IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,030

WILLIE JAMES KING,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a direct appeal by the defendant Willie King from an adjudication of guilt and sentence of death entered following a jury trial before the Honorable Michael Salmon, Circuit Judge, Eleventh Judicial Circuit, Dade County, Florida.

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(SR) - Supplemental Clerk's Record on Appeal

(T) - Transcript of Proceedings

(ST) - Supplemental Transcript of Proceedings

(CT) - Corrected Transcript, in Supplemental Transcript of Proceedings Vol 2, containing certificates of correction

(A) - Appendix attached hereto, consisting of written order of death sentence

STATEMENT OF THE CASE AND FACTS

The defendant was charged by grand jury indictment on January 31, 1990, with the first degree murder (count 1) of Marcela Fumero-Vargas in violation of §782.04(1), Florida Statutes (1989), the attempted first degree murder (count 2) of Marcela's husband Diego de Aguilar Llobera with a firearm in violation of §782.04(1), §777.04(1), and §775.087, the attempted armed robbery (count 3) with a firearm of Marcela and Diego in violation of §812.13, §777.04, and §775.087, shooting a deadly missile into Marcela's automobile (count 4) in violation of §790.19, and possession of a firearm in the commission of a felony (count 5) in violation of §790.07. (R: 1069-1073)[1] The defendant was alleged to have shot Marcela with a single shot during an attempted robbery as she and her husband, Diego, sat in their car waiting for someone else to deliver some drugs to them. (T: 297-305) A plea of not guilty was entered on February 2, 1990. (R: 1078)

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[1]The indictment also charged possession of a firearm by a convicted felon in count 6 in violation of §790.23. (R: 1073) The state nolle prossed this count on April 16, 1991. (R: 1080, 1101)

Jury trial began on March 4, 1991. (T: 1) During jury selection, the prosecutor exercised a peremptory challenge against Mr. Ashley, a black man, which the defendant objected to on Neil grounds. (T: 270-272) The defendant is also a black man. (T: 253) The record shows that during voir dire, the judge first asked Mr. Ashley for some background information. (T: 37) He replied he was 51 years old and he lived in the Liberty City section of Miami, he finished high school, he was single and unemployed "right now," and that when he worked he was an assistant manager. (T: 37) The court asked the prospective jurors if they had prior jury service and Mr. Ashley replied he served in federal court on a criminal trial, that the jury reached a verdict, and that he was not the foreman. (T: 51) When the court asked the jury panel if anyone had ever been a victim or had seen anybody shot, Mr. Ashley replied, "Someone driving by and shot out." (T: 55)[2]

Both the prosecutor and the defendant had the opportunity to question Mr. Ashley during voir dire. The prosecutor asked him about the shooting. (T: 130) Mr. Ashley explained he was the victim of a robbery, that he was on his bicycle in front of his mother's house in Liberty City and that somebody shot at him. (T: 130-131) He stated he reported it to the police, that they came and he was satisfied with the way the police handled the case. (T: 131) When asked if anyone was ever caught, Mr. Ashley replied no. (T: 131) The prosecutor asked him if he was able to recognize the person who did it and he replied, "No, I couldn't." (T: 131) When asked if there was anything about that incident that would affect him being a juror in this case, he replied no. (T: 131) This portion of the transcript is as follows:

> MR. KASTRENAKES: [prosecutor] Mr. Ashley, how are you this afternoon?

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[2]In response to the court's questioning, Mr. Forcine stated that he had also seen someone shot in a bar incident. (T: 55) Ms. Gonzalez stated she had been the victim of two robberies. (T: 55) In addition, twelve prospective jurors (Mr. Gonzalez, Mr. Ramirez, Mr. Mitchell, Mr. Guerra, Mr. Davenport, Mr. Witherow, Mr. Forti, Mr. Mesa, Mr. Leverone, Ms. De Los Santos, Ms. Gonzalez, and Ms. Douglas) indicated they had been the victims of burglaries of either their homes, cars or businesses. (T: 56-57) Mr. Asmus stated he had been an eyewitness to a bank robbery. (T: 135) The prosecutor questioned them regarding these incidents. (T: 75-77, 86, 122-130, 135, 137-138, 147-150, 155-162, 168-171, 175)

MR. ASHLEY: Fine.

MR. KASTRENAKES: You indicated you had been the victim of a robbery?

MR. ASHLEY: Yes.

MR. KASTRENAKES: And you had described it as an incident where somebody shot at you. Is that correct?

MR. ASHLEY: Yes.

MR. KASTRENAKES: Where did that occur?

MR. ASHLEY: Right in front of my mother's house. That is in Dade County. Liberty City.

MR. KASTRENAKES: Okay. Did you report it to the police?

MR. ASHLEY: No. Well, yes, I did, because they came. I had to jump off my bike.

MR. KASTRENAKES: Okay. Were you satisfied with the way the police handled the case?

MR. ASHLEY: Yes.

MR. KASTRENAKES: Was it City or County?

MR. ASHLEY: County.

MR. KASTRENAKES: Was anybody ever caught?

MR. ASHLEY: No.

MR. KASTRENAKES: Did you feel that you had been able to recognize that person that did this?

