IN THE SUPREME COURT OF FLORIDA

RODNEY TYRONE LOWE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 77,972

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Nineteenth Judicial Circuit In and For Indian River County, Florida [Criminal Division].

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PRELIMINARY STATEMENT

The record needed to be supplemented several times. The following are a list of record references utilized in this brief:

Record received August 19, 1991
(11 vols.,pp 1-1884) = "R"

Received on September 27,1991 (list of persons for first appearances on July 11, 1990 and video of first appearances) (not referenced).

Received on February 10, 1992 (computer print-out) (not referenced).

Supplemental Record received on May 8, 1992
(3 vol) = "SR"

Supplemental Record of voir dire and pre-trial hearings for both January 1991 and April 1991 trials (5 vols) = "SR-VD"

Stipulated Statement to Supplement the Record received November 9, 1992 (2 vols, 1st vol. contains legible copies of R-1725-1773, which cannot be read in initial R and then 2nd volume is consecutively numbered from 1775-1945) = "SS"

Received on March 19, 1993, Supplemental Record, transcript of Danny Butts deposition = "SR-DB"

STATEMENT OF THE CASE

Rodney Lowe was indicted by the grand jury in Indian River County for the July 3, 1990, first degree murder and attempted robbery of Donna Burnell R-1326-27. The Public Defender was appointed to represent Mr. Lowe on July 11, 1990 R-1331.

On October 29, the Public Defender filed a motion for a protective order for the state witnesses, Dwayne and Vickie Blackmon, and a supporting affidavit from Mr. Blackmon, alleging that the state had been harassing them in an attempt to influence their testimony in this case R-1371-78. The following day the state filed a motion to disqualify the office of the public defender from representing Mr. Lowe because it was also representing Dwayne Blackmon, a state witness R-1380. These motions were both withdrawn after a special public defender, John H. Power, was appointed to represent Blackmon R-1403.

On January 1, 1991, appellant filed two motions, to disqualify the trial judge for bias and to transfer the case to a circuit judge because the assigned County Judge, Joe Wild, was improperly assigned as a circuit judge R-1448-54,1455-58. The motion to transfer was denied after a hearing R-36-50. The motion to disqualify was denied by written order R-1467.

On January 17, 1991, the state filed a motion in limine to preclude the admission of a spontaneous statement of Mrs. Burnell's child who witnessed the murder R-1650-51. After hearings, SR-VD-207-230,R-60-62,402, the motion was granted R-1792.

The Public Defender filed a motion to suppress the defendant's statements and confessions on January 15, 1991, which was to be

heard during a recess in the voir dire SR-200. However, the state filed another motion to disqualify the office of the Public Defender during jury selection, January 21, 1991, SR-187-200,R-1677-1681, on the grounds that the public defender had a conflict of interest because they represented the state witness, Dwayne Blackmon, on unrelated criminal charges from October 17, 1990 to November, 1, 1990, and Blackmon signed an affidavit on October 26 recanting some of his prior statements against Mr. Lowe in this case R-167[1]-81. The prosecutor also asked for disqualification of the public defenders because he had filed a bar complaint against them R-73. After a hearing, R-64-194, the court found a potential for conflict and public defender moved to withdraw R-181,189. The public defender was disqualified R-1688-92 and sole practitioner, James Long, was court appointed to represent appellant on January 24, 1991 R-194,1691.

On February 1, 1991, Mr. Long moved for appointment of co-counsel to help with the penalty phase, R-1718-1719, which was denied after a hearing R-210-216. At this hearing, Mr. Lowe personally complained that Mr. Long was not doing his best to

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[1] The state raised this issue only because the public defenders refused to tell the state whether they intended to use the affidavit to cross-examine Blackmon. If they would not use it, the state agreed to withdraw the motion. However, it they intended to use it, then the public defenders would be in a position to be a witness as to the manner in which the affidavit came to be made, the state alleged SR-VD-190-192. The court agreed, "I don't see how you could not use the affidavit if he takes the stand." SR-VD-196. At all times Assistant Public Defenders Barnes and Unruh insisted that they did not pressure Blackmon to sign any affidavit, that they advised Blackmon they represented Mr. Lowe and of a possible conflict and that Blackmon agreed to waive the conflict R-78-84, 119-170. When Unruh talked to Blackmon, Blackmon said Lorenzo Sailor admitted he (Sailor) had shot the victim R-136.

represent him and asked for Long to be removed, which was denied without a hearing R-216-220.

On March 22, 1991, a hearing was held on the motion to suppress Mr. Lowe's tape recorded statements made after he requested counsel R-222-397. The grounds for the motion were that Mr. Lowe's tape recorded statements were taken in violation of his right to counsel and to remain silent and that the officers ignored his request for counsel. A transcript of the taped recorded statements prepared by the state was provided for the court and counsel, R-229, and is part of the record on appeal SS-1776-1848.[2]

The suppression hearing showed that on July 10, 1990, Lowe and his girlfriend, Patricia White, went to the Vero Beach Police Department to talk about a check case with Det. Divincenzo R-260. Investigator Kerby of the State Attorney's office and Det. Green of the Indian River Sheriff's Office learned that appellant was there and went to question him because he was a suspect in the Nu-Pak R-258-259. During the custodial interrogation which followed, the officers accused Lowe of the murder of Mrs. Burnell and assured Lowe this was his one chance to talk about the matter R-1796,1797.

Appellant repeatedly denied shooting or robbing Mrs. Burnell and then a asked for a lawyer:

> RL: I want to talk to me a lawyer because I know I didn't do it. You know I didn't do it. I want to talk to me a lawyer man. SS-1803.

---

[2] The tape recorded statements were electronically reported when played at the suppression hearing R-232-256,281-284. There are numerous times that the tape was inaudible to the transcriber (court reporter) so the transcript prepared by the state and used by the court and the parties, R-229, is much easier to read and to reference SS-1776-1848.

Kerby rejoined: "I'm not hard timing you. I'm just trying to give you a chance, but that's fine." SS-1803. Kerby then left the room and interviewed Patricia White.

During the interrogation of Mr. Lowe, White had been in a nearby interview room, where she overheard many parts of their conversation R-322. Detective Divincenzo, who was operating the recording system that monitored the room where appellant was being interviewed, heard Ms. White "crying and ...hysterical" so he moved her R-307.

When Kerby met with White she was obviously upset R-270. After she admitted that she had some knowledge of the robbery, they told her what evidence they had against Mr. Lowe R-269. This information upset her R-270. Kerby knew White was Mr. Lowe's girlfriend and it appeared to him that she may have been pregnant R-271-2.

White asked to speak to Lowe after Kerby told White the evidence he had against Lowe and she may have requested to speak to him before he told her of the evidence R-272. Kerby testified that Ms. White told him she had an idea that Lowe had done it R-276 and wanted to talk to him to "find out what happened" R 277, 279. Kerby knew there was a "good possibility" that she would ask him to confess R-279. ("I didn't tell her what to do, but I knew what she had on her mind" R-279-280.)

White consented to the secret taping of her conversation with Lowe, R-275-276, and extensively questioned Lowe about the robbery and confronted him with the evidence the police said they had against him SS-1805. Eventually, Lowe postulated that Dwayne

Blackmon had something to do with all of this, SS-1805, and White told Lowe that it would help him if he confessed SS-1807,1080.

Again and again, White pointed out the evidence the police had against Lowe SS-1806,1807,1808.

Lowe said that he did not do it and that Dwayne was setting him up. White responded by telling him not to lie, that she was going to find out and if he lied to her, "I am never gonna' visit you. I am never gonna fuckin' visit you. If you tell me, just tell me, Rodney." SS-1808.

Eventually, Lowe acknowledged that he had been the driver in the robbery of the Nu-Pak with Dwayne and Lorenzo Sailor, that he had picked them up that morning. Then Lorenzo, who had Lowe's gun, and Dwayne committed the robbery while Lowe waited in the car. Afterwards, he took them home before he came to give her the car and returned to work SS-1810-11.

Lowe kept pressuring Lowe to tell the police SS-1812, 1813. When Lowe said he had no reason to tell unless White guaranteed to stand by him, she said she would love him if he told the truth SS-1813.

As Lowe continued to resist White's advice to tell the police, White said that if he loved her, he would tell. She would write him and send him money if he would tell SS-1815. He then agreed to tell them "because I love you to death." SS-1815. White assured Lowe she loved him and would wait for him, that she would keep the faith and would get to love him SS-1815.

Kerby opened the door and said, " Okay, that's as long as I can give you. Sorry." SS-1816. Lowe said to Kerby: "Hey, come

inside, man." SS-1816. Kerby then directed appellant to sit down and White to leave. Appellant said: " Well, I want to..." and Kerby responded, "I'll come talk to you." SS-1816. Lowe said that he wanted White to stay while he talked to Kerby. Kerby said that she could but was not to say anything SS-1816. Green and Kerby entered the room and told White and appellant where to sit. Then the following occurred:

> SK: All right, you remember what we talked about your rights and your...
>
> RL: Yeah.
>
> SK: ...you...you telling me that you want to talk to me?
>
> RL: Yeah, I want to tell you. Yeah, yeah, yeah.
>
> SK: Okay, we just have to understand that, RODNEY. Because you asked for an attorney before and I.. I have to tell you that again. Okay? But I have to do that or I can't talk to you.
>
> RL: So you talk, man.
>
> CG: Can we have a pad and pen?
>
> SK: All right, while we're waiting on him, all right, like I said, this is a formality I've got to do. Do you remember me or Detective Green reading you your rights. That you have the right to an attorney and that you didn't have to talk to us. Do you recall that?
>
> RL: Yes, I recall.
>
> SK: Are you telling me now, when we were in here before, you told me that you wanted a lawyer, all right? Is that right?
>
> RL: Yeah.
>
> SK: Are you telling me now that you want to talk to me without a lawyer present?

RL: How long will it take to get one here?

SK: I have no idea.

RL: Don't worry about it.

SK: No, I have to worry about it. If you're telling me you want to do it without a lawyer, I'll talk to you.

RL: I'll go without a lawyer.

SK: Is that what you want to do?

RL: It's what I want to do.

SK: Okay. I can get you a lawyer if that's what you want.

RL: Huh uh.

SK: But you have to tell me that's the way it is. Because I've got to have you tell me.

RL: That's the way it is. I do not want a lawyer at present while I'm talking to you.

SS-1817-1818.

Lowe then confessed to felony-murder involvement in the robbery of Mrs. Burnell by driving Dwayne and Lorenzo to the Nu-Pak, while Lorenzo went inside and shot the clerk SS-1818-1842. After further discussion, Kerby told White that she had to leave SS-1847. The police continued to question Lowe, expressing doubts about his felony-murder story. The interrogation ended when Lowe again requested a lawyer SS-1848.

Appellant's motion to suppress was denied R-1794-1801. His renewed motion to suppress before the tapes were played for the jury was denied R-684.

Appellant was convicted by the jury as charged R-1807-08. The jury recommended death R-1833. The court sentenced appellant to death finding two aggravating circumstances (prior conviction of

a violent felony and that the murder was committed in the course of an attempted robbery), and rejecting as mitigating all of the mitigation evidence presented R-1851-56 (Appendix-12-17).

STATEMENT OF THE FACTS

GUILT PHASE

On July 3, 1990 about 10 a.m., Steven Leudtke stopped at the Nu-Pak convenience store in Sebastian R 547. Leudtke saw an unoccupied late model white car, which he thought was a Taurus, parked by the side driveway R 554-5. Leudtke saw a black man between 5'8" and 10" tall, 150-165 lbs., with light colored shirt and lighter pants, a dark cap, and a beard come out and walk quickly towards the white car[3] R-556-8. Leudtke's composite sketch showed a man with a full beard[4] R-562. Leudtke did not identify Mr. Lowe at trial as the man he saw, R-559-6[5] nor did he make any identification at a July 10 lineup R-565.

After Leudtke entered the store, he heard a child crying and noticed the clerk, Donna Burnell, lying on the floor behind the counter R-551. He called 911; except for Burnell's child, he saw

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[3] State witness Patty White, Mr. Lowe's girlfriend in July 1990, testified Lowe usually wore dark brown pants and a tan shirt to work, but was not sure if he was so dressed on July 3 R-861-2.

[4] White also testified that Lowe never had a beard during this period, but Lorenzo Sailor did R-876. During a police recorded interrogation of appellant on July 10, 1990, where White was also present, White observed that Sailor looked like Mr. Lowe R-780.

[5] Leudtke testified that on July 3 he thought the man he saw looked familiar and that he had been to Gator Lumber, Lowe's workplace, before R-558. However, he also described the clothes as light colored shirt with pants lighter than the shirt and did not notice any Gator Lumber logo on the shirt of the man he saw R-573. Mr. Lowe's usual work clothes were dark brown pants and a tan shirt R-861; State exhibits 17 & 18, introduced at R-506.

nobody else in the store R-553.

Mrs. Burnell was still alive when Sebastian police sergeant Eugene Ewert arrived there at 10:20 a.m. R-537. Bill Lawrence, an emergency medical technician, was dispatched to the store at 10:19 a.m. and arrived at 10:24. Burnell's breathing was labored, and she went into full cardiac arrest within a minute of his arrival R-586. Lawrence tried to keep her alive en route to the hospital R-589. Doctor Nasr confirmed that Burnell was probably dead on arrival at the Indian River Memorial Hospital where he tried to treat her without success R-606-7.

Debra Brook was Donna Burnell's close friend; she stopped at the Nu-Pak store when she saw the fire department arrive R-578-9. Mrs. Burnell's child, Danny Butts, was there and jumped into Mrs. Brooks arms R-579.

The medical examiner, Doctor Hobin, testified Burnell had been shot in the chest, top of her head, and upper left face. Any of these shots could have been fatal R-615,626. Hobin opined the gun had been a few inches away when fired at Burnell's chest and face; he could not determine the gun's distance when fired at her head top[6] R-617-8,620. Burnell also suffered a fresh blunt trauma injury to her left index finger, which could have been caused by the cash drawer or somebody stepping on it R-622,631.

Gary Rathman, a technician with the Florida Department of Law Enforcement, testified that two of the bullets from Burnell's body

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[6] Gary Rathman, a Florida Department of Law Enforcement technician also opined that the chest wound was caused by a gun within a foot but not pressing against Donna Burnell R-975-6.

and the bullet from the store[7] were fired from the .32 revolver, in evidence as State exhibit 11[8] R-969.

At the Nu-Pak on July 3, 1990, Indian River County Sheriff Investigator Ronald Sinclair found and collected a cold, wet 7-Up can on the microwave and a hamburger in its wrapper in that oven R-465; State exhibit 2n. Deborah Fisher, a fingerprint examiner for F.D.L.E. developed prints from this wrapper R-990. Two of them matched Mr. Lowe's prints R-981-2,991-2. Other partial prints on the hamburger wrapper were not identifiable R-995.

A cash register alarm was ringing; the cash drawer had a dent which appeared to be caused by a bullet[9] R-466-7. Sinclair found a bullet on a cabinet, an apparent ricochet off the register and the floor R-469. The cash register tapes collected by Sinclair showed the last purchase was for a cake at 10:07 a.m. R-488-90. The general manager, Mahesh Desai, also testified the last record of a purchase was for a cake at 10:07 a.m. R-596. Desai testified the hamburgers were kept in the front of the cooler; they were delivered to the store once a week R-602-3. No money was missing from the store R-594.

Patricia White, age 18, was Mr. Lowe's pregnant girlfriend in

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[7] Sinclair had collected the three bullets from the medical examiner after the autopsy and sent them and the bullet from the store to the lab R-492. He also sent the .32 revolver obtained by Detective Green from Dwayne Blackmon to the lab R-498.

[8] Dwayne Blackmon gave this revolver to Detective Green as detailed below.

[9] Sergeant Ewert also noticed the register alarm, soda can, hamburger, and dent on the cash drawer when he entered the store; he did not disturb these items R-543-4. A Florida Department of Law Enforcement technician later opined the dent was consistent with a bullet striking the drawer R-971-2.

July 1990 R-852. (After Mr. Lowe was arrested, the Blackmons and Lorenzo Sailor moved in with her, and she gave Lowe's possessions to Dwayne Blackmon for cocaine[10] R-880,909). White owned a white Mercury Topaz and Mr. Lowe a blue Oldsmobile R-854. White testified Mr. Lowe drove her white car to work on the morning of July 3 and returned home between 10 and 11 a.m.; within 5 minutes she drove him back to work R-856. She then drove to the Blackmon's house to go shopping with Vickie Blackmon; Dwayne looked as though he had just awakened and said he had a sore throat. She did not see Lorenzo Sailor, Dwayne's cousin who lived with the Blackmons. R-857. While returning home with Vickie, White was stopped by Patrolman Joseph Brown at 11:10 a.m. Officer Brown said he stopped them because her white car matching the BOLO of the car spotted in the Nu-Pak parking lot. Patty and another white woman and a child were in the car, Brown testified R-889. White got a summons for driving while license suspended or revoked R-858.

In July, 1990, Dwayne Blackmon was friends with Mr. Lowe, however, they had an argument in the week between the robbery and Lowe's arrest R-939. Blackmon had made his living selling crack cocaine and had been convicted of nine felonies or crimes involving dishonesty R-918.

On July 10, Dwayne Blackmon tried to cash a bad check written on Patty White's account at a grocery, and the police were called R-941,902-3. During questioning on that offense, the police

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[10] Dordelman, Lowe's and White's roommate, confirmed that the Blackmons and Sailor would visit White and Lowe frequently before Lowe's arrest R-638. The Blackmons and Sailor moved in without Dordelman's permission and left about a week later when he became angry at Dwayne Blackmon R-640.

indicated they thought Blackmon could connect Mr. Lowe to the Nu-Pak crime R-955-6. Blackmon then gave Detective Green a .32 revolver, which was the gun used to kill Mrs. Burnell R-831. Blackmon and his wife Vickie testified Dwayne originally acquired this gun by trading cocaine for it; he then gave the gun to Mr. Lowe around Lowe's birthday on June 2, 1990 R-919,893.

Patty White testified that she saw Mr. Lowe fire this gun several times R-859. She last saw him with it on July 2 when Lowe put it under her car seat because a friend of hers was being beaten by her boyfriend and White was involved.[11] White was stopped by police on July 3 after Lowe left her the white car and she took him back to work. She could not find the gun in her car then.

