disclosed that the defendant had on prior occasions been legally in the vicinity where the crime took place, and that there was no way of knowing just what trail the dogs had followed. Similarly in State v. Storm, 125 Mont. 346, 238 P.2d 1161 (1951) the court held that tracking evidence was improperly admitted where no evidence was adduced during the trial which made it certain that the trail upon which the dogs were started had been made by the defendant.

In Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1926) it was held that when a dog was placed upon a trail at a point where circumstances indicated the guilty party had been, or upon a track which appeared to have been made by the guilty party, the conduct of the dog in following that trail which fairly pointed out the defendant as the author of the trail was admissible as a circumstance against the defendant. However, the court cautioned that the jury should be warned that the dog's performances are not infallible and should not be given undue weight. Such evidence alone is insufficient to convict. Since a dog is able to pick up a trail hours after it is made, such evidence may indicate that the person trailed has been at the scene of the crime. It does not ordinarily, however, indicate that such person was present at a time when the crime was committed.

Nearly all jurisdictions which permit the admission of dog tracking evidence require as a foundation for such

admissibility proof that the circumstances of the tracking itself make it probable that the person in fact was the guilty party. People v. Malgren, 139 Cal.App.3d 234, 188 Cal.Rptr. 569 (1st District 1983); State v. Loucks, 98 Wash.2d 563, 656 P.2d 480 (1983); People v. Centolella, 61 Misc.2d 726, 305 N.Y.S.2d 460 (1969); People v. Harper, 43 Mich.App.500, 204 N.W.2d 263 (1972).

In the instant case, the evidence is that the dog was brought to an area and tracked a set of footprints backwards from the dune area at Holder Park to a house owned by Appellant's sister. Although there was evidence that Appellant sometimes stayed there, Appellant's sister testified that on that particular night he was not staying there. A second track was conducted starting from the same place that the first one did and went in an opposite direction around the baseball field. No evidence was adduced to show that in fact it was Appellant who made these tracks. Kim Hallock testified that in her opinion her assailant was wearing heavy work boots. The tracks were made by someone wearing tennis shoes. It is also clear that earlier that day Appellant was in fact at the baseball fields. Therefore, even if those tracks may have been Appellant's there is no showing that they were made at the time of the alleged offense. In this regard it is again important to note that the trail that was conducted was a backtrack meaning that although the dog tracked from the scene to Appellant's sister's house, the actual tracks were going from the house to the park. Quite simply, an insufficient predicate had been established to allow for the

admission of this dog scent evidence. Since it could not be tied to the defendant, the evidence was in fact irrelevant. Its admission was therefore erroneous. The evidence against Appellant in the instant case was not overwhelming. The admission of this dog scent testimony cannot be deemed harmless. Appellant is entitled to a new trial.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 TO THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BY THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS PHOTOGRAPHIC IDENTIFICATION AND SUBSEQUENT IN-COURT IDENTIFICATION OF HIM BY KIM HALLOCK.

Appellant filed a pre-trial motion to suppress the photo line-up identification and subsequent in-court identification of Appellant by Kim Hallock. (R2597-2600) A hearing was held on the motion to suppress on May 31, 1990. (R1992-2152) The basis for Appellant's motion was that the photo line-up itself was unduly suggestive and that the procedures employed by the police in obtaining the identification were tainted. The trial court denied the motion. (R2649-2650) Defense counsel renewed his objection at trial. (R790,1057,1580-87) Appellant contends that the denial of the motion to suppress was error.

In Grant v. State, 390 So.2d 341 (Fla. 1980), this Court stated:

> The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are

> condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. at 198, 93 S.Ct. at 382. But as the analysis has evolved, a suggestive confrontation procedure, by itself, is not enough to require exclusion of the out-of-court identification; the confrontation evidence will be admissible if, despite its suggestive aspects, the out-of-court identification possesses certain features of reliability. Manson v. Brathwaite, 432 U.S. 98, 110, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140 (1977). Hence the appropriate test is two fold: (1) Did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) If so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. Id. The factors to be considered in evaluating the likelihood of misidentification include:
>
>> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
>
> Neil v. Biggers, 409 U.S. at 199-200, 93 S.Ct. at 382.