MR. ASHLEY: No, I couldn't.

MR. KASTRENAKES: Is there anything about that incident that would affect you in being a juror in this case?

MR. ASHLEY: No. (T: 130-131)

During voir dire by the defense, the defendant asked Mr. Ashley whether he had thought about the death penalty, and Mr. Ashley replied he could be fair and listen to the evidence as to what happened. (T: 205) The defendant asked him whether he belonged to any clubs or groups; he said "only church," and that it did not take up a lot of his time. (T: 243)

The defendant also questioned Mr. Ashley about the shooting incident. (T: 243) The defendant asked him where he was shot and Mr. Ashley corrected him and said that he was "shot at." (T: 243) When asked whether the police came to investigate and did whatever they could, he answered they came and "did a good job." (T: 244) When the defendant asked him whether the fact that no arrest was made in that case would have anything to do with this case, he replied no. (T: 244) This portion of the transcript is as follows:

> MR. KASSIER: [defense attorney] Mr. Ashley, you belong to any clubs or groups?
>
> MR. ASHLEY: Only church.
>
> MR. KASSIER: That takes up a lot of your time?
>
> MR. ASHLEY: No, not really.
>
> MR. KASSIER: Okay.
>
> MR. ASHLEY: Just the job.
>
> MR. KASSIER: All right. When you were talking yesterday about the time you had been robbed, where were you shot?
>
> MR. ASHLEY: Shot at.
>
> MR. KASSIER: Shot at. Okay. I didn't write it down. But did the police come to investigate?
>
> MR. ASHLEY: Yes.
>
> MR. KASSIER: You felt they had done whatever they could in that case?
>
> MR. ASHLEY: Yes. They did a good job.
>
> MR. KASSIER: Okay. You don't have any feelings because they didn't make an arrest that, in that case, that in any way has anything to do with this case, do you?
>
> MR. ASHLEY: No.
>
> MR. KASSIER: Thank you. (T: 243-244)

During jury selection, the prosecutor exercised a peremptory challenge against Mr. Ashley. (T: 270) The defendant objected on Neil grounds, stating there was no basis from his answers to strike him, other than racial reasons. (T: 270) The court agreed and told the state

that unless they could give him a reason, he could find no basis for the strike against Mr. Ashley. (T: 270) The prosecutor proffered his reason that Mr. Ashley was the victim of a crime, he was shot at and unable to identify the person, and that the prosecutor did not want "anybody on this jury that feels that there is a problem or a possibility that the victim of a crime who was shot at could not identify the shooter." (T: 270) The judge pointed out that Mr. Ashley may have been shot in the back or some other position where he did not see the person who shot him, and asked whether anyone had asked Mr. Ashley that question. (T: 271) The prosecutor acknowledged he only learned that Mr. Ashley "was shot at" and did not ask Mr. Ashley as to whether he was in a position to see the person. (T: 271) The court noted the prosecutor's reason could be a valid reason if Mr. Ashley had the opportunity to identify the person, but that since there was nothing to indicate he was looking at the person, it was not necessarily valid. (T: 271) The prosecutor told the judge he was not striking Mr. Ashley for racial reasons, but that he did not "want the jury to feel that he's not in a position to look at a witness and say he had an opportunity to not make an identification or to make an identification." (T: 271-272) The court accepted the reason, over the defendant's objection. (T: 272) This portion of the transcript is as follows:

> THE COURT: All right. Mr. Ashley.
>
> MR. KASTRENAKES: [prosecutor] The State exercises a peremptory challenge on Mr. Ashley.
>
> MR. KASSIER: [defense attorney] Judge, under the recent change in the case law, I believe an inquiry can be asked by the Defense, even though there is one juror only struck -- I would ask the State at this point, because there is nothing to indicate there was a challengeable person for cause, and I can't see from his answers there is any reason other than a racial reason. So I would ask the State about that.
>
> THE COURT: I find no basis for Mr. Ashley, unless you can tell me one.
>
> MR. KASTRENAKES: Mr. Ashley was the victim of a crime. He was shot at and unable to identify the person. And I don't want anybody on this jury that feels that there is a problem or a possibility that the victim of a crime who was shot at could not identify the shooter. For that reason, I want to strike Mr. Ashley.

THE COURT: He may have been shot in the back for all I know. Did anybody ask him if he was in a position to see? You'll have to remind me of that. That is the basis, if he can't identify? He may have been shot in the back, I don't really recall. He may have been shot someplace where he didn't see the person.

MR. KASTRENAKES: He was shot at and I didn't go further.

THE COURT: Well, that could be a valid reason. He must have an opportunity, though, to identify the person.

MS. MILIAN: [prosecutor] It was a robbery. It was during a robbery attempt, so there is nothing to indicate that he wasn't looking at the person.

THE COURT: Nor that he was. If that is the only basis he's unable to make an identification?

MR. KASTRENAKES: There is nobody that had the opportunity, in a case about identification, Judge. There is no reason based on race that I'm trying to strike this man. But I don't want the jury to feel that he's not in a position to look at a witness and say he had an opportunity to not make an identification or to make an identification.

THE COURT: I am going to accept the reason, then.

MR. KASSIER: Over my objection.