Blackmon, age 19, admitted that he, Lowe, and his cousin, Lorenzo Sailor, (who had recently been released from prison R-922), planned on robbing the Nu-Pak market together and twice attempted to rob it on the weekend before July 3 R-922-929. Blackmon admitted he wanted to share in the proceeds but said the robbery was Lowe's idea because he needed money for rent R-925. Patty White also testified that Mr. Lowe told her a week before July 3 that he, Blackmon, and Sailor were planning a robbery; Lowe never told White he planned to do any robbery on his own R-874-5. White said she and Mr. Lowe were having money problems then. They borrowed the rent money from Lowe's parents on July 4.[12] R-867-8.

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[11] Mr. Lowe's roommate, Carl Dordelman, also testified he saw Lowe with a .32 caliber revolver two days before Burnell was shot, although Dordelman did not know who owned the gun R-636.

[12] Mary Burke, the comptroller at Mr. Lowe's job, testified Mr. Lowe had asked for advances on his pay at this time R-669.

On Friday, June 29, Blackmon testified that he went with Lowe to Wabasso Park and watched Lowe shoot the .32 in a trash can R-921. The bullets recovered there were too damaged to identify but were fired by the same type of gun as State's Exhibit 11 R-977.

Also on that Friday, Blackmon, Lowe and Sailor went to the Nu-Pak. Lowe went into the store with the gun, Blackmon said, and then Lowe returned and said that someone was in the cooler R-924. With Blackmon driving White's car, Lorenzo, Blackmon and Lowe returned to the Nu-Pak on Saturday and parked in the back by the meter box R-926. Lorenzo and Lowe got out and stood by the meter box; Blackmon became scared when a black Suburban came around the corner so they all left. Either Lorenzo or Lowe wanted to go back but Blackmon refused. Blackmon had a .38 but no ammunition R-929. On Saturday, Lorenzo had the .32 and Lowe had a .38 R-929. The last Blackmon saw the .32 before the murder on July 3 was when Lorenzo had it that Saturday R-953.

Blackmon claimed he had nothing to do with the July 3 robbery. He testified that he was sick with swollen tonsils, but admitted he drove to Mr. Lowe's place shortly after the robbery and ate a bowl of cereal while trying to catch White and his wife R-943. Vickie Blackmon also said Dwayne was sick that morning, R-896, and swore that Dwayne could not have gone to the Lowe household on July 3 until the evening R-908.

Blackmon said Mr. Lowe told him on the afternoon of July 3 that he had robbed the store that morning and shot the clerk three times R-934. Blackmon testified Mr. Lowe said he got nothing, not

even a pack of Newport cigarettes.[13] Blackmon admitted he confronted Sailor about participating in the robbery after Mr. Lowe admitted to the robbery; Blackmon suspected Sailor because Sailor was not at home when the robbery happened R-943. Blackmon was never arrested for any attempted robbery, or murder at the Nu-Pak store R-959.

Patty White testified that Mr. Lowe made admissions to her on two occasions, other than his recorded statements to her at the police station on July 10. She said Mr. Lowe wrote to her from jail that Blackmon and Sailor came to him at work, but he refused to go to the store although he lent them the white car because it was faster than his blue one which Blackmon was driving. Lowe wrote he then met the pair in Sebastian where he switched cars and drove her white car back home R-871. White said when she and the Blackmons visited Mr. Lowe in jail, Lowe told another version of events, blaming Sailor for the robbery, but not Blackmon R-872.

Mary Burke, the comptroller at Gator Lumber where Mr. Lowe worked, testified that Mr. Lowe's timecard for July 3 indicated a clockout at 9:58 a.m. and clock in at 10:34, 36 minutes later R-666. Steven White, Mr. Lowe's supervisor, confirmed Lowe left work with permission on the morning of July 3 R-654.

The jury also heard a portion of the taped statements, State's Exhibit 28, taken from Mr. Lowe by Detective Green and Investigator Kerby on July 10 at the Vero Beach Police department and recorded statements between Patricia White and Lowe at the

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[13] White testified that Mr. Lowe usually smoked Newports R-867.

police station on the same day. (At trial Detective Green turned down the volume of the recorder for portions which had been redacted R-684-814.) (These statements were subject to a motion to suppress which is detailed in the argument).

After the officers advised him of his Miranda rights R-687. Lowe says he was at work at Gator Lumber on Tuesday, July 3 R-687. Mr. Lowe admitted he had probably been in the Nu-Pak store at some time in the past, but said he usually went to Cumberland Farms to shop R-688-9. Lowe acknowledged he probably left work on Monday or Tuesday and that he drove his girlfriend's Topaz because a friend, Dwayne Blackmon, had his blue car R-695-696. He was sharing Patty White's car and often took it home so she could use it R-694. Lowe makes $240 a week; he pays $250 a month in rent; Patty White does not work R-699. He denied owning a gun or ammo or firing a gun since he was 13 R-700.

Lowe said that he did not know Burnell worked at the Nu-Pak store R-705. Mr. Lowe knew Burnell when she worked at Fran's Market, but is not sure if she would recognize him.[14] R-706. He left the lumberyard twice on Tuesday, July 3 R-709. He remembered that was the day the police stopped Patty White around noon because her car matched the description of the car at the Nu-Pak R-712.

At this point, the police repeatedly accused Mr. Lowe of being in the store and shooting the clerk R-714-33. He repeatedly denied it, telling them they should talk to Blackmon R-723. Kerby insisted that Lowe "robbed people before" R-722. Kerby also

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[14] Mahesh Desai, the general manager of these stores, testified that Donna Burnell worked at Fran's for about six months R-600.

reminded Lowe "you've already been to the house and you know what's gonna happen when she tells someone who you are" R-717. Later, Kerby tells Lowe on the tape: "[Y]ou tell me how it shakes down. You've been around the tree before." R-731. The interrogators repeatedly told Mr. Lowe this was his one chance to say what happened R-718, 719,722,729,730,731.

The jury then heard the next portion of the recorded statements. These were between Mr. Lowe and his girlfriend, Patty White, recorded shortly after the above interview. Using a recording system hidden in the room, the police listened to and recorded this conversation without Mr. Lowe's knowledge. When she entered the room, Mr. Lowe patted her down to see if she carried a microphone R-869. White implored Lowe to tell the truth and said she believed the police when they accused him of the crime. She threatened not to visit him if he did not tell her what she believed to be true R-745. She reminded Lowe that they had needed the money, but then White admitted that they got the rent money from Lowe's father R-748. After Lowe's repeated denials, White suggests that Dwayne Blackmon was responsible, R-745,750, and Lowe acknowledges that Blackmon and he were involved R 750-1. Mr. Lowe then told his girlfriend he went to the Blackmon's house and picked up Sailor and Dwayne Blackmon; Lowe says he thinks Sailor killed Burnell because Sailor had Lowe's gun. He does not know why Burnell was shot. White noted that Vickie Blackmon had not wanted to touch the gun and again urged Mr. Lowe to tell the truth R-753.

Kerby then enters the room to talk with Lowe and reminds him that he has the right to remain silent and speak with an attorney.

Mr. Lowe then asked how long would it take for an attorney to get there and Kerby replies, "I have no idea." R-758. Kerby then got Mr. Lowe to state he would proceed and began questioning him again while White remained in the room.

Mr. Lowe admitted he left Gator Lumber on July 3 and picked up Dwayne Blackmon and Lorenzo Sailor, who had just gotten out of prison, in Wabasso at an address that Lowe did not know. Mr. Kerby asked "Well, just tell me how you would get there if you came off of U.S. 1?" R-761. Mr. Lowe described that route. The trio went to the Nu-Pak to rob it and parked the car on the side R-763. Sailor had the .32 and Blackmon a .38 caliber R-764. The three agreed that Sailor would do the robbery; he was the only one who would shoot somebody quickly R-764. The three men had been discussing a robbery for awhile, Lowe said, as they all needed money R-774. Mr. Lowe stayed in the car on the side, Blackmon stood at the corner, and Sailor entered the store. Blackmon disappeared around the front for a period, then came to the car and jumped in R-766. When Sailor did not come, Mr. Lowe pulled the car to the front of the store, parking near the little window R-787; Sailor came out, Lowe pulled his seat up, and Sailor climbed in R-767. He noticed somebody pull in as he left R-770,778. Sailor told them he had shot the lady and the cash register R-769. The shells were thrown out of the car window R-796. Mr. Lowe dropped Sailor and Blackmon off at their house and returned to his home with the .32 which he placed on a shelf R-767. White drove him back to work; she was stopped later that day and charged with driving while her license was suspended or revoked R-767-8,783.

Lowe continues that on the 4th of July, the Blackmons and Lowe had a falling out R-785. Blackmon later threatened to report Patty White to the police for writing bad checks R-785. Mr. Lowe gave the .32 gun back to Vickie Blackmon along with their television at the Blackmon's request after the argument R-809. Dwayne Blackmon had originally given him the .32 R-791. Mr. Lowe admitted practicing with that gun at a park R-793.

After Patty White left the room, Detective Green again accused Mr. Lowe of not telling the truth R-813. The taped statement ends as Mr. Lowe denies lying and asks to take a lie detector test, which Green tells him he could not pass R-814.

Other testimony was that Sinclair and Green drove two routes, timing and videotaping them. They drove from Gator Lumber to the Nu-Pak store, then to Lowe's house, and back to the lumberyard; this trip took 22 minutes R-514. In their second trip, the men drove from Gator Lumber to Blackmon's house in Wabasso, to the Nu-Pak store, back to the Wabasso house, then to Lowe's house and back to the lumberyard; this took 55 minutes. Sinclair videotaped these drives R-515. Sinclair said they drove at or near the speed limit R-527. Green said he tried to drive 5-10 miles per hour above the speed limit R-830.[15]

Both Dwayne Blackmon and Patty White testified that there was a shorter route between Blackmon's and the Lowe's houses than that used by the police to make their videos R-883,944.

The police searched Lowe's blue Oldsmobile and his house, seizing various items. On July 11, Sinclair searched Lowe's car

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[15] Two tapes were made of one trip due to a mechanical failure.

in which he found seven bullets, a newspaper, and a ball cap R-501-2. Dwayne Blackmon admitted that this newspaper was his R-958; he had Lowe's blue car until sometime after the robbery.

On July 13, Sinclair and Green searched Lowe's house, located about 1½ miles from the Nu-Pak store R-474,505. They seized numerous tan work shirts and brown pants R-504-5. Sinclair identified a box of Lowe's personal effects, including a newspaper article, a pair of glasses, and a pack of Newport Menthol cigarettes, R-508-11, which he took from the kitchen table; Patty White, Dwayne Blackmon, Vickie Blackmon, and Lorenzo Sailor were all present at the time of the search R-524. Sinclair did not know who put the items in the box R-525. He acknowledged that he had been instructed to look for a pair of wire rim glasses which he did not find R-526.

White testified that she found the box of Mr. Lowe's belongings in the top of their closet and she gave it to Green R-864; the glasses were in the box R-865. She found the newspaper with the robbery article on the living room floor and put it in the box R-866.

PENALTY PHASE

The state introduced a certified copy of Lowe's previous conviction for unarmed robbery of Thomas Crosby in Brevard County R-1153. Mr. Crosby testified that on December 21, 1987, he was driving his van home from the library in Titusville when appellant, who had been hiding, placed some unknown instrument against Crosby's throat, and took his van and wallet R-1155-56. Brevard Deputy Scully testified, over objection, that shortly after the

Crosby robbery he chased Lowe, who fled in Crosby's van in a subdivision, across a golf course until he crashed into a chain link fence and a tree in "another victim's backyard" where Scully arrested him R-1164-65.

Jo Lynn Burke, the principal at the school at Indian River Correctional Institution, testified that Lowe earned his G.E.D in August of 1988 and did a good job working as a teacher's aid in her class R-1170-71. Lowe helped other inmates with their education until he left prison in February of 1989 R-1173,1174. He stayed out of trouble for the most part and only received one D.R. R-1172, 1175. He adapted well to the structured environment of prison R-1177. A correctional officer at the Indian River County Sheriff's Office testified that Lowe had not been in any serious trouble during his incarceration pending trial. He had only one disciplinary report for trying to get an extra tray of food R-1223.

Gordon Hine, pastor of Bible studies at I.R.C.I, met Lowe in prison. Because of Lowe's "upright behavior," the Chaplain at I.R.C.I. recommend Lowe to stay at the half-way house that Hines ran. Lowe stayed there for 5 months after he was released from prison R-1179-80. Lowe handled responsibility well, was friendly, tried to do his best and got a job at Gator Lumber Company. Lowe left when the house had to close because they lost their lease R-1181. Hines said Lowe participated in Bible studies at the halfway house but seemed to have fallen in with a bad crowd after he left the house R-1182.

Patrick Loftus, part owner of Gator Lumber Co., testified that Lowe was an excellent employee R-1189. He was hard working,

reliable, and liked by the other employees R-1189. Lowe started out on a part time basis and gained more responsibility over time; he eventually was in charge of the yard when the foreman was not there R-1189.

Other employees from Gator also testified that Lowe was a good worker, reliable and friendly, who advanced in responsibility and was sometimes left in charge of the yard R-1200,1205,1227-8,1231-33.

Mae Daniels, appellant's aunt, testified he was born June 2, 1970 R-1213. He grew up in Titusville with one sister and one brother and had a normal childhood. She said that the family was not a loving, close knit family and that Lowe's father, her brother, was always very strict R-1214. Lowe's father recently converted to the Jehovah Witness faith when Rodney was a teenager and in Ms. Daniels' opinion this caused a lot of problems because the children rebelled R-1215-1216. Lowe was not allowed to play music in the house, date, talk on the phone or participate in sports. Lowe was unhappy as a teenager. He was forced to attend Jehovah Witness meetings and go with his parents door-to-door to pass out literature R-1216. Ms. Daniels also said that the father never hugged or showed affection to Rodney, never gave Rodney positive reinforcement and that nothing Rodney ever did would please his father R-1217. Rodney got in trouble as a teenager, "more serious than normal" R-1219.

In rebuttal of mitigation, Charlie Lowe, appellant's father, testified, over objection, as a witness for the state R-1263-1271. He said Ms. Daniels only visited once or twice a year. He was a

strict disciplinarian when Rodney was young R-1271 and would physically punish but not abuse his children R-1267. He testified that his religion did not cause his son to commit these acts; his religion was non-violent and he did not teach his son to lie, or steal R-1266. He converted to the Jehovah Witness faith 9 years ago and required his family to participate with him. His children were required to go door-to-door and pass out Bibles and literature. He allowed his children to talk on the phone but Rodney was not allowed to date. His religion did not allow dating until a person was seriously contemplating marriage R-1268. He felt that he showed his son affection by doing things together and taking him fishing R-1265. He admitted he had never hugged Lowe since he was a small boy. Although he saw Rodney's mother come over and give Rodney a hug during the trial, he stated that he would never speak to his son again R-1270.

SUMMARY OF ARGUMENT

POINT I: Lowe's tape recorded statements to Patricia White and Investigator Kerby and Detective Green made after Lowe requested an attorney during interrogation should have been suppressed. Lowe did not re-initiate conversation about the investigation and his subsequent statements were involuntary, the result of coercive threats and promises made by Ms. White. The police deliberately by-passed his invocation of his rights by informing White of the evidence against him and sending her into the interrogation room, knowing that she intended to question Lowe about the crime. The police used White as a police agent. The officers should have known their actions were reasonably likely to elicit an incrimina-

tion response and thus amounted to prohibited interrogation after a request for counsel. The police began to talk to Lowe again about the crime and he did make an equivocal request for counsel which the officers did not clarify. Lowe's ensuing agreement to talk to the officers without counsel was not valid.

POINT II: During the initial interrogation of Lowe the officers made prejudicial statements and inflammatory accusations against Lowe while he steadfastly denied the crime. They referred to him robbing people before and his prior criminal record. Fundamental error occurred when the court allowed the jury to hear these taped remarks of the officers.

POINT III: Over relevancy objections, the court erroneously admitted an entire box of Lowe's personal items which contained his PSI from his prior robbery conviction, letters to Lowe in prison and other irrelevant and prejudicial items.

POINT IV: Mr. Long needed co-counsel to help him try this case and he requested the court to appoint co-counsel. Under the circumstances of this case, prejudice resulted.

POINT V: When Lowe complained about the competency of his lawyer, the court did not conduct a complete inquiry. The court failed in this duty and did nothing to ensure that Mr. Long did not rely on the pre-trial investigation of the prior attorneys who had a conflict in representing Mr. Lowe.

POINT VI: The defendant's motion to disqualify the trial judge, accompanied by an affidavit by Dwayne Blackmon that the Indian River County deputies claimed to have Judge Wild "in their pocket," asserted facts which placed Mr. Lowe in reasonable

apprehension of not receiving a fair treatment.

POINT VII: Judge Wild's assignment as a circuit judge was not temporary but reoccurring so that he has become a de facto circuit judge. Such an appointment to the circuit bench is wrong.

POINT VIII: The trial judge's special jury instruction that "inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent" was a prohibited comment on the evidence under both recent and ancient case law.

POINT IX: In spite of objections and mistrial motions, the prosecutor resorted to improper comments, appeals to sympathy for the victim's child and attacks on defense counsel in closing.

POINT X: By prevailing on a motion in limine, the state succeeded in having excluded exculpatory evidence, Debra Brook's testimony of the statements of Danny Butts, the victim's child who witnessed the shooting, that "two peoples" shot his mother. This statement, made very soon after the shooting, while Danny was still upset, is an excited utterance and a hearsay exception, even if Danny was incompetent as a witness.

POINT XI: At penalty phase, the jury needed a special instruction that the presence of the child could not be considered in their life or death recommendation and the court should not have denied defendant's request for this instruction.

POINT XII: Instructing the jury on two aggravating circumstances, heinousness and coldness, which could not possibly apply, was prejudicial under the these circumstances as the state's argument on these aggravators mislead the jury.

POINT XIII: The prosecutor's penalty argument was loaded with

prejudicial impropriety, use of non-statutory aggravation, character attacks, name calling, disparaging the law and other irregularities so that the penalty recommendation was not fairly made.

POINT XIV: Evidence of the details of Mr. Lowe's arrest for the prior robbery conviction referenced other crimes for which Mr. Lowe was not convicted. Admission of this irrelevant evidence was prejudicial.

POINT XV: The court gave excessive weight to the aggravator of prior conviction for a robbery because the court weighed evidence of a robbery with a weapon (when Lowe was only convicted of robbery) and the court also weighted the shortness of Lowe's prior prison term as a non-statutory aggravator.