Id. at 343. Applying this analysis to the facts of the instant case results in the conclusion that the identification testimony in the instant case should have been suppressed.

A. The Opportunity to View.

Kim Hallock testified she was able to observe the man who accosted her only at the Holder Park scene. After they left Holder Park and went to the grove she never looked at the man

again. (R2043) The incident at Holder Park lasted only four to five minutes. There was no light at Holder Park. Part of the time that she observed the assailant she saw only his profile as he was tying Charles Flynn. (R2038) She saw his full face when she got out of the truck for only approximately ten to fifteen seconds. (R2039) The offense occurred around midnight in a public park where there were no lights.

B. The Degree of Attention.

The assailant first accosted Flynn as he stood outside the truck. Kim Hallock was still seated in the cab of the truck. From her vantage point inside the truck Kim Hallock could only observe the profile of the assailant. (R2038) When Hallock finally got out of the truck, she did have an opportunity to observe the full face of the assailant for only ten to fifteen seconds.

C. The Accuracy of the Description.

Kim Hallock gave a description to the police shortly after the incident. Her description included the clothing that the assailant was wearing including the green army jacket, jeans, and heavy shoes like workboots. (R621) She told the officers that the man had a wide flaring nose medium eyes and average lips. (R622) She also told the officers that she was not really sure whether he had any facial hair. (R673) Most importantly, Hallock said that the assailant had very greasy hair and a permanent which included ringlets. (R2049,693) While it may be that Appellant matched some of the physical characteristics given

by Hallock, it is without question a fact that his hair was closely cut and never contained a permanent. This aspect of Hallock's description could not possibly fit Appellant.

D. The Witness' Level of Certainty

When Hallock observed the photo line-up she looked at all the photographs and picked out the photo in position number 2 which is that of Appellant. The police asked Hallock several times whether she was sure that suspect number 2 was the assailant and her reply started out that she was "pretty sure" and ended up being positive. (R757,2029)

E. The Time Between the Crime and the Confrontation

Hallock's description of her assailant was given several hours after the attack. She was asked to view the photographic line-up and make her identification two days after the incident.

These five factors are not fully satisfied and thus Hallock's identification should not have been allowed. Even if there is minimal satisfaction of these factors Appellant maintains they are outweighed however by the corrupting effect of the identification itself. Prior to viewing the photo line-up, Kim Hallock was told by the officer that it contained a suspect. Therefore she knew before she viewed the line-up that the person whom the police believed committed this offense was contained in the line-up. This practice has been condemned in Henry v. State, 519 So.2d 84 (Fla. 4th DCA 1988) and Butler v. State, 544 So.2d 1115 (Fla. 3d DCA 1989). Further, the state conceded below that

of the six photographs contained in the line-up, photo number 2 - Appellant - was clearly the darkest. (R2117) The officers themselves expressed concern about the fairness of the line-up even to the point where the original line-up had to be altered because Appellant's picture was the darkest. (R2093, 2107) Finally, after Hallock selected Appellant's photo, the police officers told her that she picked the right person. This statement clearly tainted any subsequent in-court identification that Hallock made.

In summary, the photo line-up used below was unduly suggestive thus raising the likelihood of misidentification. Under these circumstances, the identification should have been suppressed. The trial court's failure to do so resulted in a denial of due process and a fair trial. This Court must reverse Appellant's conviction and remand for a new trial with instructions that such identification testimony not be allowed.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JURY VIEW OF THE SCENE.

At the close of the state's case, defense counsel moved for a jury view of the scene. In doing so defense counsel argued:

> The jury to see how dark it is out there. It's dark, your Honor. It is dark, and what we have is a cross-racial identification, and I think it's absolutely --

(R1622-23) The trial court noted that at the time of the trial there was a full moon whereas at the time of the offense it was only a quarter moon and therefore the court noted that it would not be helpful to see how dark it was because the conditions were not the same. Defense counsel countered this by noting that he had driven out to the area the night before and still thought a view was necessary. (R1623-24) The trial court denied the motion for jury view which was renewed via a motion for mistrial based on the denial of the motion for jury view. (R1645-48) Appellant asserts that the denial of a jury view in this case constitutes reversible error.

Section 918.05, Florida Statutes (1989) provides for a jury view of the place where an offense is alleged to have been committed. Appellant recognizes that the decision to grant a jury view is left to the discretion of a trial judge. Bundy v.