THE COURT: Yes. (T: 270-272)

The jury that was selected to try the case consisted of three black females: Ms. Douglas, Ms. Rolle, and Ms. McDonald. (T: 296) The state struck one black, Mr. Ashley. (T: 296)[3]

During his preliminary remarks to the jury, the judge told them they would be returning a recommendation or advisory sentence as to death or life imprisonment and that the ultimate decision was with the judge, but he would give great weight to their recommendation. (T: 26, 220) The prosecutor informed the jury during voir dire that their recommendation was entitled to great weight. (T: 70) Also during voir dire, the issue of principals was discussed and prospective juror Wayne, who was later excused, expressed concern about the non-shooter

[3]The prosecutor also tried to strike one of the black females, Ms. McDonald, first on the ground she seemed sleepy and was on medication, then on the ground he wanted to reach another black juror, Ms. Rolle, whom he liked better. (T: 275-276) The court found the prosecutor's reasons to be insufficient and refused to permit the strike. (T: 276)

receiving the death penalty. (T: 83-86, 94-97, 128) The prosecutor told the jury "that is certainly something you can and should consider in the second phase of the trial as one of the mitigating circumstances." (T: 95) During his opening statement, the prosecutor told the jury that the issue was whether the defendant was the shooter. (T: 301)

The jury was sworn and the trial commenced. (T: 281) During opening statement, the prosecutor told the jury the victim's husband will never forget the face of the man who "wiped off the face of this earth the mother of his children:"

> And the Defense will raise questions during this trial whether he actually had an opportunity to see what the victim saw. And he can try as he might or may, but he will never forget the face of the man who, for no other reason than greed, wiped off the face of the earth the mother of his children. (T: 301-302)

The defendant objected to this comment and moved for a mistrial on the grounds it was irrelevant and totally inflammatory. (T: 302) The judge denied the motion. (T: 302)

The first witness to testify at trial was Officer Fleitas from the City of Miami Police Department. (T: 315) He testified that on January 10, 1990, at approximately 10:45 p.m., he was on routine patrol traveling down Grand Avenue in the Coconut Grove section of Miami. (T: 315-316) He testified that as he turned off Grand Avenue, he noticed a blue rental car "weaving from the right lane to the left lane, and back to the right lane." (T: 316) Officer Fleitas pulled up behind the car and activated his lights. (T: 316) He stated he knew there was something wrong because he could not see the driver and the passenger was attempting to steer the car from the passenger's side going 10 to 15 miles per hour. (T: 316-317) Officer Fleitas testified the blue car came to a stop, and that as he ran up to the driver's side, he could see the driver's side window was shattered and the driver was slumped over to the right with her head on the passenger's lap. (T: 317) The driver was a woman, later identified in court as Marcela Fumero-Vargas, and the passenger was her husband, later identified in court as Diego Llobera. (T: 317)

Officer Fleitas testified he asked the passenger what happened and he replied they "were shot at." (T: 318) The officer took the passenger out of the car and opened the driver's side

door. (T: 319) Officer Fleitas testified the woman was motionless with a wound to the left back of her head and neck area. (T: 317, 319) Because the wound was close to the spine, the officer did not move her from the seat of the car. (T: 319) The officer stated he tried to find a pulse and to determine if she was breathing. (T: 319) He testified that her pulse was faint, her breathing was "real shallow," and she did not respond when he spoke to her. (T: 319) Shortly thereafter, Officer Fleitas "lost her pulse and she appeared to stop breathing." (T: 319) Fire rescue then arrived and began to administer first aid. (T: 320)

The next witness to testify was Detective Avila who stated he arrived at the scene at 11:04 p.m., while fire rescue was administering first aid to the woman. (T: 331, 340) The detective observed that the driver's side window of the car had been shattered and that the passenger's side window was up. (T: 332-333) Detective Avila testified he interviewed the passenger who described the offender as "a black male, age 25 or 26. He was 200 pounds, 190 to 200 pounds. Black hair, short-cropped hair with a wine shirt and black pants." (T: 334) The detective stated he then conducted an area canvass for investigative leads; the canvass was not productive and the defendant's name did not come up as a suspect. (T: 340)

The next witness was the passenger, Diego de Aguilar Llobera, the victim's husband. (T: 346) He testified they lived in Costa Rica where they owned a boutique. (T: 347-351) He testified that he did not speak English, but that his wife did. (T: 350) Diego stated they spent the day of January 10, 1990, shopping for their boutique and at the end of the day, they packed all the clothing they had purchased in the back of their rental hatchback. (T: 354-356) Both of them were wearing several gold chains outside their clothing. (T: 357-359) Diego testified that as his wife drove back to the hotel, they became lost and Marcela stopped the car in a black area to ask directions of a black man. (T: 359) She then turned to Diego and asked him if it would be okay to purchase a small amount of cocaine, and he replied yes. (T: 361) He testified that although he had used cocaine years earlier, neither he nor his wife used any cocaine while in Miami and that he had never seen his wife use cocaine. (T: 362)