POINT XVI: The court erred in not making an inquiry and determining whether the defendant personally wished to waive mitigation and whether the waiver was informed and voluntary when two named witnesses, Dr. Rifkin and Cindy Schrader, were called but did not testify.

POINT XVII: The defense presented much unrebutted evidence of mitigation, that Rodney Lowe was a responsible and hard working employee, that he was a good inmate, acquired his G.E.D. and worked as a teacher's aide during his prior prison term, that he came from a family that was not close-knit or loving, that his father converted to the Jehovah Witness faith when Rodney was an adolescence which created an upheaval in Rodney's life. The state even stipulated that Mr. Lowe was a good worker but the court erroneously failed to give mitigating weight to any of the evidence in mitigation.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING LOWE'S MOTION TO SUPPRESS HIS CONFESSION WHERE THE OFFICERS DELIBERATELY BYPASSED LOWE'S REQUEST FOR AN ATTORNEY.

Lowe asserted below and claims here that his confession was obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and in violation of Art. I, §§ 2, 9, 12, 16, 17 and 23 of the Florida Constitution R-1624.

A. RELEVANT FACTS

The evidence on the motion to suppress[16] was:

Mr. Lowe and his girlfriend Patricia White were at the Vero Beach Police Department speaking to Detective Divincenzo about a check case R-260. Investigator Kerby of the State Attorney's office and Det. Green of the Indian River Sheriff Office learned that appellant was there and went to question him because he was a suspect in the Nu-Pak R-258-259. Lowe, seated in an interview room, was not free to leave when Kerby and Green entered and began to talk to him R-264.

The officers advised him of his Miranda rights SS-1778, and then, after general conversation, the subject turned to the robbery/murder and the officers accused Lowe of shooting Mrs. Burnell SS-1793.

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[16] During the suppression hearing, R-224-398, while Lowe's taped statements were played for the court, R-232-256,281-4, the court and the parties used a transcript prepared by the state R-229. That transcript is much easier to read, SS-1776-1848, because the tape of the suppression hearing is largely indiscernible. Therefore, the state's transcript is referenced here.

Kerby and Green confronted Lowe with evidence that his fingerprint was found on the wrapper of a hamburger in the microwave SS-1796-1797. To their accusations, Lowe repeatedly denied shooting Mrs. Burnell SS-1794-1801. In response, Kerby repeatedly told Lowe that this was his one and only chance to talk to Kerby and tell what happened SS-1796,1797. Green said they had appellant's time card from Gator Lumber showing he was gone during the murder, and Lowe responded, "they's lying." SS-1801.

Green then left the room SS-1801. Kerby asserted that Green had no time or patience to talk to him while Kerby did SS-1801. Lowe again insisted he had done nothing and Kerby pressed the issue of the fingerprint, that it didn't lie and again told Lowe this was his only chance to talk and tell why it happened the way it did SS-1802.

Appellant then asked for a lawyer:

> RL: I want to talk to me a lawyer because I know I didn't do it. You know I didn't do it. I want to talk to me a lawyer man. SS-1803.

Kerby rejoined: "I'm not hard timing you. I'm just trying to give you a chance, but that's fine." SS-1803. Kerby then left the room, but did not call a lawyer for Mr. Lowe. Instead, he met with Patricia White.

During the interrogation of Mr. Lowe, White had been in an interview room diagonally across the hall. She heard many parts of their conversation R-322. Detective Divincenzo, who was operating the recording system that monitored the room where appellant was being interviewed, heard Ms. White "crying and ...hysterical" so he moved her R-307.

When Kerby met with White she was obviously upset R-270. After she admitted that she had some knowledge of the robbery, they told her what evidence they had against Mr. Lowe, which upset her R-269-270. Kerby knew White was Mr. Lowe's girlfriend and it appeared to him that she may have been pregnant R-271-2.

White asked to speak to Lowe after Kerby told White the evidence he had against Lowe and she may have requested to speak to him before he told her of the evidence R-272. Kerby testified that Ms. White told him she had an idea that Lowe had done it, R-276, and wanted to talk to him to find out what happened R-277, 279. Kerby told Bruce Colton, the State Attorney, that Lowe had asked for an attorney and asked if it was alright for White to talk to Lowe R-275. Colton said that it was R-278.

White consented to the secret taping of her conversation with Lowe R-275-276. Kerby said that he did not tell her what to do but he knew there was a "good possibility" that she would ask him to confess R-279. ("I didn't tell her what to do, but I knew what she had on her mind." R-279-280).

Kerby walked to the door, opened it and immediately put White in the room with Lowe, saying:

> K[erby]: She wanted to talk to you for a minute, so I'm going to give her a few minutes to talk to you, okay, All right?
>
> R[odney] L[owe]: I told you to go on out.
>
> P[atricia]: RODNEY, why?
>
> RL: Why what?
>
> P: Why?
>
> RL: Why what?

P: Why did you do that?

RL: I...

P: RODNEY, you listen and sit down. You sit down.

RL: Baby, I did not do that baby.

P: What... they got your fingerprints.

SS-1805.

According to White, Lowe patted her down to see if she was wearing a wire R-325. Neither the police nor Ms. White told Lowe that the conversation was being overheard and recorded by the police. Green and Kerby were listening to the conversation between White and Lowe in the room with Divincenzo while he was recording it R-309.

White told appellant that his fingerprints were there, they had the car and statements against Lowe SS-1805. Lowe postulated that Dwayne Blackmon had something to do with all of this SS-1805 and White told Lowe that it would help him if he confessed SS-1807, 1080.

Again and again, White pointed out the evidence the police had against Lowe, the fingerprints, SS-1806,1807,1808, his gun, SS-1806, the car, SS-1807, that Vickie Blackmon came over and got the gun wrapped in paper towels, that Vickie did not want to touch the gun for some reasons SS-1808. White also told Lowe that Dwayne had told the police that he knew for a fact that Lowe had tried to rob the place and killed this woman SS-1808.

Lowe said that he did not do it and that Dwayne was setting him up. White responded by telling him not to lie, that she was going to find out and if he lied to her, "I am never gonna' visit

you. I am never gonna fuckin' visit you. If you tell me, just tell me, Rodney." SS-1808.

Eventually, Lowe acknowledged that he had been the driver in the robbery of the Nu-Pak with Dwayne and Lorenzo Sailor, that he had picked them up that morning. Then Lorenzo, who had Lowe's gun, and Dwayne committed the robbery while Lowe waited in the car. Afterwards, he took them home before he came to give her the car and returned to work SS-1810-11.

Lowe was reluctant to tell the police what happened SS-1812, but White kept pressuring him to tell the police SS-1812,1813. When Lowe said he had no reason to tell unless White guaranteed to stand by him, she said she would love him if he told the truth SS-1813.

As Lowe continued to resist White's advice to tell the police, White said that if he loved her, he would tell. She would write him and send him money if he would tell SS-1815. He then agreed to tell them "because I love you to death." SS-1815. White assured Lowe she loved him and would wait for him, that she would keep the faith and would get to love him SS-1815.

Kerby opened the door and said, "Okay, that's as long as I can give you. Sorry." SS-1816. Lowe said to Kerby: "Hey, come inside, man." SS-1816. Kerby then directed appellant to sit down and White to leave. Appellant said: " Well, I want to..." and Kerby responded, "I'll come talk to you." SS-1816. Lowe said that he wanted White to stay while he talked to Kerby. Kerby said that she could but was not to say anything SS-1816. Green and Kerby entered the room and told White and appellant where to sit. Then

the following occurred:

SK: All right, you remember what we talked about your rights and your...

RL: Yeah.

SK: ...you...you telling me that you want to talk to me?

RL: Yeah, I want to tell you. Yeah, yeah, yeah.

SK: Okay, we just have to understand that, RODNEY. Because you asked for an attorney before and I.. I have to tell you that again. Okay? But I have to do that or I can't talk to you.

RL: So you talk, man.

CG: Can we have a pad and pen?

SK: All right, while we're waiting on him, all right, like I said, this is a formality I've got to do. Do you remember me or Detective Green reading you your rights. That you have the right to an attorney and that you didn't have to talk to us. Do you recall that?

RL: Yes, I recall.

SK: Are you telling me now, when we were in here before, you told me that you wanted a lawyer, all right? Is that right?

RL: Yeah.

SK: Are you telling me now that you want to talk to me without a lawyer present?

RL: How long will it take to get one here?

SK: I have no idea.

RL: Don't worry about it.

SK: No, I have to worry about it. If you're telling me you want to do it without a lawyer, I'll talk to you.

RL: I'll go without a lawyer.

SK: Is that what you want to do?

RL: It's what I want to do.

SK: Okay. I can get you a lawyer if that's what you want.

RL: Huh uh.

SK: But you have to tell me that's the way it is. Because I've got to have you tell me.

RL: That's the way it is. I do not want a lawyer at present while I'm talking to you.

SS-1817-1818.

Lowe then confessed to felony-murder involvement in the robbery of Mrs. Burnell by driving Dwayne and Lorenzo to the Nu-Pak, while Lorenzo went inside and shot the clerk SS-1818-1842. After further discussion, Kerby told White that she had to leave SS-1847. The police continued to question Lowe, expressing doubts about his felony-murder story. The interrogation ended when Lowe again requested a lawyer SS-1848.

Thus, the facts developed on the motion were:

° While Mr. Lowe was in custody, the police properly advised him of his rights. In response to interrogation, he denied involvement in the crime.

° The police asserted that they had incriminating evidence, and engaged in the "good cop, bad cop" ploy in which one officer stalked from the room and the other explained that, unlike his partner, he was offering a "last chance" for Mr. Lowe to give his side of the story.

° When Mr. Lowe said he wanted to talk with a lawyer, the police outfitted Mr. Lowe's emotionally upset girlfriend with incriminating information and sent her in with a mind

to get more information from him while police agents eavesdropped on the conversation. The police made a show of ensuring that the conversation between Mr. Lowe and this secret agent would be private.

° Ms. White broke down Mr. Lowe's stubborn refusal to confess by using the police-supplied information, threats and promises and various emotional ploys.

° When Mr. Lowe finally incriminated himself, the police entered the room, and immediately reinitiated interrogation, telling him that his Miranda rights were but a "formality," and obtaining further statements notwithstanding Mr. Lowe's prior and subsequent assertion of his right to counsel.

2. ARGUMENT

a. Once Lowe requested counsel all police initiated interrogation had to cease. The police violated this rule by ignoring his request for counsel, and using Ms. White to pry incriminating statements from him.

i. Further interrogation of Lowe after his invocation of counsel.

Once a suspect undergoing custodial interrogation requests an attorney, all questioning must cease until an attorney has been provided. Miranda v. Arizona, 384 U.S. 436 (1966), Edwards v. Arizona, 451 U.S. 477 (1981), Minnick v. Mississippi, 111 S. Ct 486 (1990). The "rigid" rule set by Edwards, Fare v. Michael C., 442 U.S. 707,719 (1979), is a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers ...." Oregon v. Bradshaw, 462 U.S. 1039,1045 (1983). "In the

absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'--explicit or subtle, deliberate or unintentional--might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." Smith v. Illinois, 469 U.S. 91,98 (1984).

Where the suspect requests counsel, any subsequent statement made to the police must be spontaneous and not the result of interrogation to be admissible, Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992), Arizona v. Mauro, 481 U.S. 520 (1987). The suspect must "initiate" further conversation, evince a willingness and desire for generalized discussion about the investigation, and validly waive his previously expressed right to counsel during interrogation before any subsequent statements are admissible. Oregon v. Bradshaw, 462 U.S. at 1044.

Once a suspect has requested counsel, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present. Traylor, 596 So. 2d at 966. The police are accountable for foreseeable results of their words or actions. Interrogation or its "functional equivalent" encompasses actions that the police should have known are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980). The police must avoid such words or actions. Segarra v. State, 596 So. 2d 740 (Fla. 2d DCA 1992).

As soon as Lowe invoked his right to counsel during interrogation, the time to book him had arrived. There were no further investigative techniques or procedures the officers could undertake

consistent with Lowe's specific invocation of his right to counsel. Even if the (section 16 or 6th amendment) right to counsel had not attached, his invocation of his (section 9 or 5th amendment) right to counsel during custodial interrogation was a legal bar to further attempts at obtaining statements from him.

Here the police knew their actions were likely to elicit an incriminating response. The police instigated an already upset White to question Lowe about the crime by telling her of the details of their investigation. Kerby knew that subjecting Lowe to questioning by White would be a competing influence likely to produce an incriminating response. (Lowe had referred to her as his girlfriend in his first statement and mentioned that he had a child on the way; White appeared pregnant to Kerby). Kerby knew that White intended to find out from Lowe what happened and Kerby's action of securing the State Attorney's permission for White to talk to Lowe and listening covertly to the conversation shows that he fully expected Lowe to incriminate himself. What occurred here is an impermissible coached witness confrontation which constitutes the functional equivalent of interrogation in violation of Innis.

The Innis principles reaffirmed in Arizona v. Mauro and the dissimilar circumstances discussed there lead to the conclusion that the police activity in Lowe's case was improper. In Mauro the police neither briefed the wife for her visit with her husband by informing her of the incriminating evidence against him nor hid the recording device nor secretly eavesdropped on the conversation. There was no indication that Mrs. Mauro wanted to see her husband to find out what happened. Also, Mauro had advance warning that

his wife was coming and was fully informed that the officer would be present and taping their conversation. None of these factors are present here. Lowe was not told in advance of White's "visit" and his first words to her were that he told her to go home. There is no indication that he wanted to speak to White or that he had any choice in the matter. Mauro chose to speak to his wife with knowledge that the police were listening; that is not what happened here.

ii. The use of Ms. White as a police agent.

In Peoples v. State, 17 Fla. L. Weekly S713 (Fla. November 25, 1992), this Court disapproved authorities' knowingly circumventing a suspect's right to counsel by secretly tape recording his conversations with his co-defendant in violation of Art. 1, § 16 of our Constitution. At footnote 2, this Court quoted the following from Maine v. Moulton, 474 U.S. 159, 176 (1985):

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protection accorded the accused by invoking this right...Thus, the Sixth Amendment is not violated whenever-by luck or happenstance-the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Federal cases discussing the right to be free of compulsory self-incrimination do not discuss state agents, but rather the reasonably foreseeable standard of police actions in Innis. However, in Fourth Amendment cases, the test of agencies when searches involve private parties is foreknowledge and acquiescence or cooperation by the government. United States v. Ford, 765 F.2d 1088,1090 (11th Cir.1985); United States v. Clegg, 509 F.2d 605, 609 (5th Cir.1975). In United States v. Mekjian, 505 F.2d 1320 (5th Cir.1975), the court, after noting that constitutional protection can be effectively undercut by the intervening agency of non-governmental individuals, said:

> Where federal officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, federal authorities are clearly implicated in the search and it must comport with fourth amendment requirements.

Id. at 1327. (Emphasis supplied).

A third person may not act as a state agent merely because the police overhear the suspect approach the person to discuss the crime, Stewart v. State, 549 So. 2d 171 (Fla. 1989) (with grandmother's permission, police listened in when suspect telephoned her from jail), Muehleman v. State, 503 So. 2d 310 (Fla. 1987) (police bugged cellmate who suspect approached to discuss case), or where the police are openly listening in and recording the conversation. Arizona v. Mauro, 481 U.S. 520 (1987) (police officer present when suspect spoke with wife and conversation recorded by machine plainly in sight). On the other hand, the third person does become a police agent when the police bring the person into contact with the suspect and secretly listen in on the

conversation, State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985), Nelson v. Fulcomer, 911 F.2d 928 (3rd Cir.1990), Arizona v. Mauro, 481 U.S. at 535 (Stevens, J., dissenting) ("It is undisputed that a police decision to place two suspects in the same room and then listen to or record their conversation may constitute a form of interrogation even if no questions are asked by any police officers."), or otherwise mislead the suspect into thinking that the discussion is confidential. See Walls v. State, 580 So. 2d 131 (Fla. 1991) (violation of state Due Process Clause where jail employee, assuring defendant that everything he said would be confidential and telling him not to tell his attorney, befriended him and obtained information from him). As already noted, the police mislead Mr. Lowe into thinking that they were respecting his right to counsel. They prepared Ms. White with information useful to obtaining statements from him, and brought Ms. White to him without his asking and with a show that the conversation was confidential. Under these circumstances, Ms. White acted as a state agent, the statements resulting from her role violated Mr. Lowe's rights to counsel, to remain silent, and to due process of law.

iii. Voluntariness of statements to Ms. White.

Under our law, an involuntary confession is inadmissible even if made to a private person. Lawton v. State, 13 So. 2d 211 (Fla. 1943); (written confession to embezzlement made to victim's lawyer on the promise that the county prosecution would be dropped and Lawton would make restitution payments); Howard v. State, 515 So. 2d 430 (Fla. 4th DCA 1987) (burglary victim confronted suspect

found in possession of his stolen property and forced him to recant denials to the burglary at gunpoint); State v. Kettering, 483 So. 2d 97 (Fla. 5th DCA 1986) (confession obtained by direct or implied promise of employer that if Kettering confessed, then the matter would remain within the store).

A confession made subsequent to promises or inducements which delude a suspect as to his true position or have the effect of exerting improper and undue influence over his mind will be suppressed as the product of illegal psychological coercion. Brewer v. State, 386 So. 2d 232 (Fla. 1980), Frazier v. State, 107 So. 2d 16 (Fla. 1958), Lawton.

In the face of Mr. Lowe's recalcitrance, Ms. White vigorously promised both love and money if he would relent and confess. His statements were the product of these promises, and were therefore involuntary.

iv. Reinitiation of interrogation.

During White's questioning of Lowe, the police overheard Lowe tell White that he now agreed to talk to the police and tell them what happened. Kerby then came to the door of the interrogation room and Lowe invited him inside but Lowe did not make any spontaneous statements to the police or intimate why he was inviting them inside. He did not tell the police that he was ready to make a statement nor initiate any conversation. Kerby told him White had to leave and Lowe said that he wanted her to stay. The first mention of Lowe's making a further statement came from Kerby, who then began to question Lowe R-1816. This conduct violated Edwards, and the resulting statements were improperly admitted.

v. The renewed interrogation.