State, 471 So.2d 9 (Fla. 1985). However, under the facts of the instant case, Appellant asserts that the trial court abused its discretion in denying the motion for jury view. The instant case involved a cross-racial murder of a white victim by a black assailant. The key evidence against Appellant in the instant case was the identification testimony of Kim Hallock. According to Hallock's own testimony, she did not have an extended period of time in which to view the assailant whom she did not know before that evening. The offense occurred at a park which had no lights. The offense is also alleged to have occurred sometime around midnight. Because the eye witness identification was so critical defense counsel requested the view so that the jury could better determine whether Kim Hallock's identification of Appellant was reliable. Since "the primary purpose of a view by the jury is to assist them to analyze and apply the evidence taken at the trial," McCollum v. State, 74 So.2d 74, 76 (Fla. 1954), the denial of the request for a jury view in the instant case was error. Again, because the instant case hinged on the identification testimony of Hallock which testimony was seriously questioned, the denial of the jury view cannot be deemed harmless. Appellant is entitled to a new trial.

POINT IV

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON FLIGHT.

During the jury charge conference the state requested an instruction on flight to which defense counsel interposed an objection. (R1778) Thereafter, the trial court gave the requested instruction on flight as follows:

> When an accused in any manner attempts to escape or evade a threatened prosecution by flight or concealment, that fact may be considered by you in arriving at a determination of the guilt or innocence of the accused. Flight is considered to exist when an accused departs from the vicinity of the crime under circumstances such as to indicate a sense of guilt or to avoid arrest. If you find that the defendant attempted to escape or evade a threatened prosecution through flight or concealment, or similar indications of a desire to evade prosecution, you may consider this fact along with all the other testimony and the evidence in deciding guilt or innocence of the defendant.

(R1959) The sole evidence of flight to support the giving of such an instruction in the instant case came from the testimony of Alan Murray who testified that while he was intoxicated one afternoon, Appellant came up, said he had just killed a man and then said "I am going to disappear." (R1231,1234) Additionally the evidence showed that although the police officers were searching for Appellant from April to June they were not able to

locate him until some time in June when Appellant was arrested in the city of Mims in Brevard County. Appellant contends that under these facts, the giving of an instruction on flight was error.

It is well-settled that trial judges may not comment on the evidence to the jury. Seward v. State, 59 So.2d 529 (Fla. 1952); Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959). However in Whitfield v. State, 452 So.2d 548 (Fla. 1984) this Court noted that an instruction on flight, permitted in the limited circumstance where there is significantly more evidence against the defendant than flight standing alone, is an exception to the general rule. Flight alone, however, is no more consistent with guilt than innocence. Merritt v. State, 523 So.2d 573 (Fla. 1988). Recently in Jackson v. State, 575 So.2d 181 (Fla. 1991) this Court found error in the giving of an instruction on flight where the evidence was that two unidentified men ran from the scene of the crime and a witness saw the defendant driving away from the general direction of the store possibly in excess of the speed limit. This Court ruled that departure from the scene of the crime even if hastily done is not the flight to which the jury instruction refers. To hold otherwise this Court noted, the instruction would be given every time the perpetrator left the scene, and it would be omitted only in those cases where the perpetrator waited for the police to arrive.

In a factually similar case, United States v. Barnhart, 889 F.2d 1374 (5th Cir. 1989), cert denied 494 U.S. __, 110 S.Ct.

1307, 108 L.Ed.2d 483 (1990) the court found error in the giving of an instruction on flight where the only evidence to support it were statements made by the defendant that "Bogota looked real good this time of year," and a statement made to his mother after his arrest that he tried to get "invisible" and that he "tried to run" but he "couldn't run fast enough or far enough." Similarly, in the instant case, Appellant's alleged statement to Murray that he was "going to disappear" is insufficient to support the giving of an instruction on flight. While it may be true that Appellant was not arrested for some two months after the crime occurred, there is no showing that in fact Appellant left the area or did anything to intentionally conceal himself. Appellant submits that the mere fact that the police were unable to find him does not lead to the conclusion that Appellant intentionally concealed himself. The fact remains that Appellant was arrested in the same area where the crime occurred, Mims, Florida. While the police were indeed looking for him, the evidence is equally clear that the search was not exclusive or intensive. Rather, Appellant was merely one of hundreds of people whom the police were searching for. Eventually they caught up to him. Under these circumstances, the giving of an instruction on flight is clear error which served to deny Appellant his right to a fair trial and due process of law. The evidence against Appellant is far from overwhelming and thus the giving of this erroneous instruction cannot be deemed harmless error. Appellant is entitled to a new trial.