Diego testified that the first black man asked them what they were doing there and they

replied they were going to buy drugs. (T: 361) They did not purchase cocaine from that man, but a black woman got into the back seat of their car and tried to assist them in locating some cocaine as they drove around the Coconut Grove area. (T: 363) Diego stated the woman got out of their car and a boy on a bicycle then came by and told them to follow him and park the car to one side of the street. (T: 363) Diego said his wife gave the boy $20 and they followed him and parked the car. (T: 364-365) While they waited for the boy to return with the drugs, Diego rolled up his passenger's side window, but his wife's driver's side window was open about two or three inches. (T: 356-366) He stated he never spoke to anybody from his passenger's window and that he never saw anyone on the passenger side of the car. (T: 366-367) He also said the dome light in the car was off and that his wife never had a map or a piece of paper in her hands. (T: 367)

Diego testified that he then heard screaming in English coming from his wife's side of the car toward the back. (T: 368) He immediately locked his car door and his wife simultaneously began driving the car away slowly. (T: 368) According to Diego, the moment he heard the screams, he turned his head, saw the driver's side window shatter, felt the car move, his wife fell on top of him, and he saw the face of a person who had a pistol pointing at them towards the interior of the car:

> At that moment, after I heard the screams, when I turned my head, I saw the window on my wife's side shatter. It shattered. And at that moment she fell on top of me and the car continued.
>
> And through the window I was able to see the face of the person who had shot, and the pistol pointing at us, towards the interior of the car. (T: 369)

Diego testified he saw the shooter for about five to seven seconds and he described him as a black man, medium in height, 180 to 190 pounds, with short dark hair, around 26 years old, wearing a dark shirt and faded jeans. (T: 369-371) Diego then identified the defendant in court as the shooter. (T: 370) Diego testified the defendant was standing on the driver's side of the car, even with the back door of the car about three or four meters away. (T: 373-374) He said the defendant never touched the car and did not jiggle or move the driver's door. (T:

374) Diego also described the gun that was used as a black Smith & Wesson type .38 special revolver with five or six rounds and a two-to-four inch barrel length. (T: 371-372) After the shot, the car kept moving and Diego steered the car from the passenger seat with his wife lying on top of him. (T: 373) He turned the car onto Grand Avenue, honking for the police, until the car came to a stop. (T: 373)

Diego admitted at trial that when initially questioned by the police, he told them he and his wife were in the area asking directions and denied they were attempting to buy cocaine. (T: 374-375) He stated he was not honest with the police because it was a "small temptation" and he did not want to destroy his wife's reputation. (T: 375, 391) Diego estimated the amount of time between their conversation with the first black man and the point when his wife was shot was about 15 to 20 minutes. (T: 376)

Diego further testified that about 4:00 the next morning, after his wife had been taken to the hospital, the police showed him a folder containing six pictures and that he identified photograph number 3 as the man from whom they had asked directions earlier that night before the shooting. (T: 377) Diego stated this man was not the person who shot his wife. (T: 378) Diego said that the next afternoon the police showed him another set of six photographs and that he identified photograph number 4 as the man who shot his wife. (T: 379-382)

On cross examination, Diego admitted that he does not speak English and that all he knew about the conversations his wife had with the people prior to the shooting was what his wife told him. (T: 391) Diego stated that before the shot, his wife told him, "Lock the doors. Put the buttons down. They're going to rob us here. Let's go." (T: 397) He stated the shot rang out when the car began to move. (T: 397) He also testified that while he and his wife were waiting for the drugs in their parked car, another car came up and parked a few meters behind them; the man got out of the driver's side of that car, walked up to his wife's side, yelled out something, and then shot the one shot through his wife's window. (T: 400, 409)

The state also presented the testimony of several witnesses who were in the area at the time of the incident. Vernice Rechourse, a twenty-six year old woman also known as Flukie,

testified that between 9:00 p.m. and 11:00 p.m. that night she was standing by herself on the corner of Grand and Plaza. (T: 464, 478) She observed the blue rental car drive by with a white woman driving and a white man in the passenger's seat. (T: 465-466) About ten to fifteen minutes later, she saw them driving by again and they stopped to talk to her. (T: 466) Vernice testified they "wanted to badger up," to buy drugs, so she got in the car with them to help them find a certain address to locate some drugs. (T: 466-467, 475) When they did not find the address, she got out of the car. (T: 467) Vernice testified that about ten minutes later, she saw them again sitting in their parked car by an apartment building on Plaza and Thomas Streets. (T: 468)

Vernice further testified that she looked away, then she heard the defendant say, "Cracker, get out of here." (T: 469) She stated she had known the defendant most of her life from the Grove and that she knew and recognized his voice. (T: 469-470) Vernice said she looked towards the car, heard a shot, then saw "Willie's hand come down." (T: 470) She described the defendant's hand being first stretched out in a fist pointing towards the woman in the car, then bringing his hand down extended straight out to his side. (T: 470-471) Vernice stated the defendant had something dark in his hand, but that she could not tell exactly what it was. (T: 470-471) She said he was standing "close to the car" on the driver's side. (T: 470, 472) She described the defendant as wearing a brown shirt and dark pants. (T: 471-472) Vernice testified that after he pointed at the person in the car, she saw him run away. (T: 477) Vernice further testified that she knew Chester Hall and Robert Smith and that both of them were in the area that night in the same block, although Smith was not at the scene. (T: 472, 478) She said that Robert Smith did not have a shirt on that night. (T: 473)