Even if there is an initiation of communication by the suspect, where a statement is made after counsel is invoked, the court must further determine whether the subsequent rights waiver was knowing, intelligent and voluntary.[17] Oregon v. Bradshaw, 462 U.S. 1039 (1983).[18] Where reasonably practical the waiver must be in writing. Traylor v. State, at 966.

Where the police have mislead the suspect as to his true situation or the nature of his rights, a subsequent waiver is invalid even where the suspect re-initiates interrogation. In Collazo v. Estelle, 940 F.2d 411 (9th Cir 1991), the suspect requested counsel during interrogation. The interrogating officer, Destro, told Collazo that this was his last chance to talk to the police, said that a lawyer would only tell him to not talk to the police and implied it would be worse for the defendant. Collazo was then left in the interview room "to ponder Officer Destro's inappropriate admonition and to consider whether he could afford to exercise his Constitutional rights." Id at 414. Later, Collazo asked to talk to police and confessed.

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[17] At bar, the trial court found only that Lowe's waiver was "voluntary," SS-1800, but made no finding as to whether it was intelligent and knowing.

[18] Although Oregon v. Bradshaw and Edwards pertain to the right to counsel under the Fifth Amendment, at footnote 8 Edwards cites to both Brewer v. Williams 430 U.S. 387 (1977) and Massiah v. United States, 377 U.S. 201 (1964), focusing on the standard for waiver of the Sixth Amendment right to counsel to inform the standard to be applied to a waiver of the Fifth Amendment right to counsel after counsel is requested. ("[A] valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information.")

The court found that instead of respecting Collazo's right to remain silent, Destro stepped on it. Destro took unfair advantage of the compelling pressures of custodial interrogation. "Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements." Id. at 417. Destro's statements after the request for counsel improperly bullied the accused and constituted the functional equivalent of interrogation under Innis.

Destro and the police at bar were obviously working from the same book. Several times, when Lowe did not answer with the kind of statement Kerby wanted, Kerby told Lowe that this was his one and only chance to tell his version of the events to the police. When Lowe requested counsel, Kerby did not immediately stop the interrogation but told Lowe he was not hard timing him and repeated that he "was trying to give him a chance."

The effect of Kerby's misinformation in response to Lowe's request for counsel (not to mention other coercive tactics, such as the "good copy bad cop" routine) was to inform Lowe that he had only this chance to talk to the police and that Lowe could not tell his version of what happened unless he waived his right to a lawyer.

Further, when Kerby attempted to secure a waiver of Lowe's previously asserted right to counsel, Lowe made another request for counsel by asking how long it would take a lawyer to get there. The trial court's finding that Kerby immediately responded to clarify the request is not supported by the record. Kerby did not clarify the request but instead deliberately gave Lowe wrong

information as to when a lawyer would be available. Kerby did not clarify that a lawyer would be present before interrogation proceeded. Instead, Kerby's response, "I have no idea" led Lowe to believe that he had to waive his right to have a lawyer present if he wanted to talk to police. Collazo v. Estelle, supra. In these circumstances, Lowe did not knowingly and intelligently give up his right to an attorney during interrogation because he was not informed at that moment that a lawyer would be present before Kerby could question him. Thompson v. State, 17 Fla. L. Weekly S78 (Fla. Jan. 30, 1992). That Kerby later got Lowe to say he wanted to talk to Kerby without an attorney also does not show a valid waiver. In response to Lowe's saying "don't worry" about getting a lawyer, Kerby said that getting a lawyer for Lowe was a worry, that he could only talk to him if Lowe would waive his right to counsel:

> SK: No, I have to worry about it. If you're telling me you want to do it without a lawyer, I'll talk to you.
>
> RL: I'll go without a lawyer.

Only then did Kerby tell Lowe his other choice was to get a lawyer. Rather than clarify the request, Kerby said he could not get Lowe a lawyer right away and told him he could not speak unless he agreed to waive counsel. The resulting agreement to speak without a lawyer is hardly a knowing, and intelligent waiver of a known right and benefit and the trial court erred in denying the motion to suppress.

The admission of these illegally obtained taped statements to White and to White, Kerby and Green were harmful error. In closing argument the state relied primarily on these statements of Mr.

Lowe, in relationship to his earlier denials of involvement to Kerby and Green, to prove Lowe's guilt R-1069,1087-1096. Lowe's admission of guilt to Dwayne Blackmon does not render the error harmless because the state in closing acknowledged that if Blackmon were the only witness he would not be believable R-1099.

POINT II

FUNDAMENTAL ERROR UNDERMINED THE FAIRNESS OF MR.LOWE'S TRIAL WHEN THE COURT PERMITTED THE JURY TO HEAR KERBY'S INFLAMMATORY AND PREJUDICIAL STATEMENTS DURING TAPE ONE OF THE INTERROGATION OF LOWE.

The taped interrogation, which was played for the jury, is rife with improper references to collateral crimes and other irrelevant evidence such as to require a new trial.

Kerby began his accusations by dwelling on the presence of a small child at the scene of the murder R-1793. Beginning at this point, R-714,1793, and through the point in time that Lowe asks for an attorney, R-733,1803, the taped interrogation consists almost entirely of Kerby's opinion of Lowe's guilt, his inflammatory accusations of how the murder occurred, that Lowe murdering Mrs. Burnell in front of the child, attacks on Lowe's character, an assertion that Lowe "robbed people before" and had been before the court on charges and in prison, suggestions that Lowe shot Mrs. Burnell to eliminate her as a witness, and opportuning Lowe to show remorse, which he declines to do because he maintains his innocence. In response, Lowe steadfastly and repeatedly denies that he robbed or shot Mrs. Burnell.

Although the state had agreed to delete from the statement references to Mr. Lowe's prior record, R-400, it broke this

promise:

> MR. KERBY: You may not--you may not have wanted it to go down that way, Rodney. You may have figured you could go in there and get you some money and you get there and there's a lady that knows your face and you've already started what you're doing and there's no way to turn back on it, you've already been to the house and you know what's gonna happen when she tells somebody who you are. R-717.
>
> ...
>
> MR. KERBY: What went--what happened--what made it go bad? Cause she knew you? Did she call your name. Something made it go wrong. Your robbed people before. Something wrong--something happened with this one. What happened? Cause she knew you? R-721-722.
>
> ...
>
> MR. KERBY: What happened, Rodney, come on...I don't think that you've ever shot anyone before, but you shot this one. R-726.
>
> ...
>
> MR.KERBY: ...Okay. We've got our case made right now. Okay. I got your-- I can go into Court right now with your fingerprint on the bottom of that hamburger thing and you telling me you never were there and you tell me how it shakes down. You've been around the tree before. I'm gonna go into Court and I'm gonna have your fingerprint on the bottom of that hamburger that was gotten out of there that day when you've already told us you were no where near that store. R-730-731.

Further, the statement is full of improper assertions of the officer's opinion of Mr. Lowe's guilt. Kerby went well beyond saying that "he has the evidence" on Lowe R-722: "I wouldn't be talking to you if I didn't know you were there ... I can put you right there on the spot. Dead certain. Okay. I can put you right there." R-719. "[W]e walked in this room to talk to you because

we know what the hell we're talking about." " You did shot the lady though, Rodney. ..but you shot her and she died. ... I know you shot her. There's no question that you shot her. There wasn't anybody in there, but you. And you know it. And you know I know that cause I know I--that we know what we're talking about when we tell you these things... We got the evidence on you." R-722. "I know what happened. I already know what happened. I know what happened.... I've got a witness that saw the person that came out of that store and it was you. I know that." R-722-723. "I know you were in the store...R-723. "You went in there and just saw her and blew her up right on the spot. Bim, bam, boom. For no reason. Okay. That's how it goes down..." R-726. "if we go with what we're doing right now it's gonna go down just like I been telling you. You gonna come in there and kill her without ever saying boo to her." "We've got a lady dead in cold blood in the store in front of a three year old kid...." "you walked in there and you killed her right in front of that--that child." R-731.

In Pausch v. State, 596 So. 2d 1216 (Fla. 2nd DCA 1992), the court found fundamental error and reversed a conviction for second degree murder where the jury heard a tape recording of an "interview" between the Mrs. Pausch and a detective after her arrest for critical injuries sustained by her son. The detective vigorously questioned her, disbelieved her story, accused her of lying and abusing her son. He called her an unfit mother, predicted she would eventually kill the boy if he survived these injuries (which he did not), accused her of abusing her son in the past and being indifferent to his present condition for she had never asked

about him or tried to go see him in the hospital. The court found the officer's assertions and questions irrelevant, citing Charles Ehrhardt, Florida Evidence (1992 Edition) § 401.4, which states:

> Only those portions of the recording which are relevant and otherwise admissible may be placed before the jury. [footnote omitted] It is the better practice of the trial judge to preview the recording and strike any inadmissible evidence before the recording is presented to the jury.

Similarly, error was found in admitting inadmissible portions of a tape where objection was raised in Aetna Casualty & Surety Company v. Cooper, 485 So. 2d 1364,1366 (Fla. 2nd DCA 1986), and Food Fair, Inc. v. Anderson, 382 So. 2d 150,156 (Fla. 5th DCA 1980). See also People v. Sanders, 75 Cal.App.3d 501, 142 Cal. Rptr. 227,230-1 (Cal. 2d DCA 1977) (officer's narrative statements during interrogation of defendant should be struck); Hock v. State, 591 So. 2d 680 (Fla. 4th DCA 1992) (Warner, J., dissenting: court prejudicially erred in not striking hearsay by police in defendant's interview). Reversible error was found in the jury's hearing the audio portion of a video of the search of the defendant's house in Scott v. State, 559 So. 2d 269 (Fla. 4th DCA 1990). There the officers statements and comments about the defendant's running a cocaine supermarket, the number of complaints against him and the need to remove a baby from the scene because of the drug dealing going on unfairly prejudiced the defendant's case and required reversal.

References that Lowe "robbed people before," had been in prison (been to the house), and was familiar with the criminal justice system (you've been around the tree before) are inadmis-

sible and highly prejudicial. McGuire v. State, 584 So. 2d 89 (Fla. 5th DCA 1991) (reference that defendant had been "doing time in Georgia" and that he was on a 15 year sentence in Georgia), Jackson v. State, 598 So. 2d 303 (Fla. 3d DCA 1992) (testimony that defendant had "an arrest record and was recently released from prison." Dibble v. State, 347 So. 2d 1096 (Fla. 2nd DCA 1977) (Admission of arresting officer's statement, "You just all hit the wrong guy this time" at defendant's arrest for robbery of police undercover decoy, reversible error even though officer-victim identified Ms. Dibble and chemical on her hands indicated she handled robbery proceeds).

Opinion testimony as to the guilt or innocence of the defendant is not admissible. Farley v. State, 324 So. 2d 662 (Fla. 4th DCA 1975). If given, such opinion testimony should be stricken by the court of its own motion. Gibbs v. State, 193 So. 2d 460 (Fla. 2d DCA 1967). A jury is particularly influenced by and likely to give great weight to the opinions of police officers by virtue of their positions. Gianfrancisco v. State, 570 So. 2d 337 (Fla. 4th DCA 1990). The jury is just as likely to credit the opinions of the officers it deduces from a taped interview with the defendant as from improper opinions of officers adduced as testimony in open court.

In Blackwell v. State, 76 Fla. 124, 79 So. 731 (1918), convictions for first degree murder were reversed for a multitude of statements and proceedings which were prejudicial to the accused. Without objection, the Sheriff had testified to his opinion, previously given before the trial commenced, that he had the

evidence to convict the Blackwell brothers. He reaffirmed to the jury that was still his opinion. This Court noted that the Sheriff's opinion was so "flagrantly improper" that it should have been stricken by the court on its own motion. Id at 739. In Smart v. State, 596 So. 2d 786 (Fla. 3d DCA 1992), eighteen statements by the prosecuting attorney and the arresting officer that the defendant had been arrested before and the officer had numerous contacts with the defendant were so prejudicial that they could not have been cured by a curative instruction had one been requested.

Furthermore, the interview here is peppered by the officers exhortations for Mr. Lowe to show remorse, "it's been eating on you for a while," R-714, and for Mr. Lowe to admit he can't sleep well and sees Mrs. Burnell's face when he closes his eyes R-717, 726. On each occasion Mr. Lowe expressly declines to declare remorse and then states that he has no trouble sleeping because he didn't shoot Mrs. Burnell R-726. This evidence showing that the defendant had no remorse was irrelevant and inflammatory and should not have been admitted. Wilkins v. State, 17 Fla. L. Weekly D2525 (Fla. 3d DCA Nov. 10, 1992). Bouchard v. State, 556 So. 2d 1215, 1216-7 (Fla. 2d DCA 1990).

The improper matters on the tape were prejudicial not only in the guilt/innocence phase but affected the fairness of the penalty phase: the tape placed before the jury evidence that Mr. Lowe had no remorse and had robbed "people" before, although the only proper evidence at the penalty phase was one prior unarmed robbery. These errors harmed Mr. Lowe's rights to a fair penalty proceeding under the Fifth, Eighth and Fourteenth Amendments to the Constitution and

Art. I, §§ 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT III

THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT 32, THE ENTIRE CONTENTS OF A BOX OF LOWE'S PERSONAL ITEMS, WHICH INCLUDED HIS PSI FROM HIS PRIOR ROBBERY CONVICTION AND LETTERS WRITTEN TO LOWE IN PRISON.

Ms. White gave the police a box containing the personal effects of Mr. Lowe. Wanting to show that a pair of glasses found in the box belonged to Mr. Lowe, the state sought to introduce into evidence the box and all of its contents R-865. Over appellant's objection that the box contained irrelevant items, the court admitted the box and its contents as state exhibit 32 R-863-5.

The trial court erred. The glasses were admissible but there is no logical relevancy for the admission of personal items just because they were near or in the same container where other relevant evidence was found.

Among other things, the box contained a copy of Mr. Lowe's PSI from his prior robbery conviction, describing that offense and his juvenile record in detail, and letters from Mr. Lowe's mother both during his imprisonment for the prior robbery charge and afterward. These letters include her many assessments of Mr. Lowe's crimes and sins and her strong exhortations for him to return to the Jehovah Witness faith and doctrine.

These contents of the box were irrelevant and impermissibly attacked Lowe's character. Stokes v. State, 541 So. 2d 642 (Fla. 1st DCA 1989) (letters from defendant to her cellmate which were probative of defendant's bad character were not relevant to any issue at trial and inadmissible to corroborate close confidential

relationship between defendant and cellmate), Straight v. State, 397 So. 2d 903 (Fla. 1981), Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989). See also Jackson v. State, 545 So. 2d 260 (Fla. 1989) (testimony that prior jury had convicted the defendant of the crime for which he was being tried, harmful error). Evidence that a defendant has committed a similar crime is harmful because of the danger the jury will consider the defendant's bad character in returning its verdict of guilty. Straight, King v. State, 545 So. 2d 375 (Fla. 4th DCA 1989). Such evidence prompts a more ready belief by the jury that the defendant might have committed the offense charged. Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). Reversal for a new and fair trial is now required under Art. I, §§ 2, 9, 16, 17, 21 and 22, Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the U. S. Constitution.

POINT IV

MR. LOWE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO EQUAL PROTECTION OF THE LAWS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO APPOINT CO-COUNSEL TO ASSIST MR. LONG.

Although our law authorizes appointment of co-counsel for indigents in a capital case,[19] although it had long been the practice in the Nineteenth Circuit to appoint co-counsel in capital cases, although the Public Defender had provided Mr. Lowe the assistance of counsel and co-counsel prior to being removed for a conflict of interest (at the urging of the state), and although Mr.

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[19] Section 925.035, Florida Statutes (1989) mandates, as to a public defender with a conflict on a capital case, that "it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender."

Lowe's newly-appointed counsel represented that he was not an expert on capital cases, R-214, and that, because of the complicated nature of the case, he needed co-counsel to be responsible for the penalty phase, R-210-11, the acting circuit judge refused to appoint co-counsel R-216. The court apparently accepted the state's argument that (notwithstanding that the prosecutor himself did have co-counsel) the motion for "unwanted and unnecessary" and made solely to protect the record.

The trial court erred. In the "interest of justice" and to ensure the right of effective assistance of counsel at trial on this capital offense, Mr. Lowe was entitled to two lawyers to defend his life. Cf. Butler v. Culver, 111 So. 2d 35 (Fla. 1959) (defendant not entitled to counsel pre-Gideon[20] except in "the interest of justice"). The interest of justice can require the appointment of counsel even before the Constitution recognizes the defendant's entitlement to such a privilege.

Mr. Lowe had two lawyers representing him when the public defender's office was appointed to his case but was denied that privilege when a conflict arose. This inequity denied Mr. Lowe his Constitutional guarantees to equal protection of the law. Constitutionally unfair treatment is afforded in capital cases when defendants represented by the public defender receive representation from two attorneys but indigent defendants with court-appointed counsel receive representation from only one attorney.

Current standards for effective representation of counsel mandate co-counsel be appointed in capital cases. Currently, and

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[20] Gideon v. Wainwright, 372 U.S. 335 (1963).

since 1731, South Carolina law has required two lawyers to be assigned to an individual facing a capital murder charge. Appeal of Akin County, 424 S.E. 2d 503 (S.C. 1993). The New Jersey Public Defender routinely assigns two lawyers to represent each capital defendant to ensure adequate representation. State v. Oglesby, 585 A. 2d 916, 928 (N.J. 1991), J. Handler, concurring. Both the National Legal Aid and Defender Association and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases strongly advocate that in death cases two qualified trial attorneys should be assigned to represent an indigent defendant. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline § 2.1 (1988), STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Standard § 2.1 (National Legal Aid and Defender's Association 1987). Circuit courts around the state have begun to recognize this fact and to appoint two attorneys. Such is the practice in the Nineteenth Circuit from which this case originated (R-210). See Stewart v. State, 420 So. 2d 862 (Fla. 1982) (the defendant had two attorneys diligently working on his case).

The failure to appoint co-counsel was prejudicial. Defense counsel's motion was based on his inability to handle both the penalty and guilt phases of the trial by himself. The trial bore out this inability. Not once in his closing argument to the jury in the guilt or innocence phase of trial did he request that Mr. Lowe be found not guilty. He explained this during the penalty phase by saying that the jury did not have any other choice, their verdict of guilty was understandable and that he was not surprised

(R-1286). Mr. Long then continued:

> And if you recall I did not ask you -- I specifically did not ask you to -- to find Rodney not guilty because I knew that the law that you would be faced with. I ask you to review the evidence and to return a verdict that you would be comfortable with and you did.
>
> Following that law in that part of the trial was easy. Very easy.