POINT V

THE TRIAL COURT ERRED IN CONSIDERING AS SEPARATE AGGRAVATING CIRCUMSTANCES THAT THE MURDER WAS FOR PECUNIARY GAIN AND THAT THE MURDER OCCURRED DURING THE COMMISSION OF A FELONY (KIDNAPPING).

In the instant case, the trial court found as separate aggravating circumstances the fact that the murder was committed in the course of a felony, to wit: kidnapping and that the murder was committed for pecuniary gain as shown by Appellant's contemporaneous robbery convictions. (R2947-49) Defense counsel objected and argued at the sentencing that these two factors could not be considered separately since the kidnapping was alleged to have occurred with the intent to commit a robbery. (R2261) Appellant submits that the trial court erred in finding both of these aggravating circumstances present.

The controlling legal analysis in this regard is set forth by this Court in Provence v. State, 337 So.2d 783 (Fla. 1976):

> The state argues the existence of two aggravating circumstances, that the murder in the commission of the robbery [subsection (d)] and that the crime was committed for pecuniary gain [subsection (f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating

> circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances [citation omitted], we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Id. at 786. Appellant is mindful of the fact that where multiple felonies are committed one of which is a robbery, the finding of both aggravating circumstances, in the course of a felony and for pecuniary gain, is not improper. Bates v. State, 465 So.2d 490 (Fla. 1985); Johnson v. State, 438 So.2d 774 (Fla. 1983); Brown v. State, 473 So.2d 1260 (Fla. 1985). However, the two underlying felonies at play in the instant case are kidnapping and robbery. Without a doubt the robbery supplies the needed factual basis for a finding that the murder was committed for pecuniary gain. The indictment in the instant case alleges that the underlying intent for the kidnapping is to commit a robbery. While the kidnapping allegation also contains the option that the kidnapping was done with the intent to terrorize, there is no jury finding which theory of kidnapping was found to exist. Without this, and because the state chose to charge the kidnapping the way that it did, the finding that both aggravating circumstances exist must be disapproved. In this regard the instant case is very similar to Cherry v. State, 544 So.2d 184 (Fla. 1989) wherein this Court held that applying the aggravating circumstances that the murder occurred during the commission of a

burglary and that the murder was for pecuniary gain constituted impermissible doubling. In Cherry the defendant had in addition to the murder, convictions for burglary and for grand theft. The state argued that the pecuniary gain was based on the grand theft conviction and the commission of a felony aggravating circumstance was based on the burglary conviction. However, the indictment in Cherry alleged that the burglary was committed with the intent to commit the theft. Appellant submits that the same analysis done by this Court in Cherry should be applied in the instant case. Thus, this Court must consider these two aggravating circumstances as a single aggravating circumstance.

Appellant further submits, that because these two aspects should have been considered as a single aggravating circumstance the jury should have also been instructed that they could consider these two aspects as a single aggravating circumstance. Because the jury was not so instructed, there is a great likelihood that the jury's recommendation was tainted. See generally Omelus v. State, Case No. 73,911 (Fla. June 13, 1991).

This Court must reverse Appellant's sentence and remand with instructions to impanel a new jury and to resentence Appellan accordingly.

POINT VI

> IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF CHARLES FLYNN WAS HEINOUS, ATROCIOUS AND CRUEL AND FURTHER ERRED IN INSTRUCTING THE JURY THAT THEY MAY CONSIDER THIS AGGRAVATING CIRCUMSTANCE IN ARRIVING AT THEIR RECOMMENDATION.