On cross examination, Vernice admitted she also saw another man named Travis go up to the woman driver in the blue car earlier that night. (T: 479) Vernice testified that a crowd of people, more than five or six, had gathered near the blue car as it was parked waiting for drugs before the shooting. (T: 487) Vernice further stated that she had not seen the defendant in the area that night until she heard him say, "Cracker, get out of here." (T: 480, 487) After

the shot, everyone in the area scattered. (T: 488) She admitted that Robert Smith and the defendant look alike to her. (T: 490)

Vernice's nephew, Jerry Nelson, who lived in Coconut Grove, also testified at trial. He stated that on the night of the shooting, he was standing outside in front of the store at the intersection of Grand Avenue and Plaza Street with his two aunts, Vernice Rechourse or Flukie Nelson and Shirley Nelson. (T: 640-641) He testified he saw the defendant, whom he had known since they were children, drive by on Grand Avenue in a "green duce and a quarter," a Buick 225. (T: 641-643) With him in the car were three other men, Chester Bell, Dog, and another man, a bald-headed guy, whose name he did not know. (T: 644)[4] Dog and the bald-headed guy did not have shirts on, but the defendant was wearing a shirt. (T: 648) Jerry testified he saw the defendant drive by a couple of times and he guessed the defendant "was following the white people in the car." (T: 646) He described the car as a little four-door with the woman driving and the man in the passenger seat, luggage in the back and the woman's pocketbook with her on the front seat. (T: 650)

Jerry testified he saw the defendant turn right onto Plaza Street, stop and let the other guys out of the car. (T: 646-647) Jerry said he saw the defendant make a U-turn and stop when the woman's blue car stopped. (T: 650-651) Jerry testified the defendant got out of the car, ran to the driver's side of the woman's car, and took the gun from in his trousers. (T: 651) He said the woman "ran the window down a bit and had a few words," and the "next thing" Jerry knew, the defendant shot her. (T: 651) Jerry stated the defendant "put it to the window and shot." (T: 652) He also said that when the defendant shot, the other guys were around and that Dog was on the passenger's side of the car, although he was not talking to the passenger. (T: 652) Jerry testified that immediately after the shooting, he said to his aunt Shirley Nelson, "Willie King was saying, stop, you Cracker. He shot her. Oh, my God, he shot her." (T: 653) Jerry watched the three other guys run into the apartment building and

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[4]Jerry identified in court the photographs of Chester Bell and the bald-headed guy. (T: 648-650) Detective Everett later testified that the bald-headed guy in the photograph shown to Jerry Nelson was Robert Smith. (T: 663-665)

watched the defendant run to his car, get in and drive away. (T: 654)

Shirley Nelson, Jerry's aunt, then testified that while she was standing on the corner of Plaza and Grand, she heard Jerry say to her, "There go Willie King. They're off to rob those crackers." (T: 662) Shirley testified she heard a shot so she ran behind the store. (T: 662)

Another witness was Sabrina Osborne, who lived on Thomas Avenue near Plaza Street and Grand Avenue in the Grove. (T: 605) On the night of the shooting, she was having a long telephone conversation with her friend, Maria Mejia. (T: 609) Sabrina testified she began her conversation with Maria about 3:00 or 4:00 that afternoon and they were still talking at 9:00 that night. (T: 609-610) At about 9:00 p.m., Sabrina put the receiver down and walked out to a nearby grocery store on the corner of Plaza and Thomas Streets. (T: 610-611) While there, she noticed a small blue car with a white woman driving and a white man in the passenger's seat. (T: 611) She saw Flukie get out of the car and later saw Flukie standing next to it talking with them. (T: 612)

Sabrina returned to her home and resumed her phone call with her friend Maria. (T: 613) She stated she was looking out the front window overlooking Thomas Street and she heard "a lot of yelling and a lot of voices." (T: 613) She stated the blue car was parked nearby, not far from her window. (T: 613, 615) She heard a voice say, "Wait, I will be right back." (T: 613) She stated that three or five minutes later, the car was still parked there. (T: 613) She saw the defendant, whom she had known for two years, come up from behind the car and stand next to the driver's side of the car. (T: 613-614, 618) Sabrina testified she saw the car move as the woman "tried to go," and Sabrina watched as the defendant "pulled out a gun and he shot her" with his right hand, the woman "was shot one time." (T: 614-615, 617) Sabrina said she immediately told Maria on the phone that Willie King had just shot the lady. (T: 615) Sabrina also stated she saw another person on the passenger side very close to the car with no shirt on and that she thought it might have been a man named Patrick Truesdell. (T: 616, 631) She stated that after the shooting, the defendant gave the gun to the guy without

the shirt and ran away. (T: 620)[5]