(R-1286).

Mr. Long made his choice clear to the jury as he had made it to the judge. He was unable to represent Mr. Lowe without assistance and to argue as he should in both the guilt, innocence and penalty phase of trial. When the trial court denied his request for co-counsel, Mr. Long solved the dilemma by refusing to argue for a not guilty verdict during the first phase of trial. This is a complete admission that he rendered the ineffective assistance of counsel and proof positive why Mr. Lowe suffered prejudice from the trial court's denial of his motion for co-counsel.

This Court has been a leader in directing trial judges to approve funds for defense counsel in capital cases. Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). Makemson was cited with approval by the Supreme Court of South Carolina in Akin. The Sixth and Fourteenth Amendment compel the state to provide counsel to indigent criminal defendants and although the state is not required to provide unlimited funding, it must ensure that the defendant has competent counsel. The link between compensation and the quality of counsel remain too clear, Akin.

The trial court had the discretion and indeed the duty to appoint co-counsel in this case for by himself this defense

attorney was unable to shoulder the awesome burden placed on an attorney in a capital case. Reversal is required for a new and fair trial where Mr. Lowe will be adequately and competently represented by two qualified criminal defense attorneys.

The denial of co-counsel deprived Mr. Lowe of his rights under the Fifth, Sixth, Eighth and Fourteenths Amendments to the United States Constitution and Art. I, §§ 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN INQUIRY INTO COUNSEL'S EFFECTIVENESS WHEN APPELLANT MOVED TO DISCHARGE HIS COURT-APPOINTED COUNSEL.

When a defendant complains about incompetency of his court-appointed attorney, the court must inquire of the defendant and defense counsel to determine if reasonable cause exists to believe that counsel is not rendering effective assistance. Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), approved Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Watts v. State, 593 So. 2d 198,203 (Fla. 1992); Hunt v. State, 18 Fla. L. Weekly S188 (Fla. March 18, 1993).

Here, at the first hearing where Mr. Lowe was before the court represented by Mr. Long, Mr. Lowe told the court that he "had a little conflict with Mr. Long," R-200, that he had asked Mr. Long to file a motion to withdraw, and that Mr. Long "wouldn't be doing his best and that's what I need right now" R-201 and was "not -- he's not gonna fully represent me." R-201. When the court asked Mr. Lowe to explain further, Mr. Lowe said, "Well, in regard to the case I feel that he's not doing his best." R-201, adding: "I feel

like he's not gonna be trying his best, you know. And I feel that's what I need." When the court again pressed Lowe to explain, Mr. Lowe said "never mind" and eventually told the judge to "forget it, man." R-204.

Later in the same hearing, the court renewed the matter, realizing that Lowe had said to forget it out of frustration. The court asked Lowe for "some legal reasons why Mr. Long should not continue to represent you," R-216-217, and then told Mr. Lowe that a personality conflict was insufficient, that there must be some conflict as when his public defender was removed because he was a witness R-217. The court said no court-appointed attorney would do things differently than Mr. Long R-218.

Lowe continued to complain about Mr. Long's saying, "I don't see where he's doing anything." R-219. The court repeated that people in jail could not always see what their lawyers were doing but "apparently," the court continued, Mr. Long was doing something: he prepared a motion to suppress and was reviewing depositions R-220. The court told Lowe to discuss his case fully with Mr. Long and told him even if he didn't like Long's advice he couldn't fire him. The court said that despite Mr. Long's advice it was still up to Lowe to make decisions on motions and witnesses R-220. The court made no inquiry of Mr. Long.

Mr. Lowe made sufficient allegations of incompetency to require inquiry of Mr. Long. Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991) (complaints of ineffective representation were "I don't think I am being represented to the best of my (sic) ability... Me and my counsel can't see eye to eye... he ain't going

to defend me, you know, to the best of my (sic) ability...."), Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992) (defendant's claim that the attorney did nothing on defendant's behalf at a bail hearing and had not filed an appeal required Nelson hearing).

When these allegations were made, the court erred in not determining what trial preparations had been done and whether they were sufficient. Hardwick. It was error to quarrel with the defendant and lecture him rather than make an adequate inquiry to ensure vindication of Mr. Lowe's right to effective counsel.

This issue is not mooted by Mr. Lowe's later affirmative answer that he was satisfied with Mr. Long's "representation up to this point" R-1003. "This point" was before Mr. Long declined to argue for a verdict of not guilty R-1050-1061,1106-1115,1286. It was also at a time when Mr. Lowe had to rely on Mr. Long for both closing arguments and a penalty phase and was not a fair question, for the consequences of answering in the negative might affect his lawyer's performance.

Furthermore, "this point" was after the trial judge determined that the former pre-trial counsel had a conflict of interest. Yet Mr. Long went to trial relying on pre-trial counsel's work and without conducting an independent investigation. See United States v. Tatum, 943 F.2d 370 (4th Cir.1991) (where pre-trial counsel had a conflict of interest and trial counsel relied on pretrial counsel's work, defendant was deprived of effective assistance of counsel).

Mr. Lowe's initial complaint was that Mr. Long was not representing him to the best of his ability, a sufficient

allegation to require a Nelson hearing. Long had previously announced (in his request for co-counsel) that this case was "basically ready for trial" when he was appointed R-211. The court told Mr. Lowe that "Mr. Long is not gonna do anything different than most ---- whatever --- what all other attorneys are gonna do." (R-217). The court told Lowe that Long was going about the case in a way that all competent attorneys do ("they're gonna basically do the same thing") R-217. The court then informed Lowe (but without any inquiry of Long) what Long was "apparently," R-219, doing to represent Lowe, including "he's looked -- gone over the depositions. He's ready to subpoena witnesses. Only way he can do that is if he's looked over the whole case file." R-220. Not once did the court inform Lowe that the conflict continued to the extent that Long relied on the work of pre-trial counsel, who had a conflict. Lowe's expression of satisfaction with Long's representation was not a knowing, voluntary and intelligent waiver of his previous complaint because Lowe did not know that Long had a duty not to rely on pre-trial work of counsel with a conflict and a duty to conduct an independent investigation which would overcome the conflict. United States v. Tatum.

The court's failure to make an adequate inquiry into the effectiveness of appellant's trial counsel under these circumstances constitutes reversible error in violation of appellant's rights under Art. I of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT VI

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR HIS DISQUALIFICATION UNDER FLA. R. CRIM. P. 3.230.

On January 2, 1991, the defense moved to disqualify the trial judge, County Judge Joe Wild, under Fla. R. Crim. P. 3.230, alleging that Mr. Lowe had a well-founded fear that the judge was prejudiced against him and in favor of the Sheriff's Department and the state, R-1448, and attaching affidavits signed by Dwayne Blackmon (a state witness) and Mr. Lowe.

The Blackmon affidavit, dated October, 26, 1990, averred that sheriff's officers had threatened and harassed him to get him to testify against Mr. Lowe, that reward money was offered Mr. Blackmon for his testimony, and that the deputies had offered to take care of Blackmon's ticket for driving with a suspended license (R-1450). The affidavit also alleged:

> 4) That these same law enforcement officers told me they could influence my and Patricia White's misdemeanor charges because they had Judges Balsiger and Wild "in our pocket." R-1450.

Mr. Lowe's affidavit said that he had read Blackmon's affidavit that the Indian River deputies claimed influence over misdemeanor charges against two state witnesses, Blackmon and White, because "they had Judges Wild and Judge Balsiger in their pocket." R-1452.[21] Mr. Lowe also swore that "Patricia White's

[21] Here defense counsel in good faith filed the motion on sworn allegations he believed to be true. Defense counsel had no reason to question the truth of Blackmon's allegation about the judge at the time the motion to disqualify was made and denied (Jan. 2, 1991 and Jan. 4, 1991). Later, Blackmon reaffirmed his allegations though in slightly different language.

criminal charge was dismissed by Judge Wild on his own motion (see exhibit 1, attached hereto and incorporated by reference)" R-1452, and that Judge Wild set Lowe's trial to commence on Martin Luther King Day, a state holiday, and had announced that no continuances would be allowed despite "the fact that the State has not supplied good addresses for several witnesses." R-1453. Based on these facts, Mr. Lowe swore that he believed that "Judge Wild is prejudiced against me or for the State and that I can not receive a fair trial from him." R-1453.

On January 4, 1991, Judge Wild denied the Motion to Disqualify "as being legally insufficient," R-1467, citing K.H. v. State Department of Health and Rehabilitative Services, 527 So. 2d 230 (Fla. 1st DCA 1988), Dragovich v. State, 492 So. 2d 350 (Fla. 1986), which provide that "adverse judicial rulings do not constitute sufficient grounds to disqualify a trial judge."

Blackmon's affidavit was originally filed in support of a defense motion to secure a court order of protection for the witness Dwayne Blackmon. Before the scheduled hearing date of November 15, 1990, counsel for Mr. Blackmon informed Lowe's public defender, John Unruh, that "Dwayne was not going to testify the same as he previously had talked about this case" so Mr. Unruh withdrew the motion R-143. Although the State Attorney's Office took a statement from Mr. Blackmon regarding the affidavit on November 14, 1990, R-1742-1774, the State Attorney's office did not disclose or provide discovery of Blackmon's November 14 statement until January 14, 1990, after the motion to disqualify the judge had been denied R-143-4,1732.

In the November 14, 1990, statement Blackmon explained how the "in our pocket" allegation was made. Blackmon reaffirmed the allegations and said that Deputy Green claimed to Blackmon to have influence with Judge Wild, that Unruh had asked if the deputies claimed to "have him in our pocket," similar to putting words in Blackmon's mouth, but Blackmon had agreed with words Unruh used ("oh, yeah, uh, huh, you know") because he was angry ("pissed off") with Green R-1755. Even on November 14, Blackmon continued to swear as true that Deputy Green said that he had influence with Judge Wild, but Green had not used the words "in our pocket" R-1761.

Had the allegation about the decision to start the trial on Martin Luther King Jr. Day been the sole factual allegation, denial of the motion may have been correct under K.H. and Dragovich.[22] But the allegations that members of the sheriff's office had the trial judge "in our pocket" sufficed to show that the defendant had "a well grounded fear that he will not receive a fair trial at the hands of the judge." State ex. rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695,697 (1938). The affidavits showed enough personal bias or prejudice to require disqualification. Livingston v. State, 441 So. 2d 1083,1087 (Fla. 1983), Tafero v. State, 403 So. 2d 355,361 (Fla. 1981).

No judge may preside over a cause where his neutrality is shadowed or even questioned. Livingston at 1084. The facts here raise strong doubts about the judge's neutrality and show bias for the state and against the accused. No judge should sit on a case where deputies can acquire favors on misdemeanor charges for the prosecution's witnesses because of their influence with the judge, particularly where that influence is apparent because the trial judge had indeed, on his own motion, dismissed a misdemeanor traffic offense against the state's witness White.

Sworn allegations in a motion for disqualification must be taken as true. Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). Any defendant faced with the situation in this case, remarks from a law enforcement officers that they had influence with the trial judge

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[22] Yet it appears the height of racial insensitivity to insist on starting the trial of a black man on this particular state holiday, the only national or state holiday in honor of a black American.

and a disposition of a state witness' charge indicative that influence with the judge had been exercised, would be placed in reasonable apprehension of not receiving fair treatment. The court's denial of this motion was error in denegration of appellant's constitutional rights under Art. I, Fla. Const. and the Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution.

POINT VII

COUNTY COURT JUDGE WILD LACKED JURISDICTION TO PRESIDE OVER THE INSTANT FELONY PROSECUTION WHERE HIS ASSIGNMENT TO THE CIRCUIT BENCH WAS NOT TEMPORARY.

Under Florida Rule of Judicial Administration 2.050(B)(4), the chief judge of a circuit "may assign any judge to temporary service for which the judge is qualified in any court in the same circuit." Thus county court judges may be assigned circuit court work. Crusoe v. Rowls, 472 So. 2d 1163 (Fla. 1985); State ex rel. Treadwell v. Hall, 274 So. 2d 537 (Fla. 1973). But a chief judge may not contravene the constitutionally established two-tier court system by repeating these temporary assignments so that a county court judge becomes a de facto permanent circuit judge. Payret v. Adams, 500 So. 2d 136 (Fla. 1986).

Important considerations in deciding whether an assignment violates Payret are:

1) Length of the appointment. Rowls suggests that an appointment should last no longer than six months or sixty days, depending on the circumstances. 472 So. 2d at 1165, nn. 2, 3.

2) Whether the county court judge retains county court duties? If the county judge does only circuit court work, then the appointment should last no longer than sixty days. Id.

3) The scope of the assigned judge's circuit court duties. In Rowls, the county judges heard only a limited class of circuit court child support cases, but in Payret, the county court judge heard all circuit court cases in western Palm Beach County.

4) The degree of independence of the assigned judge. In Rowls, the county judges merely enforced child support orders that circuit judges had previously entered, but in Payret, the county judge operated independently of the circuit court judges.

5) The extent to which the assignment usurps circuit court jurisdiction of a particular type of case. In Rowls, the circuit court judges were still active in child support cases, and their jurisdiction was therefore not usurped. 472 So. 2d at 1165.

6) The importance of the circuit court issues that the county court judge hears. In Rowls, the county court judge only enforced previously issued child support orders, but in Payret, the county judge presided over the full range of significant circuit court cases, including felony criminal trials.

At bar, the Chief Judge repeatedly assigned Judge Wild to perform the duties of a circuit court judge. The first of these assignments was effective from July 1, 1990 to December 31, 1990 R-1457; and the second assignment was made from January 1, 1991 to June 30, 1991 R-1458. Thus, by the time Lowe filed his motion to transfer, Judge Wild had been assigned as an "acting" circuit court judge for a year.

Hearing on the motion to transfer the case from him, R-36-50, the judge stated that he philosophically agreed with the defense, but had discussed the matter with Judge Geiger shortly after being

elected county judge. Judge Geiger had said that Judge Wild was ordered to do circuit court work and if he refused, then Judge Wild would end up in the Supreme Court on a contempt hearing R-48.

Since only two successive six month assignments had been made, the state argued that requirements of Payret had not yet been violated. Deputy Clerk Gatt testified that one circuit judge had been called for active military duty and another circuit judge had a heart attack, R-39, so only county judges were assigned to do felony cases in Indian River County since January 1, 1991 R-40. Judge Wild pointed out that he and Judge Balsiger still did county court duties R-42. Judge Wild agreed to correct the record to show that Judge Smith had a stroke in September and had returned to do circuit work in some capacity the week prior R-49-50.

The extent of Judge Wild's circuit court activity is not reflected by the two administrative orders, for contrary to the state's argument, the assignment is not temporary and limited. Appellant asserts that once the second order was entered, Judge Wild's assignment became repetitive and successive in violation of Payret. Subsequent administrative orders continually assign Judge Wild to circuit court duty from the time of Lowe's trial through June 1993 (see Appendix-1-11).

The assignment of Judge Wild as a circuit court judge is therefore one which must be characterized as an effectively permanent one, failing, as it does, each of the six criteria set forth in Rowls and Payret, supra. The assignment failed criterion (1) as, at the time of the motion to transfer, it extended to least twice the six month maximum period. Indeed, where, as here, the

county court judge served full-time on the circuit court bench, Rowls recommends that assignments last for no more than sixty days. Judge Wild's assignment was much more than "temporary" as defined in Rowls.

The assignment also failed criterion (2): Judge Wild performed circuit court work, for well over six months. His circuit court case load was not limited in any way: he heard all felony criminal cases, including capital cases just as any circuit judge assigned to the criminal division would have done. The scope of his duties were thus identical to those of any other circuit judge in the Nineteenth Judicial Circuit so that his assignment therefore also failed criterion (3).

As to criterion (4), Judge Wild acted in effect as an additional full-time circuit court judge, which would, of course, help the permanent judges have more time to devote to their remaining cases. But of course this is not the kind of "help" envisioned by criterion (4), which refers to help a county court judge gives to a circuit judge on cases still being handled by the circuit judge, as, for instance, in Rowls, where the county court judges enforced child support orders already been entered by the circuit court judges. In this sense, Judge Wild did not "help" the circuit judges of his circuit, since the cases he presided over were not part of the caseload of any other circuit judge. Rather, by handling half of all the felony cases in Indian River County (the other half handled by another county judge), he usurped the authority of the circuit court in that category of cases, so that his assignment was also contrary to criterion (5). That military

duty and illness of other circuit judges occurred does not make this a proper assignment. It merely indicates a proper assignment might have been made but neither order specifies any such reason for continuing Judge Wild's appointment beyond a proper temporary assignment of six months.

Finally, the assignment violated criterion (6), since felony prosecutions and particularly capital cases are among those which, carrying such great stakes for the accused, are not merely ministerial or "housekeeping" matters which might comfortably be entrusted to a temporarily assigned county court judge.

At bar, the purportedly temporary assignment of Judge Wild to perform circuit court duties by trying felony cases totally failed to meet the criteria for a true temporary assignment as set forth in Rowls and Payret. Appellant's motion to transfer his cause to a properly elected and designated circuit judge was therefore well-founded and should have been granted.

POINT VIII

THE TRIAL COURT ERRED IN GIVING, OVER DEFENDANT'S OBJECTION, THE STATE'S SPECIAL JURY INSTRUCTION: "INCONSISTENT EXCULPATORY STATEMENTS CAN BE USED TO AFFIRMATIVELY SHOW CONSCIOUS OF GUILT AND UNLAWFUL INTENT."

Special instructions to the jury pointing to particular circumstances in the state's evidence to show consciousness of guilt are impermissible judicial comments on the evidence. In Whitfield v. State, 452 So. 2d 548 (Fla. 1984), the giving of a special instruction, over the defendant's objection, that the defendant's refusal to submit to fingerprinting was a circumstance from which consciousness of guilt could be inferred was found to

be an impermissible judicial comment on evaluating the evidence. Whitfield relied and approved of Jackson v. State, 435 So. 2d 984 (Fla. 4th DCA 1983) (disapproving instruction that defendant's change in appearance could be evidence of the consciousness of guilt). See also, Redford v. State, 477 So. 2d 64 (Fla. 3d DCA 1985) (instruction that the giving of a false name by the accused following his arrest could be evidence of consciousness of guilt).