In determining that the murder of Charles Flynn was especially heinous, atrocious or cruel, the trial court made the following findings:

> The state urges the court to give weight to the fact that Charles Flynn, Jr., suffered for approximately an hour before dying. This is not a permitted reason for finding this aggravating circumstance in most homicides resulting from gunshot wounds. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983), where the victim suffered hours following a shotgun wound to the stomach. In Miller v. State, 476 So.2d 172 (Fla. 1985), the Supreme Court explained that application of this aggravating circumstance turns on the intent of the murderer, and not on the time a victim lingers while suffering which is "pure fortuity."
>
> The victim was parked in a public place late at night with his girlfriend when he was approached by the defendant who was pointing a pistol at him. He knew immediately of his likely peril as he pleaded with the defendant, "Hold on, wait a minute, man. Put it down." Ignoring his pleas the defendant forced him to his knees and then tied his hands behind his back. Money was removed from his wallet and he was forced into his own truck and driven through the darkness to an isolated citrus grove. He suffered agony from this point knowing he was likely to die soon. He

> observed the defendant assault his girlfriend and heard him say, "You are a slut and you'll do what I say or I'll blow your brains out." Aware of his likely fate he attempted to save himself and rescue his girlfriend. He was successful in the latter.
>
> The state has proved the existence of this aggravating circumstance beyond a reasonable doubt. (R2842)

Appellant maintains that the facts relied upon by the trial court do not support a finding that the murder of Charles Flynn was especially heinous, atrocious and cruel.

In the seminal case of State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court addressed the meaning of "especially heinous, atrocious or cruel":

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked or vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be include are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9. Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious and cruel. In Lewis v. State, 398 So.2d 432 (Fla. 1981) this Court stated the principle that "A murder by

shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law, not heinous, atrocious and cruel."

In Kampff v. State, 371 So.2d 1007 (Fla. 1979) this Court reversed a finding of heinous, atrocious and cruel where the defendant had brooded for three years over his divorce from his wife. He then procured a gun and shot his wife three times, the last of which was a point blank shot to her head. In several other cases this Court has reversed a finding of heinous, atrocious and cruel in situations involving worse scenarios than the instant case. See Mendendez v. State, 368 So.2d 1278 (Fla. 1978) [defendant shot victim twice as he stood with his arms raised in a submissive position]; Lewis v. State, 377 So.2d 640 (Fla. 1979) [defendant shot the victim in the chest and then shot him several more times as he tried to escape]; Simmons v. State, 419 So.2d 316 (Fla. 1982) [defendant attacked the victim in her home and killed her by two hatchet blows to her head]; Teffeteller v. State, 439 So.2d 840 (Fla. 1983) [victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was facing death]; Rembert v. State, 445 So.2d 337 (Fla. 1984) [victim beaten with a club one to seven times and lived for several hours]; Herzog v. State, 439 So.2d 1372 (Fla. 1983) [female victim induced by defendant to take drugs, after which she was gagged, placed on a bed and smothered with a pillow and ultimately dragged into the living room where she was successfully strangled to death with a telephone cord].

Very recently in Robinson v. State, 574 So.2d 108 (Fla. 1991) this Court disapproved a finding of heinous, atrocious and cruel. In Robinson, the defendant and an accomplice kidnapped the victim, ordered her into the car at gunpoint and handcuffed her. They then took the victim to a cemetery where they sexually assaulted her. Robinson then walked up to the victim, put a gun to her cheek and shot her. This Court in holding that the crime was not heinous, atrocious and cruel noted that the fatal shot to the victim was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed to cause the victim unnecessary and prolonged suffering. Obviously this Court did not consider the fact that the victim had been abducted at gun-point, handcuffed, taken to a remote area and raped prior to the fatal shot as being additional acts so as to make the actual shooting heinous, atrocious and cruel. In the instant case, the evidence shows that the victim was accosted, his hands tied, and he was driven to a citrus grove. However, the evidence is also clear that the victim was armed and fired the first shot. The evidence also shows that the victim was shot one time and did not die immediately. Simply put, the facts of the instant case do not support a finding that the crime was especially heinous, atrocious and cruel. It was therefore error for the trial court to find the existence of this aggravating circumstance.

Defense counsel argued at the sentencing that the facts were such that as a matter of law the crime was not heinous,

atrocious or cruel and therefore the court should not instruct the jury on this factor. (R2239-45) Because the trial court did instruct the jury and because the jury's recommendation was only eight to four in favor of death, Appellant contends that the sentence in the instant case must be vacated and a new penalty phase held before a new jury. See Omelus v. State, Supreme Court Case number 73, 911 (Fla. June 13, 1991).