Sabrina further testified that she did not call the police and did not want to get involved in the case. (T: 620-621) Although she later gave a statement to the police, she did not want to come to court to testify. (T: 621) She admitted that a year after the shooting, she gave a sworn statement to the defense attorney in which she said the defendant did not do the shooting. (T: 626) According to Sabrina, an investigator came to her house with a tape recorder and that she told him Willie King did the shooting; he told her Willie King did not do it and that if she was not sure, then she would not have to come to court to testify. (T: 621-626) Sabrina stated she told the investigator she was not sure who did the shooting; they then went to the defense attorney's office where she gave her statement that the defendant did not do it. (T: 625) She admitted telling a lie to the defense attorney. (T: 626)

On cross examination Sabrina admitted she did not hear the defendant say anything prior to the shot and that she was close enough that she would have heard if he had said anything. (T: 629-630) Sabrina described the shirt the defendant wore as a very light color and his pants as blue jeans. (T: 631) She also said there was another man next to the car on the passenger's side at the same time. (T: 630-631) Sabrina admitted that she voluntarily gave her statement to the defense attorney during which she lied. (T: 631-633) She admitted the defense attorney was kind and polite to her and did not pressure her, and further, that he told her to tell the truth during her statement. (T: 631-632, 635)

The state also put the defendant's half-brother, Vann Wilson, on the witness stand. He admitted he did not want to testify and was under subpoena to do so. (T: 674) He stated that about 10:30 that night he was out in his yard in Coconut Grove when he observed the defendant drive by in his car with Michelle, Chester, Robert and Vincent. (T: 675-676) He also saw another car, a blue car with a lady driving, drive by and stop to have a conversation

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[5]The state also put Maria Mejia on the witness stand. (T: 600) She testified that on the night of the shooting, she was talking on the telephone with Sabrina when Sabrina became very hyperactive and extremely nervous. (T: 600-601) She stated that Sabrina told her Willie King just shot a white lady and that Patrick Truesdell and Flukie were also in the area. (T: 601-602)

with his other brother, James Wilson. (T: 676) Vann testified they asked to buy drugs from James, then drove around the block and when they returned, they stopped and asked him for some drugs. (T: 677) He testified the defendant then got back into his car with Chester, Robert, and Vincent and had a conversation "[A]bout jacking them . . . [R]obbing them." (T: 678-679) Vann stated he saw the defendant with a .38 gun with a six-inch barrel and that Vincent also had a .38 gun. (T: 685-686) He said the defendant, Chester, Robert, and Vincent got into the defendant's car with the defendant driving. (T: 686) Before they drove off, Vann told the defendant, "Don't do it." (T: 686) He stated the defendant drove off and followed the blue car. (T: 686) On cross examination, Vann admitted he did not see the shooting and admitted he had been convicted of a felony three times. (T: 688-690)

The state also presented the testimony of several police officers and detectives from the City of Miami Police Department. Detective Torriente was the lead detective on the case. (T: 534) He testified he arrived at the scene a few minutes after midnight and found the blue car on Grand Avenue resting against the curb and a tree stump. (T: 534-535) The detective stated the police received no cooperation at the scene from any witnesses, but that he did learn the names of several individuals, including Patrick Truesdell and Flukie. (T: 540-541) Detective Torriente prepared a standard six-photo lineup containing Patrick Truesdell's photograph and showed the lineup to Diego, the passenger. (T: 541-545) Diego picked out the photograph of Truesdell as the man whom they asked for directions, but who did not shoot his wife. (T: 545) Detective Torriente stated he then received information that the defendant fit the description, so he prepared another lineup containing the defendant's picture. (T: 552) He showed the lineup to Diego the next day and Diego identified the defendant as the person who shot his wife. (T: 552-553)

Detective Torriente testified he returned to the police station where he interviewed the defendant, who had been arrested that morning, January 11, 1990. (T: 548, 554) Detective Torriente and Detective Ilhardt read the defendant his Miranda rights that afternoon and the defendant waived his rights and agreed to talk without an attorney. (T: 555-562) Detective

Torriente stated they told the defendant he had been identified as the shooter and he replied he did not know what they were talking about because he had been with Michelle all night. (T: 562-563) When the police told him they knew he had not been with Michelle, the defendant told them he knew what had happened because he had ridden by on his bicycle after the shooting had occurred. (T: 565-566) According to Detective Torriente, the defendant then told them he had been there during the shooting, but he denied knowing or shooting the woman and maintained he had stood on the corner by the phone booths. (T: 567) The defendant later said he knew the woman from other occasions when she had bought drugs from him, but he had not talked with her this time and had no part in this shooting. (T: 670) Detective Torriente testified the defendant then told him he was there and approached the woman and she asked him if he could sell her some drugs. (T: 570) The defendant told her he did not do that sort of thing and walked away when he heard the shot. (T: 570-571) The defendant told the detective he weighed 180 to 190 pounds and stood five feet ten or eleven inches tall. (T: 574)

On cross examination, Detective Torriente testified he interviewed Diego after the incident and that Diego told him they were lost in the Grove area asking directions. (T: 589) The detective admitted that when other witnesses informed him the couple was there to buy drugs, he confronted Diego with that information and Diego denied it. (T: 590) On direct examination, the detective admitted that ten months later, Diego informed him they were in fact in the area to buy drugs. (T: 584) Detective Torriente also acknowledged there was a lot of media attention to this case, and that the presence of the media and the media cameras hampered the investigation on the scene so that the police finally had to call a press conference. (T: 580, 587-589)