Whitfield cited long-standing authority warning trial judges to scrupulously avoid comments on the evidence, Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976), and cases directing judges to take great care to not intimate to the jury the court's opinion as to the weight, character or credibility of any evidence adduced. Seward v. State, 59 So. 2d 529 (Fla. 1952); Tanner v. State, 197 So. 2d 842 (Fla. 1st DCA), cert.denied 201 So. 2d 898 (Fla. 1967).

Although Whitfield recognized flight instructions as the sole exception to the rule against commenting on the evidence, Fenelon v. State, 594 So. 2d 292 (Fla. 1992) disapproved flight instructions as well. See also, Wilson v. State, 596 So. 2d 775 (Fla. 1st DCA 1992) (disapproving instruction relating consciousness of guilt to the defendant's refusal to give handwriting exemplars).

At bar, the state submitted a special jury instruction that consciousness of guilt and unlawful intent could be affirmatively shown from inconsistent exculpatory statements R-1030,1802. Over appellant's objections R-1030-1031, the court gave the proposed instruction R-1031,1126. This special instruction was relied upon by the state in its closing argument R-1069.

This instruction is precisely the type of impermissible judicial comment on evidence of the defendant's statements which requires reversal. Simpson v. State, 562 So. 2d 742 (Fla. 1st DCA 1990) (reversible error to instruct that jury could infer consciousness of guilt from the defendant's false statements).

Admittedly, in Johnson v. State, 465 So. 2d 499 (Fla. 1985), this Court approved the giving of a special jury instruction identical to the instruction given in this case. This Court should revisit that decision as inconsistent with Fenelon. Even though inconsistent statements by the defendant are relevant and thus admissible, "there is a great distinction between the admission of such relevant evidence and the court's instruction to the jury of how they should view the evidence. Jackson, supra 435 So. 2d at 985.

This improper instruction violated appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the federal constitution and Article I of the state constitution, if not singly, then in combination with all the other errors in this case, requires reversal.

POINT IX

APPELLANT'S OBJECTIONS TO THE PROSECUTOR'S IMPROPER ARGUMENT IN CLOSING WERE ERRONEOUSLY OVERRULED AND THE DENIAL OF HIS MISTRIAL MOTION ON THESE GROUNDS WERE ALSO ERROR.

The theme of the state's summation to which the prosecutor "continually referred," R-1103, was that the defendant's inconsistent exculpatory statements were a "web of lies" R-1068-1101. Although the prosecutor stopped short of calling the defendant a "liar" or any vituperative name, Glassman v. State, 377 So. 2d 208

(Fla. 3d DCA 1979), Pier 66 Co. v. Poulos, 542 So. 2d 377 (Fla. 4th DCA 1989) (improper to call defendant liar instead of asking the jury to disbelieve defendant's testimony), he was not so careful to guard against improper attacks on the defense counsel and the defense itself:

> Ladies and Gentlemen, the Defendant's web of lies do not be tangled therein. Don't be confused by those lies. Don't allow Mr. Long to argue that the Defendant's lies create reasonable doubt. R-1070.
>
> . . .
>
> ["]Let's blame Lorenzo." None of it makes any sense, ladies and gentlemen, unless the intent to catch you in the web of lies. Confuse you so you can not see the truth and hope that that confusion equals reasonable doubt. R-1097.
>
> . . .
>
> I do not have an opportunity to get up in rebuttal to Mr. Long. Mr. Long may say things here in the closing minutes of this trial that you would like to have answers from me, but I will not have another opportunity to speak with you again. So I have to ask for your good common sense to look at the evidence, to question the things that Mr. Long would say and say what would Mr. Barlow, what would Miss Park, what would the evidence show, what has the evidence shown in this case in response to it. R-1100.
>
> . . .
>
> Do not allow the web of lies to confuse you and create that reasonable doubt. R-1101.

After the prosecutor's argument, the appellant unsuccessfully moved for a mistrial due to Mr. Barlow's attack on defense counsel, telling the jury not to believe the defendant's attorney R-1103-1104.

The remarks disparaging the defense argued by defense counsel

were improper and prejudicial. Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989) (prosecutor's opinion in closing that the defense was a fabrication, improper); Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) (repeatedly characterizing defense counsel arguments as misleading and a smoke screen, harmful even without an objection); Tarrant v. State, 537 So. 2d 150 (Fla. 2d DCA 1989) (improper for state to attack integrity and personal credibility of opposing counsel); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984) (state argument that defense attorney was not being honest with jury is improper); Carter v. State, 356 So. 2d 67 (Fla. 1st DCA 1978) (prejudicial state argument that defense attorney trying to distort the evidence and mislead the jury and "it's criminal the extent to which these people go").

More prejudicial was the prosecutor's misstatement of the law that the jury would have to disbelieve all the state witnesses to acquit the defendant:

> Confuse you so you cannot see the truth and hope that the confusion equals reasonable doubt R-1097.
>
> . . .
>
> [Prosecutor argues Dwayne Blackmon's testimony didn't help defense] R-1097.
>
> . . .
>
> You're gonna have to disbelieve Steve White, Mary Jean Burke, the fingerprint people, the gun people, Mr. Dordelman, who say the Defendant with the gun. You're gonna have to disbelieve the girlfriend --
>
> MR. LONG: Your Honor, I have an objection to make. Make it at the bench.
>
> (Bench conference:)

> MR. LONG: Your Honor, that -- that's an improper argument to argue that they have to disbelieve -- disbelieve the witnesses, all the witnesses because that -- that is not the law. There's -- I can dig out the case law for you if you want me to. It's an improper argument to argue. That -- that is not the issue. The issue is whether or not it's been proved beyond a reasonable doubt. Not that they have to disbelieve all of the State's witnesses. They can -- they can disbelieve -- they can believe him and still find him not guilty. It's totally improper argument and I move for a mistrial.
>
> THE COURT: That'll be denied. Objection is overruled. (End of bench conference.) R-1097-1098.

Argument that the jury must disbelieve all state witnesses in order to acquit is improper because it distorts the state's burden of proof. Rodriquez v. State, 493 So. 2d 1067 (Fla. 3d DCA 1986) (argument that if the jury disbelieved the defendant's testimony then he was guilty of first degree murder was "unquestionably erroneous" but was remedied by the court's curative instruction to the jury), Clewis v. State, 605 So. 2d 974 (Fla. 3d DCA 1992) (reversing conviction due to the state's argument that the jury had to disbelieve the state's witnesses and believe the defendant's testimony to acquit). The court wrote in Clewis:

> The test for reasonable doubt is not which side is more believable, but whether, taking all of the evidence in the case into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt. United States v. Stanfield, 521 F.2d 1122, 1125 (9th Cir. 1975). The argument made by the prosecutor distorts the State's burden of proof by shifting that burden to the defense. See United States v. Reed, 724 F.2d 677, 681 (8th Cir.1984) (prosecutor's comment "that for the jury to acquit Reed '[they] must determine that Mr. Reed is telling the truth and that all [the government witnesses] are lying to you,' involves a distortion of the

> government's burden of proof."); United States v. Vargas, 583 F.2d 380, 387 (7th Cir.1978) ("To tell the jurors that they had to choose between the two stories was error."); People v. Ferguson, 172 Ill.App.3d 1, 12, 122 Ill.Dec. 266, 274, 526 N.E.2d 525, 533 (prosecutor's comment that "to find the Defendant not guilty ... you have to believe he told you the truth ... [a]nd that all of [the State's witnesses] are liars and fools" held to be such a misstatement of law as to constitute fundamental error), appeal denied, 122 Ill.2d 583, 125 Ill.Dec. 226, 530 N.E.2d 254 (Ill.1988).

Clewis v. State, 605 So. 2d at 975.

At bar, the state relied on an impermissible appeal to sympathy for the victim's three year old child to rebut the defendant's argument that Leudtke's eyewitness description of the man leaving the store having a full but scraggly beard was inconsistent with the defendant's (though consistent with Lorenzo's) appearance. The prosecutor argued that seeing the three year old crying over his mother's body caused Mr. Leudtke to panic so he was unreliable when he testified that the black male leaving the store had a beard. Appellant's objection to this argument was overruled R-1078. This was an improper, prohibited appeal for sympathy for the victim's small child. Macias v. State, 447 So. 2d 1020 (Fla. 3d DCA 1984), Johnson v. State, 442 So. 2d 185 (Fla. 1983) (prosecuting attorney should not attempt to elicit sympathy by referring to the victim's family). The inference that Leudtke was so upset at seeing the child over his mother's body as to be unable to recall a description of the man he saw leaving the store is unsupported by the evidence. Prosecutors may not argue facts not in evidence and that includes inferences not supported by the evidence. See Beagles v. State, 273 So. 2d 796 (Fla. 1st DCA 1973)

(sperm in deceased's vagina does not allow inference of rape); Breines v. State, 462 So. 2d 831 (Fla. 4th DCA 1984) (inferring other witnesses could have been brought to the stand to testify). Leudtke testified he was nervous giving a deposition and at trial, R-568, but nowhere does his testimony establish that he "panicked" upon seeing the child.

In evaluating the propriety of the prosecutor's argument, each case must be decided on its own merits within the circumstances pertaining when the questionable argument is made. Collins v. State, 180 So. 2d 340 (Fla. 1965). A circumstance pertaining here is that this prosecutor demonstrated a style characterized by the trial judge as "a brow beating and overbearing manner" R-1037. The prosecutor's domineering personality is apparent elsewhere in the record. During jury selection, one of the prospective jurors criticized the same prosecutor's "forceful personality," SR-VD-832, and later called attention to the prosecutor's manner of "sharp questioning" on the death penalty and accused the prosecutor of attempting to close the minds of the jurors on the issue before they were even questioned by the defense attorney R-857.

Given this prosecutor's overbearing, bossy and dominant deportment in the courtroom, his improper, inflammatory argument requires reversal. These arguments destroyed appellant's right to a fair trial in violation of the Fifth, Eighth and Fourteenth Amendments to the federal constitution and Article I of the state constitution

POINT X

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE WHICH EXCLUDED DANNY BUTTS' SPONTANEOUS STATEMENT TO DONNA BROOKS THAT "TWO PEOPLES" ARGUED WITH AND SHOT HIS MOTHER.

The state's theory was that Mr. Lowe acted alone in attempting to rob and shoot Mrs. Burnell. Debra Brook, a family friend of Mrs. Burnell, had important evidence rebutting the state's theory. Her deposition testimony was: She arrived at the Nu-Pak store just as the fire truck was pulling in and Danny Butts, the victim's 3 year, 3 month old child, called out Debra's name and jumped into her arms when she entered the store. Mrs. Burnell was still alive and breathing and the medics were working on Mrs. Burnell so Mrs. Brooks took Danny outside SR-5-6. Outside the store, Danny was crying for his mommy SR-8. As soon as the medics put Mrs. Burnell into the ambulance to take her to the hospital, Mrs. Brooks told officers on the scene that she was taking Danny to her house.

As she was backing her truck from the store parking lot, Danny spontaneously said "two peoples came in; argued with Mommy and bang, bang, bang, they shot Mommy." SR-8. He did not "per se" say "shot Mommy"; he just made the gun sound SR-9. At the time he made this statement Danny was still upset over his mother SR-10; he kept repeating this same statement over and over and asking how was his mother SR-10.

IMMEDIATELY, after Mrs. Brooks' deposition, the state filed a Motion in Limine #1 seeking to preclude the admission of Danny's statements made to Mrs. Brooks at the scene of the crime R-1650-51. The motion asserted that Danny's statements were not hearsay exceptions under 90.803(1) and 90.803(2) "as the statements are

not spontaneous or excited utterances." R-1650-51.

The state's motion was first heard on January 21 while appellant was still represented by the public defender SR-VD-207-230. The state informed the court the defense would try to introduce the statements as an exception to the hearsay rule through the testimony of Debra Brooks, SR-VD-203, and argued that the statement was not admissible because Danny was incompetent as a witness, that the child was unreliable because he did not know his numbers or colors. The defense countered that the statement fell within the excited utterance or spontaneous statement exception to the hearsay rule and that Danny's statement was exculpatory SR-VD-205.

The state presented the testimony of a family friend, Michelle Burnell, SR-VD-207-217, and Ricky Burnell, the victim's husband, that Danny could not count and did not know his colors on July 3, 1990 R-208,218. Michelle said that Danny couldn't count to 3 and couldn't tell the difference between 1 finger and 2 SR-VD-210. Danny's word for "person" is "peoples," Michelle said SR-VD-211. Mr. Burnell said that "peoples" to Danny meant "everybody," SR-VD-219, and that at his deposition Danny couldn't identify 5 fingers, 3, 4, or 2. Both said that Danny's statement to Ms. Brooks, that two peoples shot his mother, could not be trusted, SR-VD-221,212, and Michelle said it was untrustworthy because he saw his mother getting shot and he was hysterical SR-VD-213. However, Michelle said that Ms. Brooks had no reason to make things up about what Danny said SR-VD-216. Both also said that Danny is sometimes correct in his observations and statements SR-VD-214,221.

Counsel agreed that the court could review the video tape of Danny's deposition, which was admitted into evidence during a break, SR-VD-222, and the court deferred disposition of the motion. The judge said he would look at the video and admitted it as a court exhibit. (The video has been transcribed SR-DB-2-8). The next day the state's motion in limine was discussed again. Counsel agreed that the court could read the deposition of Mrs. Brooks before ruling on the admissibility of the statement R-60-61. The court expressed doubt that the deposition would resolve the matter of whether this was a spontaneous statement or excited utterance because the court did not know when the statement was made in relation to the shooting; defense counsel assured the court that it would as Mrs. Brooks "was there just right--just almost instantaneously." R-62.

Later, when Mr. Long was representing appellant, the court reminded counsel that the motion was still pending. Mr. Long asked if the Public Defender had argued this motion before and the prosecutor assured Mr. Long that a hearing had already been held; Mr. Barlow said: "Yeah, he argued it. We--we had testimony and everything else." R-402. At the court's request, the prosecutor prepared a written order and the state's motion in limine #1 was granted R-1792.

Danny Butts' statement was plainly an excited utterance and admissible under Section 90.803(2), Florida Statutes:

> (2) EXCITED UTTERANCE.- A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Danny saw the murder of his mother, SR-4, which was sufficient to cause nervous excitement in a child. Mrs. Brooks arrived on the scene shortly after the shooting, at the same time that the fire rescue personnel arrived and Danny's statements to Mrs. Brooks were made shortly thereafter, while he was still under the stress of excitement caused by the event. Mrs. Brooks said that he was still upset over his mother at the time he made the statement SR-10. These facts establish all that is necessary to show the admissibility of Danny's statements under Section 90.803(2). State v. Jano, 524 So. 2d 660 (Fla. 1988) ("The essential elements necessary to fall within the excited utterance exception are that (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent and (3) the statement must be made while the person is under the stress of excitement caused by the event.").

In State v. Ochoa 576 So. 2d 854 (Fla. 3rd DCA 1991), the court observed that "[t]here is a distinction between determining that a child declarant's statements are reliable for purposes of admissibility under a hearsay exception, and determining that a child is competent to testify in court." Id. at 857. Danny did not have to be competent as a witness for his excited utterances to Mrs. Brooks be admissible as a hearsay exception. A hearsay exception may apply even where the declarant is incompetent to testify, Ochoa, State v. Jano, State v. Bauer, 146 Ariz. 134, 704 P.2d 264 (Ariz.App.1985), and even where the declarant is of tender years, Lancaster v. People, 200 Colo. 448, 615 P.2d 720 (1980);

People v. Miller, 58 Ill.App.3d 156, 15 Ill.Dec. 605, 373 N.E.2d 1077 (1978); Bishop v. State, 581 P.2d 45 (Okl. Cr.1978).

Even against a confrontation clause objection to a hearsay exception (which is not available to the state), the Court has said: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Idaho v. Wright, 497 U.S. 805,815 (1990).

The granting of the state's motion in limine was erroneous and preserved the error for appellate review without the necessity of appellant's attempting to elicit such testimony from Debra Brooks at trial. Bender v. State, 472 So. 2d 1370,1373 (Fla. 3rd DCA 1985).

How many people were involved in the shooting of Mrs. Burnell is of critical importance to determine appellant's degree of culpability for this offense and the appropriate penalty. The prosecution's securing suppression of this favorable evidence on an erroneous evidentiary principle denied appellant's rights to produce favorable evidence at trial and on penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, § 9, 16 and 17 of the Florida Constitution. Chaney v. Brown, 730 F.2d 1334 (10th Cir.1984) (Death sentence vacated where state did not disclose exculpatory evidence on penalty). Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (Error to exclude exculpatory hearsay from penalty phase where state used same witness at co-defendant's trial). Reversal for a new trial or at least a new penalty phase is required.

POINT XI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUESTED INSTRUCTION THAT THE PRESENCE OF THE CHILD COULD NOT BE CONSIDERED IN THE PENALTY RECOMMENDATION.

The court denied this proposed defense penalty instruction:

> Although the evidence you have heard at this trial included testimony that a child was present at the scene of the crime, I instruct you that the presence of a child at the scene of the crime, even if the inference can be made that the child witnessed the crime itself, is not a legal aggravating circumstance. You are prohibited from giving this matter any weight towards a decision to recommend a death sentence. (R-1824,1239)

The court erred. The instruction correctly set out law not covered by the standard instructions. Cf. Castro v. State, 547 So. 2d 111 (Fla. 1989) (error to deny penalty instruction not covered by standard instructions).

The error was prejudicial given the state's inflammatory references, in both opening statement and closing at the guilty phase, to the child's presence: In opening, defense objections and mistrial motion were denied when the state argued that the child was crying and Leudtke picked him up to comfort him and assure him his mother would be alright R-430. In summation it went further and, over defense objection R-1078, used the emotional argument that the sight of the child kneeling over his mother's body crying so overwhelmed Leudtke that he could not accurately describe the black male he saw leave the store.

These arguments and the evidence of the boy's presence called for the jury's reaction at the penalty phase and consideration of sympathy for the child who saw his mother murdered. The only

aggravating circumstance to which this evidence could even arguably pertain is the "especially heinous, atrocious, or cruel" circumstance. But, this Court has repeatedly struck the circumstance even where children witnessed the murder. Wright v. State, 586 So. 2d 1024 (Fla.1991) (shot mother in front of children), Santos v. State, 591 So. 2d 160 (Fla. 1991) (defendant shot mother and her 22 month old child), Porter v. State, 564 So. 2d 1060 (Fla. 1990) (child awoke to gunshots and saw defendant with a gun standing over mother).