POINT VII

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPROPERLY REFUSED TO FIND VARIOUS MITIGATING CIRCUMSTANCES WHICH WERE ESTABLISHED BY THE EVIDENCE BELOW.

At the sentencing proceeding evidence was presented concerning several non-statutory mitigating circumstances. Additionally, defense counsel argued that the statutory mitigating factor that the defendant acted under extreme duress was also established by the evidence. The trial court in his order discussed each of these factors but then made a finding that the statutory mitigating circumstance was not established and that the various evidence presented regarding non-statutory mitigating circumstances were in fact not mitigating circumstances. (R2843-46) The court then made a statement that "After weighing the evidence the court finds four aggravating circumstances to exist. The court further finds that no statutory mitigating circumstances exist nor any non-statutory mitigating circumstances." (R2846) Appellant contends that these findings do not comport with the law in that the trial court was not free to refuse to find the evidence in mitigation.

Recently, this Court set forth the correct standard and analysis which a trial court must apply when considering mitigating circumstances presented by a defendant. In Campbell v. State, 571 So.2d 415 (Fla. 1990) this Court quoted prior federal and Florida decisions to remind trial courts that the

sentencer may not refuse to consider as a matter of law any relevant mitigating evidence. This Court held:

> When addressing mitigating circumstances, a sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating factor. [citation omitted]. The court <u>must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence</u>: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established."

<u>Id</u>. at 419-20 (emphasis added). In a footnote, this Court noted that certain valid non-statutory mitigating circumstances could include charitable or humanitarian deeds. In the instant case, evidence was presented through the testimony of Damon Jones that he and Appellant were good friends for most of their lives. Jones then related that several years ago when Jones was swimming he almost drowned and Appellant without thought to his safety saved his life. (R2227) The trial court in discussing this evidence noted that the defendant established by a preponderance of the evidence that in fact he did save Mr. Jones. The court then stated:

> There is no evidence that the defendant's action placed his own safety in jeopardy. The court does not consider this a mitigating circumstance.

(R2845) Appellant submits that under this Court's ruling in

Campbell the trial court was not free to refuse to find this evidence as a mitigating circumstance. While the trial court could have given this evidence little weight, he was not permitted to simply reject it out of hand. The trial court similarly treated the evidence that when Appellant was a teenager, his father killed his mother by shooting her with a handgun and then committed suicide by shooting himself. The trial court appeared to simply reject this evidence as a mitigating circumstance because no psychological or psychiatric testimony was presented. The evidence also established that Appellant had a six year old son with whom he enjoyed a loving relationship. The trial court rejected this evidence as a mitigating circumstance because Appellant does not live with his son. (R2845-46) Once again, under this Court's ruling in Campbell, the trial court was not free to refuse to find these factors as mitigating circumstances.

Appellant also submits that the trial court erred in finding that the statutory mitigating circumstance that Appellant acted under extreme duress was not established. In Toole v. State, 479 So.2d 731 (Fla. 1985) this Court noted that:

> "Duress" is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats.

Id. at 734. In the instant case, the evidence clearly shows that the victim initiated the gunfire which resulted in the single shot which killed him. While it may be true that the offense was

committed during the commission of a felony, there is little, if any, evidence to show that Appellant intended to kill. Consistent with the evidence presented, it is likely that Appellant was provoked into shooting the victim when the victim initiated the gunfire. Once again, Appellant asserts that the trial court was not free to simply refuse to find the existence of this mitigating circumstance but rather was required to find it and then assess whatever weight he thought it should be given.

Because the trial court's findings of fact with regard to the mitigating circumstances are seriously flawed and in violation of this Court's ruling in Campbell, this Court has no option but to vacate the death sentence and remand the cause for a new sentencing hearing.