Officer Silva from the Miami Police Department testified he was the officer who brought the defendant into the police station on January 11, 1990, the day after the incident. (T: 496, 505) He testified that on January 11th, about 10:00 a.m., he went with his partner to a house on Fro Avenue in the Grove. (T: 500, 516) While his partner took the front of the house, he drew his weapon and proceeded around the back of the house. (T: 501-502) When

he reached the back of the house, he observed the defendant in the backyard attempting to lift his car out of a hole with a car jack. (T: 501) Officer Silva ascertained there was no personal danger, so he put away his gun and approached the defendant. (T: 503) The officer stated he told the defendant there was an investigation and that the defendant's "name had come up," and would the defendant accompany him to the police station. (T: 503) The defendant replied "sure." (T: 503) According to the officer, the defendant was nervous, but he "cooperated 100 percent" and went with them to the station. (T: 505, 513)

Officer Silva testified that on the way to the station, the defendant asked him what this was about. (T: 506) Officer Silva replied he did not know, that the defendant's name had come up in an investigation and he would have to ask the detective. (T: 506) The officer stated the defendant said, "I don't know nothing about any shooting." (T: 506) Officer Silva took the defendant up to Detective Torriente in the police station and returned by himself to the Grove to locate more witnesses. (T: 506-507)

On cross examination, Officer Silva acknowledged this shooting had received extensive media coverage and that anyone who had listened to the radio would have knowledge of it. (T: 519-520) He agreed that knowledge of such events traveled quickly on the streets of the Grove. (T: 520) He admitted the defendant never told him he was involved in the shooting. (T: 521)

The state also presented the testimony of Dr. Marta Rionda, the Associate Medical Examiner who performed the autopsy on the victim. (T: 412) She testified that the victim had a gunshot wound located "on the back of the neck, the entrance, a little to the left side." (T: 417) The prosecutor then presented Dr. Rionda with several photographs and the jury was taken out of the courtroom while the evidence was discussed. (T: 418-420) The defendant objected to the introduction into evidence of the state's identification 1-X, which was a photo of the full back naked body of the victim, including the buttocks, showing the bullet hole in her neck and also showing extreme markings and discoloration to the skin. (SR: 100; T: 418-419) The defendant argued the photo was inflammatory and that it was of limited relevance

since the prosecutor was already introducing two less prejudicial pictures, identification 1-Y and 2-A, that also depicted the gunshot wound. (SR: 101-102; T: 419-420) The court expressed concern over the prejudice arising from introducing 1-X and asked Dr. Rionda whether she needed to use that photo to help her describe her testimony. (T: 420) Dr. Rionda replied she did because the photo "depicts the directionality and the only way to really show that is to show a picture of the wound here." (T: 420) The court asked the doctor why she needed the full body when she had two other close-up photographs showing the neck and the wound; she replied it would be difficult for the jury "to imagine where exactly on the neck it is." (T: 420) The judge let the photo into evidence as state's exhibit 20, but expressed his concern about the propriety of doing so. (T: 421) The jury returned and the trial resumed. (T: 421)

The prosecutor asked Dr. Rionda for the location of the wound on the photo, state's exhibit 20, then suggested the doctor use him as a model to show the location. (T: 423) Dr. Rionda used the prosecutor as an anatomic model and pointed out to the jury precisely where the wound was located. (T: 423-424) Dr. Rionda testified she used other photos, state's exhibits 21 and 22, close-ups of the neck area, to aid her in determining the directionality of the projectile and she described for the jury the abrasion marks depicted on state's exhibits 21 and 22. (T: 424-426) She testified that her examination revealed a projectile abrasion at 10:00 on the gunshot wound which showed the directionality of the bullet as it entered the neck. (T: 424-425) The doctor then used the prosecutor again as a model and showed the jury the direction and angle the projectile would have to travel to leave that type of abrasion on the body. (T: 426) She stated the projectile travelled from left to right, slightly behind and slightly upward. (T: 427) Later in the trial, the judge pointed out to the parties that although he let the photo, exhibit 20, into evidence because the doctor said she needed it to show the direction of the bullet, in fact the doctor never used the photo for that purpose and instead, used the prosecutor as a model. (T: 433)

With respect to the internal examination, the doctor stated the bullet entered the skin and muscles of the neck, then fractured part of the first cervical vertebra of the spinal column, then

lodged itself into the base of the skull where it met the spinal canal. (T: 427) She said she recovered the projectile from that point at the base of the skull where it met the vertebral column. (T: 427, 429) Dr. Rionda stated that Marcela died as a result of a gunshot wound to her neck. (T: 436) Dr. Rionda testified her findings were consistent with Marcela having sat in the driver's seat looking forward as if driving and the shooter standing five or six feet out and back from the left side of the car. (T: 437)

Dr. Rionda further testified that she reviewed the hospital records in assessing the cause of death and she learned that Marcela lost consciousness almost immediately after being shot and that she never regained consciousness. (SR: 38-75; T: 439) Marcela was transported to the hospital where the neurologist determined this was a nonsurvivable wound and that if she were disconnected from the respirator, she would not survive. (SR: 43; T: 433-434, 439-440) She had no reaction to pain and had no movement because the gunshot damaged her spinal cord at a very high position in the cervical part of the vertebral column. (SR: 50, 55, 61, 70-74; T: 433-434)[6]