Who witnessed a murder is not relevant to any aggravating circumstance, but the jury could not know that without special instruction disabusing it of any thought that Danny's presence contributed to the aggravated nature of the murder of his mother. Refusal to give the instruction violated the right to fair penalty proceedings under the Fifth, Eighth and Fourteenth Amendments to the federal constitution and Article I of the state constitution.

POINT XII

IT WAS ERROR TO INSTRUCT ON THE HEINOUSNESS AND COLDNESS AGGRAVATING CIRCUMSTANCES WHEN THE EVIDENCE DID NOT SUPPORT THEM.

Although the evidence did not support the heinousness and coldness circumstances, and the trial court did not find them, it denied defense objections to instruction on these circumstances, R-1243-1251,1303,1305, accepting the state's incorrect premise that the heinousness circumstance applied since Mrs. Burnell suffered a lingering, painful death. Such factors do not support the aggravator. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

It is error to instruct on circumstances not supported by the

evidence. Elledge v. State, 613 So. 2d 434 (Fla. 1993), Johnson v. Singletary, 612 So.2d 575 (Fla. 1993) (Barkett, C.J., concurring), Fla. R. Crim. P. 3.390(a).[23] Instruction on a circumstance not supported by the facts requires reversal where the state's argument has so dwelt on the circumstance that the jury could have been mislead into misapplying it. Lawrence v. State, 18 Fla. L. Weekly S147 (Fla. March 11, 1993), Archer v. State, 613 So. 2d 446 (Fla. 1993). See also Padilla v. State, 18 Fla. L. Weekly S181 (Fla. March 25, 1993). Compare Occhione v. Singletary, 18 Fla. L. Weekly S235 (Fla. April 8, 1993) (instruction on factually insupportable circumstances harmless). The giving of the improper instructions here violated Mr. Lowe's rights under Art. I of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The record shows prejudice requiring reversal. While the court did not find the circumstances, it relied on them indirectly by specifically giving great weight to the penalty verdict R-1852. See Espinosa v. State, 112 S. Ct. 2926 (1992). The bulk of the state's penalty argument (it hardly mentioned the two circumstances found by the court) exhorted the jury to recommend death based on improper and inflammatory considerations regarding these

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[23]

> **(a) Subject of Instructions.** The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

(Emphasis added.)

aggravators. It mislead the jury by advancing legal theories disapproved by this Court. As to the coldness circumstance the argument was that Lowe fired three shots at someone he knew, that this was "a very, very brutal murder," an atrocious killing done in cold blood R-1275. The state repeatedly suggested motives of witness elimination were responsible for the murder and that the murder was therefore brutal and atrocious R-1275,1279. The pain Mrs. Burnell must have suffered was held up to the jury, as was her knowledge that she was mortally wounded and dying. The state argued that such evidence made the murder heinous, atrocious or cruel R-1275-1278. Case law refutes these arguments. See Teffeteller as to heinousness and Hamblen v. State, 527 So. 2d 800 (Fla. 1988), and Rogers v. State, 511 So. 2d 526 (Fla. 1986) as to coldness.

Given the weakness of the remaining aggravating circumstances, a new penalty phase before a new jury is required.

POINT XIII

THE STATE'S PENALTY ARGUMENT WAS SO IMPROPER AND RELIED SO HEAVILY ON NON-STATUTORY AGGRAVATING CIRCUMSTANCES AND CHARACTER ATTACKS ON APPELLANT THAT A NEW SENTENCING MUST BE HELD.

Mr. Barlow's penalty summation to the jury was short and toxic R-1273-1283. Hardly mentioning the two valid aggravating circumstances, he dwelt on improper sentencing considerations:

1) He attacked Mr. Lowe's character R-1280;

> A person that robs at and puts an object to a man's throat and threatens to kill at seventeen and then who robs at twenty with a gun and kills in the manner that he killed in is not deserving in a civilized society to live. That is a man that has become more

> dangerous, more evil, more wicked by his daily acts" R-1280.

It is improper to use derogatory terms. Glassman v. State, 377 So. 2d 208 (Fla. 3d DCA 1979); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984); Green v. State, 427 So. 2d 1036 (Fla. 3d DCA 1983).

2) He made inferences and innuendoes contrary to the facts:

> "Now you also heard that the Defendant was seventeen years old when he committed that act. That's pretty young. But what you heard, ladies and gentlemen, from other testimony today, from the lady from Indian River Correctional Institute was that she deals with young Defendants, ages fourteen through twenty. Almost all the Defendants she deals with violent criminals start at a young age. R-1275.

3) Argument that Mr. Lowe learned from his prior prison term only to kill eyewitnesses dominated Mr. Barlow's summation:

> In 1987, the Defendant committed a robbery of Mr. Crosby....Because the Defendant let Mr. Crosby live in that case Mr. Crosby lived on to be a witness, to call the police at 911...Mr. Crosby was alive to testify, to identify the Defendant, to be a witness and ultimately to the conviction of the Defendant for which he went to prison for in that robbery.
>
> An he went to prison, ladies and gentlemen, for that robbery. You saw the sentence that he received. Four years in prison, two years community control, six year total sentence. He did a year. A year. Now he gets out and did that year in prison out of that six year sentence teach him not to commit another crime? No, ladies and gentlemen, I submit to you it taught him one very--I won't say it's a valuable lesson, it's an unfortunate lesson. The next time you commit a robbery don't leave an eyewitness alive that can testify, come before a Court, call the police, identify you and put you in prison. And in this case it wasn't a knife or a sharp instrument. Now he had learned to use the deadly instrument of a gun, a pistol. And this time he learned don't just pretend you're going to cut their throat,

> make sure you shoot them, shoot them where they will die, the heart and the head R-1278-79.
>
> ....
>
> He has learned nothing by the prior punishment. Learned nothing besides how to commit the robbery in a more serious manner by killing and taking the life of another so that person won't be a witness like Mr. Crosby was. And Mr. Crosby continues to be years later. R-1280.

That the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. E.g. Perry v. State, 522 So. 2d 817,820 (Fla. 1988). While not even requesting jury instruction on the avoid arrest circumstance, the state indulged in inflammatory speculation on Mr. Lowe's motives of witness elimination and evil acts learned in prison, which were not in evidence. See Jackson v. State, 522 So. 2d 802 (Fla. 1988) (improper to inject emotion and fear into deliberations or urge factors outside the scope of the deliberations).

4) He repeatedly urged that appellant's age was an aggravating, rather than a mitigating, circumstance, R-1280, and argued appellant's short prior prison term and early release as aggravation R-1279. The state may not urge consideration of non-statutory aggravating circumstances. Grossman v. State, 525 So. 2d 833,842 (Fla. 1988), Miller v. State, 373 So. 2d 882,885 (Fla. 1979), Elledge v. State, 346 So. 2d 998,1002 (Fla. 1977).

5) He disparaged the law that the jury must weigh aggravating and mitigation circumstances, urged disregard of mitigation regarding Mr. Lowe's life history and accused the defense of misleading the jury by introducing mitigation. He pressed the jury

to break its oath and ignore legally valid mitigation:

> The Defense will certainly argue, ladies and gentlemen, as they brought you five, six witnesses from Gator Lumber that Mr. Lowe is a good worker, a responsible individual who would come to work on time, do his work, take responsibility and do the job. ...Why? I submit to you in the hope that you will not remember the facts of this brutal murder. You will not consider the facts of this brutal murder ..I stipulate he was a good worker. A very nice worker at work. But that is not the issue before you. The issue before you is that facts and circumstances of this case is it appropriate that he be punished with the death penalty for the brutal murder of Miss Burnell. R-1280-1281.

The state may not mislead the jury on death penalty law. Garron v. State, 528 So. 2d 353,359 (Fla. 1988) (argument that the death penalty is proper if aggravating circumstances outnumber mitigating circumstances). The prosecutor should not misstate the law, Harvey v. State, 448 So. 2d 578 (Fla. 5th DCA 1984), or disparage legal principles, Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989) (denigration of entrapment defense), Norwitzke v. State, 572 So. 2d 1346 (Fla. 1990) (disparaging insanity defense), Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987) (same). Refusal to consider valid mitigating evidence of a defendant's background violates the eighth amendment. E.g. Hitchcock v. Dugger, 481 U.S. 393 (1987).

6) Worst of all were remarks that appellant was incorrigible so that he would have to be put to death for his evil acts:

> You have to look at his track record for that. Past robbery and this robbery. The punishment did not change the leopard. Did not change the spots on the leopard and that, ladies and gentlemen, is the only way for our punishment in our society, the death penalty can do--can stop that. Can teach him appropriately. If you commit a robbery you're punished. If you don't learn, you kill, commit a robbery then

you should also die for your evil acts. R-1281.

It is highly improper to tell the jury during the penalty phase that it is their sworn duty to come back with a determination that the defendant should die for his actions. Garron v. State, supra at 359 (Fla. 1988), Teffeteller v. State, supra at 845 (argument implied that unless the jury recommended death, the defendant would be released from prison to kill again), Freeman v. State 563 So. 2d 73,76 (Fla. 1976) (rhetorical question, "how many times is this going to happen to this defendant," an impermissible implication that he would likely commit future crimes). References to Mr. Lowe's prior early release, and remarks that prior punishment had not changed his criminal ways communicated that a death recommendation was needed to "stop" Mr. Lowe lest he be released to kill again.

While the defense did not object to these arguments at penalty phase, it had repeatedly objected to Mr. Barlow's similar arguments during the guilt phase and the trial court summarily overruled the objections, so that further objection would have been futile: one need not renew objections that the court has already rejected. E.g. Simpson v. State, 418 So. 2d 984 (Fla. 1982), Holton v. State, 573 So. 2d 284,288 (Fla. 1990).

Even were the matter not preserved, the extent and pungency of the prosecutor's misconduct would require reversal. See Pait v. State, 112 So. 2d 380,385 (Fla. 1959). This Court should adopt the in favorem vitae doctrine in capital cases, considering errors not preserved for review. State v. Riddle, 353 S.E. 2d 138 (1987), State v. Patterson, 295 S.E. 2d 264 (1982).

It is "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Zant v. Stephens, 462 U.S. 862 (1983); Gardner v. Florida, 430 U.S. 349,358 (1977). The death recommendation was the product of a fundamental due process error in violation of Mr. Lowe's rights under Art. I, §§ 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A new and fair trial on the issue of penalty must now be held.

POINT XIV

THE COURT GAVE EXCESSIVE WEIGHT TO THE PRIOR VIOLENT FELONY BY CONSIDERATION OF USE OF A WEAPON WHEN LOWE WAS NOT CONVICTED OF ARMED ROBBERY AND OF THE BREVITY OF THE SENTENCE FOR THAT ROBBERY.

The trial court found two aggravating circumstances (prior conviction of a violent felony and that the murder was committed in the course of an attempted robbery), and its order detailed the evidence on which it relied in applying these aggravators. As to the prior violent felony, the court said:

> The Defendant was previously convicted ...of a felony involving the use of threat or violence to the person. The evidence established that the Defendant previously committed and was convicted of a Robbery in Brevard County. The facts showed that the Defendant entered the victim's van while it was vacant and hid in the van until the victim returned. The Defendant remained hidden in the van as the victim drove eight miles to the victim's home. At that point the Defendant put a weapon to the throat of the victim and demanded money. The Defendant then let the victim out and fled in the victim's van. This

> crime was committed on December 21, 1987. The Defendant was sentenced to serve 4 years incarceration. R-1853.

In weighing the prior violent felony, the court erroneously weighed it as an armed robbery when Mr. Lowe had been found guilty only of unarmed robbery. This was error: the court may not consider in aggravation accusations and arrests for which the defendant had not been convicted. Odom v. State, 403 So. 2d 936 (Fla. 1981), Dougan v. State, 470 So. 2d 697 (Fla. 1985). The improper weight given the circumstance violated the Fifth, Eighth, and Fourteenth Amendments to the federal constitution and Art. I, §§ 2, 9, 16, 17, 21, and 22 of the state constitution. Johnson v. Mississippi, 486 U.S. 578 (1988), Burr v. State, 576 So. 2d 278 (Fla. 1991).

Also, the court pointed to the facts that the prior robbery occurred on December 21, 1987, and that Mr. Lowe was sentenced to 4 years imprisonment. These facts do not support the aggravator of prior violent felony. They refer to the prosecutor's prejudicial argument that Mr. Lowe was released early from his prior conviction and should have been incarcerated at the time Mrs. Burnell was murdered R-1279. It is improper to consider as an aggravating circumstance that the defendant was not under sentence of imprisonment at the time of the murder.

Here the findings concerning the prior violent felony aggravator are not specifically linked to this statutory aggravating circumstance and go beyond the proper use of the circumstance in the sentencing findings. Cf. Trawick v. State, 473 So. 2d 1235 (Fla. 1985). The sentence of death must be reversed.

POINT XV

THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTION TO OFFICER SCULLY'S TESTIMONY CONCERNING LOWE'S FLEEING A POLICE OFFICER AND THE CHASE WHICH PRECEDED LOWE'S ARREST FOR THE PRIOR ROBBERY.

Accusations and arrests for which the defendant had not been convicted may not be considered as aggravation. Odom v. State, supra, Dougan v. State, supra. Details of the prior felony conviction for violence are admissible in the penalty phase. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). However, here Officer Scully testified over defense objection, R-1163, to the details of Lowe's arrest for the prior violent felony of robbery, which included details of additional crimes of which Lowe was not convicted R-1164. Scully said that shortly after hearing a BOLO on the Crosby robbery he chased Lowe, who fled in Crosby's van into a subdivision, across a golf course until he crashed into a chain link fence and a tree in "another victim's backyard" where Scully arrested him R-1164-65.

This evidence was irrelevant and unrelated to the facts of the prior conviction for robbery. Postell v. State, 398 So. 2d 851,855 fn.7 (Fla. 3d DCA 1981) (Arrest is not an element of robbery and proof concerning the facts of the arrest and the circumstances of it are normally irrelevant). The testimony that Lowe eluded a police officer and damaged property of "another victim" was only evidence of crimes for which Lowe was never convicted and its sole purpose was to show Lowe's propensity for crime. Its admission denied Lowe a fair penalty proceeding in violation of Art. I, §§ 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XVI

THE COURT FAILED INQUIRE INTO THE FAILURE OF DR. RIFKIN AND CINDY SCHRADER TO TESTIFY AS DEFENSE WITNESSES AT PENALTY PHASE AND WHETHER MR. LOWE WAIVED THAT MITIGATING EVIDENCE.

The defense intended to call as mitigation witnesses Dr. Rifkin and Cathy Schrader[24] R-1631,1168. Defense counsel sought an early lunch recess to bring in Dr. Rifkin, saying the doctor "kind of rebelling" R-1229, but refused the court's offer to have a bailiff take Dr. Rifkin into custody saying, "it's not that kind of problem." R-1229. Dr. Rifkin never appeared to testify.

Ms. Schrader was familiar with Mr. Lowe's relationship with Patty White and knew him away from his job. (The state had cross-examined Mr. Lowe's co-workers, and later minimized their testimony during closing argument on the basis that they did not know how Mr. Lowe acted away from work R-1195,1210,1236,1282.) Although called by the bailiff, R-1236, Ms. Schrader did not testify.

The foregoing alerted the court that the witnesses had mitigation to offer. Aware that mitigation was thus being waived, it erred by not inquiring into the matter and determining whether the defendant personally waived presentation of the mitigating evidence when they did not appear to testify and that the waiver was informed and voluntary. Koon v. State, 18 Fla. L. Weekly S201 (Fla March 25, 1993). The failure to inquire resulted in loss of valuable mitigating evidence in violation of Art. I, §§ 2, 9, 16,

[24] The name is variously spelled in the record.

17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XVII

THE TRIAL COURT FAILED TO CONSIDER OR WEIGH MITIGATION.

"We have held that in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, supra at 394 (internal quotation marks omitted). "When addressing mitigating circumstances, the 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 nonstatutory factors, it is truly of a mitigating nature. The court 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 ...." Campbell v. State, 571 So. 2d 415,419 (Fla. 1990) (footnotes and citations omitted). "Moreover, ... the trial court is under an obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory." Cheshire v. State, 568 So. 2d 908,912 (Fla. 1990). "Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059,1062 (Fla. 1990). "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase." Wickham v. State, 593 So. 2d 191,194 (Fla. 1991).

"[E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process.... The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So. 2d 490,491 (Fla. 1992).

At bar, the trial court failed to give any mitigating weight to any of the mitigation that Mr. Lowe presented at the penalty phase R-1855 (Appendix-12-17). Although the state stipulated that Mr. Lowe's work habits were wonderful and that he was a wonderful employee at Gator Lumber, R-1232-3,1281, and the court found that such evidence was presented, R-1853-53, yet, the court refused to consider this (as well as any other mitigating circumstance) as having any weigh whatsoever in mitigation. Not only was this mitigation stipulated to by the state, its existence was proved by overwhelming evidence; at Gator Lumber, Mr. Lowe carried his responsibilities well, was a hard worker, very congenial, and friendly R-1180,1189,1200,1205,1227,1234; Mr. Lowe's responsibility increased from his original position as yard worker to assistant director of the yard R-1200, he controlled runs R-1206, and was placed in charge of the yard on several occasions R-1189,1228. This is valid non-statutory mitigation. Smalley v. State, 546 So. 2d 720 (Fla. 1990) (willing worker and good employee), Thompson v. State, 565 So. 2d 1311 (Fla. 1990) (maintained employment), Dolinsky v. State, 576 So. 2d 271 (Fla. 1991) (hard worker).

Further, the trial court gave no mitigating weight to unrebutted evidence that Mr. Lowe adapted well to the structured

environment of prison, was a good inmate at the jail pending trial, acquired his G.E.D. in prison, worked as a teacher's aide there, R-1177-1180, and that he functioned well in the less structured environment of a half-way house (where he lived voluntarily), submitted to authority of the house, and was engaged in serious Bible study there R-1180-83. Lowe left the house only because it lost its lease and had to close R-1181. This is valid non-statutory mitigation. McCrae v. State, 582 So. 2d 613 (Fla. 1991) (good in prison), Songer v. State, 544 So. 2d 1010 (Fla. 1989), Young v. State, 579 So. 2d 721 (Fla. 1991) (ability to conform to prison rules and regulations), Eddings v. Oklahoma, 455 U.S. 104 (1982).