POINT VIII

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Under the totality of the circumstances in this case, imposition of the death penalty is proportionally unwarranted. There exists but two valid aggravating circumstances, the fact that the crime was committed in the course of a felony and for pecuniary gain (two circumstances merged as one) and the fact that Appellant had a previous conviction for a violent felony. There also exists valid mitigating circumstances. This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973); Holsworth v. State, 522 So.2d 348 (Fla. 1988). A comparison of the instant case to other cases decided by this Court leads to the conclusion that the death sentence is not proportionally warranted in this case. Blakely v. State, 561 So.2d 560 (Fla. 1990) (death sentence was disproportionate despite finding two aggravating circumstances: heinous atrocious or cruel; and cold calculated and premeditated); Livingston v. State, 565 So.2d 1288 (Fla. 1988) (death penalty disproportionate despite finding of two aggravating circumstances: previous conviction of violent felony and commission of murder during

armed robbery); Farinas v. State, 569 So.2d 425 (Fla. 1990) (death sentence not proportionate where defendant convicted of first-degree murder of girlfriend even though trial court properly found two aggravating circumstances: that capital felony was committed while defendant was engaged in commission of kidnapping and that capital felony was especially heinous, atrocious or cruel); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances); and, Wilson v. State, 493 So.2d 1019 (Fla. 1986) (death sentence not proportionately warranted despite trial court's proper finding of two aggravating circumstances and no mitigating circumstances).

The death sentence must be vacated in the instant case and the case remanded with instructions to impose a life sentence.

POINT IX

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

In Smalley v. State, 546 So.2d 720 (Fla.1989), this Court rejected a claim that Florida's especially heinous, atrocious or cruel statutory aggravating factor ("HAC" factor) is unconstitutionally vague under the eighth and fourteenth amendments because application of that factor by the juries and trial courts is subsequently reviewed and limited on appeal:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989).

Even more recently, however, the United States Supreme Court decided Shell v. Mississippi, 498 U.S. __, 111 S.Ct. __, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Maynard v. Cartwright, 486 U.S. 356 (1988). The concurring opinion

explained why the limiting constructions being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. __, __, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion))(emphasis added).

Shell v. Mississippi, 112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United States Supreme Court in Shell as being too vague are the precise ones used by this Court to review the HAC statutory aggravating factor.

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating factor is too indefinite to comport with constitutional requirements. The definitions of the terms of the HAC aggravating factor do not provide any guidance to the jury when the factor is first weighed in issuing a sentencing

recommendation, by the sentencer when the factor is next weighed in conjunction with the recommendation when the sentence is imposed, and finally by this Court when the factor is reviewed and the limiting construction is applied. The inconsistent approval of that factor by this Court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application.

For instance, recently in Hitchcock v. State, 16 FLW S26 (Fla. Dec. 20, 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, 16 FLW at S26. Compare this statement to the analysis contained in Mills v. State, 476 So.2d 172, 178 (Fla. 1985):

> In making an analysis of whether the homicide was especially heinous, atrocious and cruel, we must of necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. **The intent and method employed by the wrongdoers is what needs to be examined.** The same factual situation was presented in Teffeteller v. State, 439 So.2d 840 where this Court set aside the trial court's finding that the murder was heinous, atrocious and cruel.

Mills, 476 So.2d at 178 (emphasis added).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). "What is important . . . is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). It is an arbitrary distinction to say that one murder is especially heinous because, for a matter of minutes while being driven approximately two to three miles, a victim perceived that death may be imminent, yet say that another murder was not heinous because, for hours after the fatal wound was inflicted, a victim suffered and waited impending death.

Because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this Court both facially and as applied is too vague and indefinite to comport with the eighth and fourteenth amendments as set forth in Maynard v. Cartwright, supra, Godfrey v. Georgia, 446 U.S. 420 (1980), and Shell v. Mississippi, supra, the instant death sentence imposed in reliance on the HAC statutory factor must be vacated and the matter remanded for a new penalty phase before a new jury.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court to:

As to Points I, II, III and IV, to reverse Appellant's convictions and remand for a new trial;

As to Points V, VI and IX to vacate the sentence and remand for a new sentencing hearing before a new jury; and,

As to Points VII and VIII to vacate the sentence of death and remand for imposition of a life sentence.

Respectfully submitted,

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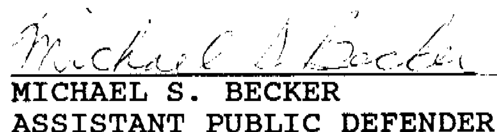
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Crosley A. Green, #902925, P.O. Box 747, Starke, Fla. 32091 on this 21st day of June, 1991.



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