The court misconstrued the mitigation concerning Lowe's home life that was presented. The evidence was unrebutted that Lowe's family was not close knit or loving R-1214; Lowe's father, Charlie Lowe, testifying as a state witness, did not rebut this evidence. Instead he insisted that he had attempted to instill moral values in his son, that he was a strict disciplinarian and brought him up with rules, R-1264,1271, but never did Charlie Lowe say he did so with love. The evidence that Lowe's father never gave Lowe positive reinforcement, was never pleased with anything that Rodney ever did and that the father never hugged Rodney or showed him affection, R-1217, was more than confirmed when the father testified for the state. What greater confirmation of a lack of love could there possibly be than that a father testify for the state to win a death sentence against his son?

The court also failed to consider mitigating evidence regarding Charlie Lowe's conversion to the Jehovah Witness faith when his son Rodney was an adolescence or teenager R-1271,1266.[25] The evidence established this created an enormous upheaval in Rodney's life; he was unhappy as a teenager, was forced to attend frequent Jehovah Witness' meetings and accompany his parents door to door distributing Jehovah Witness literature, was not allowed to date, listen to music in the house or participate in other normal activities for a teenager R-1215-17,1269. Although Charlie Lowe testified "in rebuttal" for the state, his testimony rebutted nothing and went only to prove non-statutory aggravation, that the father gave Rodney a fine upbringing, that Rodney went against it and was therefore a bad child R-1264-65.

The failure of the court to give any credit in mitigation to any of this evidence violated Mr. Lowe's rights to a fair penalty proceeding in violation of Art. I of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United State's Constitution.

---

[25] Charlie Lowe testified he converted to the Jehovah Witness faith 9 years previous, R-1266, at which time Rodney would have been 11. Later, in his testimony, Charlie Lowe said that he and his wife separated when Rodney was 14 or 15 and after they were reunited he experienced his conversion R-1271.

CONCLUSION

WHEREFORE, appellant prays this Honorable Court will reverse his conviction and sentence and remand for a new and fair trial.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

Margaret Good
MARGARET GOOD
Assistant Public Defender
Attorney for Rodney Lowe
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 192356

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 14th day of MAY, 1993.

Margaret Good
MARGARET GOOD
Assistant Public Defender

A P P E N D I X

INDEX TO APPENDIX

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THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

INDIAN RIVER COUNTY

WHEREAS, it has been officially made know to me that it is necessary to the dispatch of business in the Circuit Court in and for Indian River County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, DWIGHT L. GEIGER, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Joe A. Wild, a Judge of the County Court in and for Indian River County, Florida, to the Circuit Court in and for Indian River County, Florida, beginning July 1, 1990 through July 31, 1990 to hear, conduct, try and determine all matters presented to him in the civil division concerning HRS filings and all matters in the Juvenile Division. The said Joe A. Wild, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

civil

All prior assignment Orders concerning Judge Joe A. Wild are hereby revoked effective July 1, 1990.

DONE AND ORDERED at Vero Beach, Indian River County, Florida, this 15th day of June, 1990.

DWIGHT L. GEIGER, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
JEFFREY K. BARTON
Clerk, Nineteenth Judicial Circuit
County of Indian River, Florida

BY: J K Barton D.C.

A-1

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

INDIAN RIVER COUNTY

RECORD VERIFIED
JEFFREY K. BARTON
CLERK CIRCUIT COURT
INDIAN RIVER CO., FLA

672738

90 DEC 27 AM 8:37

WHEREAS, it has been officially made know to me that it is necessary to the dispatch of business in the Circuit Court in and for Indian River County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Joe A. Wild, a Judge of the County Court in and for Indian River County, Florida, to the Circuit Court in and for Indian River County, Florida, beginning January 1, 1991 through June 30, 1991 to hear, conduct, try and determine 1/2 of all filings in the criminal division. The said Joe A. Wild, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

All prior assignment Orders concerning Judge Joe A. Wild are hereby revoked effective January 1, 1991.

DONE AND ORDERED at Fort Pierce, St. Lucie County, Florida, this 19TH day of December, 1990.

William L. Hendry
WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
JEFFREY K. BARTON
Clerk, Nineteenth Judicial Circuit
County of Indian River, Florida

BY: Janice A Miller D.C.

STATE OF FLORIDA, INDIAN RIVER COUNTY
THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL.
J.K. BARTON, CLERK
BY: [illegible]
DATE: 4-29-93

OR0883PG1087

A-2

DAVID B. DOUGLASS
COURT ADMINISTRATOR
THOMAS H. WILLIS
DEPUTY COURT ADMINISTRATOR

State of Florida
Nineteenth Judicial Circuit
June 5, 1991

ROOM 401 COUNTY COURTHOUSE
221 SO. INDIAN RIVER DRIVE
FORT PIERCE, FLORIDA 34950
PHONE: (407) 468-1472

M E M O R A N D U M 91-31-A

TO: COUNTY JUDGES, INDIAN RIVER COUNTY, NINETEENTH JUDICIAL CIRCUIT

FROM: DAVID B. DOUGLASS, COURT ADMINISTRATOR

RE: SECOND SIX MONTHS, 1991 CIRCUIT COURT ASSIGNMENTS

Attached is a copy of the Order beginning July 1, 1991 through December 31, 1991 concerning Circuit Court Assignments.

The original of this Order has been sent to the Clerk of the Circuit Court for recording by copy of this letter.

DBD:sif
enclosure

cc: Circuit Judges, assigned to Indian River County
Clerk of the Circuit Court, Indian River County
State Attorney, Indian River County
Public Defender, Indian River County
Sheriff's Office, Indian River County

STATE OF FLORIDA
INDIAN RIVER COUNTY
THIS IS TO CERTIFY THAT
THIS IS A TRUE AND CORRECT
COPY OF THE ORIGINAL.
J.K. BARTON, CLERK
BY _____
Deputy Clerk
DATE 4-29-93

A-3

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

INDIAN RIVER COUNTY

WHEREAS, it has been officially made know to me that it is necessary to the dispatch of business in the Circuit Court in and for Indian River County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Joe A. Wild, a Judge of the County Court in and for Indian River County, Florida, to the Circuit Court in and for Indian River County, Florida, beginning July 1, 1991 through December 31, 1991 to hear, conduct, try and determine 1/2 of all filings in the criminal division. The said Joe A. Wild, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

All prior assignment Orders concerning Judge Joe A. Wild are hereby revoked effective July 1, 1991.

DONE AND ORDERED at Fort Pierce, St. Lucie County, Florida, this 4TH day of ~~May~~ JUNE, 1991.

William L. Hendry

WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
JEFFREY K. BARTON
Clerk, Nineteenth Judicial Circuit
County of Indian River, Florida

BY: _____ D.C.

001

AMENDED

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

INDIAN RIVER COUNTY

RECORD VERIFIED
JEFFREY K. BARTON
CLERK CIRCUIT COURT
INDIAN RIVER CO., FLA

721031

92 JAN -9 AM 10:29

ORO920PG1557

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business in the Circuit Court in and for Indian River County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Joe A. Wild, a Judge of the County Court in and for Indian River County, Florida, to the Circuit Court in and for Indian River County, Florida, beginning January 1, 1992 through June 30, 1992 to hear, conduct, try and determine 1/2 of all filings in the criminal division and to hear Detention and Shelter Care Hearings as provided in Administrative Order 90-5. The said Joe A. Wild, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

- civil -

FILED FOR RECORD
CIRCUIT/COUNTY COURT
92 JAN -8 PM 1:35
JEFFREY K. BARTON
CLERK OF CIRCUIT COURT
INDIAN RIVER CO., FLA.
BY _____

STATE OF FLORIDA, INDIAN RIVER COUNTY
THIS IS TO CERTIFY THAT THIS IS A TRUE AND
CORRECT COPY OF THE ORIGINAL.
J.K. BARTON, CLERK
BY: _____
DATE: 4-29-93

A-6

All prior assignment Orders concerning Judge Joe A. Wild are hereby revoked effective January 1, 1992.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 6th day of January, 1992, nunc pro tunc January 1, 1992.

William L. Hendry
WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
JEFFREY K. BARTON
Clerk, Nineteenth Judicial Circuit
County of Indian River, Florida

BY: Elaine A Miller D.C.

OR0920PG1558

A-7

RECORD VERIFIED
JEFFREY K. BARTON
CLERK CIRCUIT COURT
INDIAN RIVER CO., FLA

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

INDIAN RIVER COUNTY

FILED FOR RECORD
CIRCUIT/COUNTY COURT
92 JUN 11 AM 11:36
JEFFREY K. BARTON
CLERK OF CIRCUIT COURT
INDIAN RIVER CO., FLA.
BY _____ D.C.

742433

92 JUN 15 PM 2:07

ORO937PG1088

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business in the Circuit Court in and for Indian River County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Joe A. Wild, a Judge of the County Court in and for Indian River County, Florida, to the Circuit Court in and for Indian River County, Florida, beginning July 1, 1992 through December 31, 1992 to hear, conduct, try and determine 1/2 of all filings in the criminal division and to hear Detention and Shelter Care Hearings as provided in Administrative Order 90-5. The said Joe A. Wild, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

STATE OF FLORIDA, INDIAN RIVER COUNTY
THIS IS TO CERTIFY THAT THIS IS A TRUE AND
CORRECT COPY OF THE ORIGINAL.
J.K. BARTON, CLERK
BY: _____
DATE: 4-29-93

A-8

All prior assignment Orders concerning Judge Joe A. Wild are hereby revoked effective July 1, 1992.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 10 day of June, 1992.

William L. Hendry
WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
JEFFREY K. BARTON
Clerk, Nineteenth Judicial Circuit
County of Indian River, Florida

BY Barbara Mae Williams D.C.

A-9

THE CIRCUIT COURT OF FLORIDA

NINETEENTH JUDICIAL CIRCUIT

INDIAN RIVER COUNTY

WHEREAS, it has been officially made known to me that it is necessary to the dispatch of business in the Circuit Court in and for Indian River County, Florida, that an additional Judge be assigned,

NOW, THEREFORE, I, WILLIAM L. HENDRY, pursuant to authority vested in me as Chief Judge of the Nineteenth Judicial Circuit of Florida, under Section 2 (b) and (d), Article V of the Constitution of Florida and Rule 2.050(b)(3)(4) Rules of Judicial Administration, do hereby assign and designate the Honorable Joe A. Wild, a Judge of the County Court in and for Indian River County, Florida, to the Circuit Court in and for Indian River County, Florida, beginning January 1, 1993 through June 30, 1993 to hear, conduct, try and determine 1/2 of all filings in the Circuit Criminal division and to hear Detention and Shelter Care Hearings as provided in Administrative Order 90-5. All Ex Parte petitions for Injunction for Protection in the absence of the assigned judge and at First Appearance Hearings as provided in Administrative Order 92-1. The said Joe A. Wild, under and by virtue of the authority hereof, is hereby vested with all and singular the powers and prerogatives conferred by the Constitution and the Laws of the State of Florida upon a Judge of the Court to which he is hereby assigned as to the proceedings set forth.

- Civil -

A-10

All prior assignment Orders concerning Judge Joe A. Wild are hereby revoked effective January 1, 1993.

DONE AND ORDERED at Okeechobee, Okeechobee County, Florida, this 14th day of September, 1992.

William L. Hendry
WILLIAM L. HENDRY, Chief Judge
Nineteenth Judicial Circuit

ATTEST:
JEFFREY K. BARTON
Clerk, Nineteenth Judicial Circuit
County of Indian River, Florida

BY: Barbara Ann Williams D.C.

OR0946PG2076

A-11

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY
STATE OF FLORIDA

CASE NO. 90-658 CF

STATE OF FLORIDA,

Plaintiff,

vs.

RODNEY TYRONE LOWE,

Defendant.
_____/

SENTENCING ORDER

On April 12, 1991 you, Rodney Tyrone Lowe, were found guilty by a jury comprised of the residents of Indian River County of the First Degree Murder of Donna Burnell and the Attempted Robbery with a Firearm of the Nu-Pack Convenience Store located in Sebastian, Florida. The offenses occurred on July 3, 1990.

The penalty phase of the trial was conducted on April 22, 1991 in front of the same trial jury. At the conclusion of those proceedings the jurors recommended to this Court, by a vote of 9-3, that this Court sentence you to death for the First Degree Murder of Donna Burnell. The jury was not required to give any recommendation as to the charge in Count II.

As to Count II of the Indictment, the charge of Attempted Robbery with a Firearm, I find that a sentence outside the guidelines is legally justified. The reasons for departure are as follows:

1. The unscored conviction for First Degree Murder.
2. The entire unscored juvenile record of the Defendant.
3. The escalating pattern of criminal conduct as evidenced by

the juvenile offenses to the Robbery in Brevard County to this offense.

Mr. Lowe is sentenced to 15 years in the custody of the Department of Corrections to run consecutive to the sentence to be imposed pursuant to Count I of the Indictment.

As to Count I of the Indictment the Court must make its own evaluation of the facts and circumstances of the case in conjunction with giving great weight to the recommendation of the jury.

I find that the following aggravating circumstances were proven by the State beyond a reasonable doubt:

1. The Defendant was previously convicted ... of a felony involving the use of threat or violence to the person. The evidence established that the Defendant previously committed and was convicted of a Robbery in Brevard County. The facts showed that the Defendant entered the victim's van while it was vacant and hid in the van until the victim returned. The Defendant remained hidden in the van as the victim drove eight miles to the victim's home. At that point the Defendant put a weapon to the throat of the victim and demanded money. The Defendant then let the victim out and fled in the victim's van. This crime was committed on December 21, 1987. The Defendant was sentenced to serve 4 years incarceration.
2. The capital felony was committed while the Defendant was engaged, or was an accomplice ..., in the attempt to commit any ... robbery ... The evidence established that the Defendant was engaged in the Attempted Robbery of the Nu-Pack store when Donna Burnell was killed as a result of the

Attempted Robbery. The evidence showed beyond a reasonable doubt that the Defendant, acting alone, perpetrated the Attempted Robbery and the Murder of Donna Burnell. The time period analysis presented by the State refutes the Defendant's initial story to the police that other individuals were involved in the crime of July 3, 1990. The Defendant's initial story to the police would, in any event, establish the existence of this aggravating circumstance.

Once aggravating circumstances have been established by the State, the Court must next consider whether the Court was reasonably convinced that any mitigating circumstances were proven and, if proven, whether they outweigh the aggravating circumstances.

The mitigating circumstances presented were as follows:

1. The age of the Defendant at the time of the crime. The evidence established that the Defendant was 20 years old at the time of the crime. No other evidence was presented to show that his age, either mentally or physically, had any impact on his ability to take responsibility for his own behavior and to realize the consequences of his conduct. The evidence does not establish age as a mitigating circumstance.
2. The Defendant functions well in a strictly controlled environment. While in prison on a previous Robbery the Defendant received a GED and became a teacher's aide. The Defendant did not receive any disciplinary reports while in prison, or while incarcerated at the local jail pending trial on this case.
3. The Defendant was a responsible employee after his release from prison. The evidence showed that the Defendant's

employer and co-workers all believed the Defendant to be a good and valuable employee.

4. The Defendant's family background. Evidence was presented by the Defendant, through his Aunt, that the Defendant was raised in a strict moral environment and did not have a close relationship with his parents, particularly his father. The Aunt testified that the Defendant rebelled against this strict upbringing when the Defendant was a teenager. The Aunt's testimony was based on visits to the family, which happened once or twice a year. However, the father of the Defendant testified the Defendant had a normal childhood and that the father required his children to participate in the religious activities of the family and follow the rules of the house as long as they were dependents.

5. The Defendant participated in Bible studies after release from prison. A pastor testified that the Defendant was housed in a halfway house upon release from prison and participated in Bible studies for several months, until the house was closed.

6. Disproportionate punishment. The Defendant's attorney argued that other individuals participated in the crime and had not been punished, or even arrested. The only evidence to support that allegation was the testimony by a witness that the perpetrator leaving the scene of the crime appeared to have a beard and a statement made by the Defendant to the police. The evidence does not reasonably convince this Court that any other individuals were involved in this crime on July 3, 1990.

7. The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. This circumstance was not requested to be instructed to the jury, however it is being considered by this Court. This mitigating circumstances is rejected for the same reasons as stated in the preceding paragraph. The Court is not reasonably convinced that any other person participated in the crime of July 3, 1990, except for the Defendant himself.

No other statutory or non-statutory mitigating circumstances were argued, nor was there any evidence presented concerning any other mitigating circumstances.

I find, based on a review of the evidence presented, that the circumstances presented by the Defendant do not reasonably convince me that they are mitigating circumstances. The evidence established that that the Defendant received a normal upbringing, free from abuse or deprivation. The Defendant was exposed to moral training both before and after his previous prison sentence. The Defendant was provided housing upon release from prison and given a steady job. I find that the Defendant, based on his life experiences, was able to make free and voluntary decisions with full knowledge of the consequences of his decisions. I do not believe that the fact that the Defendant lived a normal life during the periods of time when he was not committing a crime is any mitigation of a sentence of death for the crime committed in this case.

In addition, I find that even if living a normal, responsible life and being a model prisoner were mitigating circumstances, this would not outweigh the aggravating circumstances of committing a prior

robbery and committing a murder during the commission of another attempted robbery.

Therefore, after weighing both of the proven aggravating circumstances against the evidence and circumstances presented by the Defendant, I find there are sufficient aggravating circumstances to justify the sentence of death on Count I of the Indictment.

Justice requires and it is the sentence of this Court that you, Rodney Tyrone Lowe, be sentenced to death, for the Murder of Donna Burnell, a citizen of Indian River County.

It is ordered that you, Rodney Lowe, be transported to the Florida State Prison and be kept in close confinement until the date of your execution is set. If Justice prevails, on such scheduled date you shall be put to death under the authority of, and in a manner approved by, the people of the State of Florida.

This sentence and the judgments of conviction will be automatically reviewed by the Florida Supreme Court. You have the right to the assistance of counsel in the filing and preparation of your appeal. If you wish to have counsel appointed for the preparation of the appeal you may request the Court to do so and an attorney will be appointed.

DONE AND ORDERED in open court in Indian River County, Florida, this 1 day of May, 1991.

Joe Wild
Acting Circuit Judge

cc: State Attorney
Defense Counsel
Rodney Tyrone Lowe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 14th day of MAY, 1993.

Margaret Good

MARGARET GOOD
Assistant Public Defender