Technician Hart, a criminologist from the Metro Dade Police Department, testified he examined the projectile that was removed from the victim in the Dade County Medical Examiner's Office. (T: 452) He described it as a fired .38 caliber bullet. (T: 454) He examined it under the microscope and determined the markings that were engraved on the bullet as it was fired contained six grooves in an unusual counter-clockwise direction. (T: 456) Technician Hart stated the only commonly encountered gun with that pattern of rifling would be a Colt firearm, specifically a .38 Special or a .357 Magnum revolver. (T: 456, 459) He stated that both firearms were revolvers of similar design and appearance, and could be fired "by simply pulling the trigger with no other working being necessary." (T: 455) He testified this bullet could be loaded into either gun. (T: 454-458) He stated that the description of the gun in this case, as a dark weapon with an adjustable sight and a tapering of the barrel of

[6]Dr. Rionda also testified that she did a toxicology examination of the victim from antemortem blood drawn shortly after the admission to the hospital and that there was no evidence of any alcohol or narcotic drugs in the victim's blood. (T: 430-431)

approximately four inches, would fit the two models of Colt revolver that appeared almost identical to each other. (T: 460-461) He also stated the rifling of this bullet would fit either model. (T: 460) On cross examination, Technician Hart acknowledged that he received no actual firearm in this case for examination. (T: 462)

The state rested its case and the defendant moved for judgment of acquittal, arguing there was no evidence of premeditated or felony murder of Marcela, no evidence of attempted premeditated murder or felony murder of Diego, and no evidence of attempted robbery. (T: 697-699) The court found there was no grounds for attempted premeditated murder of the passenger Diego and permitted the prosecutor to proceed solely on the attempted felony murder theory as to count 2. (T: 703-705) The court then proceeded with the trial without specifically ruling on the motion for judgment of acquittal. (T: 705)

The defendant then presented two witnesses on his behalf. The first witness was Cheryl Ogletree, a young lady who grew up in the same neighborhood with the defendant and, although not close friends, had known him since they were children. (T: 734-736) She testified that she was a witness to the shooting and that she saw another guy, not the defendant, shoot the woman. (T: 736) She testified that she was dropping off her godsister at a nearby house when she noticed the blue rental car driving behind her on Grand Avenue. (T: 737) The blue car made a U-turn and stopped near the corner of Thomas Street "as if they were looking for directions." (T: 738-741) Cheryl testified her own car was parked and she had one leg out getting ready to get out of her car while she was talking with her friend on the sidewalk. (T: 741) The rental car came to a complete stop and the woman who was driving "had like a piece of paper and she was looking over." (T: 742) The woman's window was up and the light was on inside the car, but she could not tell if the passenger window was up. (T: 742-743) She saw the defendant "on the sidewalk" across the street and the woman and the passenger were asking the defendant "for information or something." (T: 741-743, 761) Cheryl testified that another guy, not the defendant, ran up from some apartments, hit the window of the car and, unable to break it, tried unsuccessfully to open the car door, and then

shot the woman with one shot, turned and ran back towards the apartments as the rental car started driving slowly away. (T: 740-741) She described the shooter as wearing no shirt and stated that she had never seen him before and would not be able to recognize him. (T: 743-744) She testified the defendant was on the sidewalk the entire time and that when the shot rang out, the defendant took off towards Thomas Street. (T: 744)

Cheryl admitted that shortly after the incident, Detective Harlan asked her if she "noticed anything" and that she told him no. (T: 745-746) She explained she did not say anything at the time because "it's your life in this area" and she was afraid something would happen. (T: 746) She went home and told her mother what happened. (T: 746) About two or three months later, she gave a statement to Detective Torriente that the defendant was not the shooter. (T: 747-748, 807)

On cross examination, she further stated that as she was driving to the house to let off her godsister, she saw the defendant driving his car in front of her, stop his car and drop someone off near the garbage cans, then make a left turn on Thomas and park his car. (T: 751) She continued straight another block to Williams with the rental car behind her. (T: 752) She made a U-turn and stopped about a block and a half, or over 100 yards, from the incident. (T: 755, 758) She further stated that the shooter with no shirt on was the same person who got out of the defendant's car, and that the defendant was merely standing on the sidewalk on the passenger's side while the shooter ran up to the driver's side of the rental car. (T: 759) Cheryl also stated that the shooter ran up to the driver's side of the car, tapped the window and jiggled the car door, and when the woman turned to look, shot her in the head and she immediately "went over." (T: 762) She testified again that the defendant was still on the sidewalk when the shooter shot the woman. (T: 763)

Cheryl testified that after the shooting, she spoke with the defendant's girlfriend Michelle, and told her what happened. (T: 764) Michelle gave Cheryl's telephone number to the defendant and he called Cheryl twice. (T: 764) Cheryl testified that no one asked her to be a witness, but that Michelle did mention the defendant needed somebody to be a witness for

him. (T: 764-765) Cheryl also testified on cross examination that she spoke with Detective Harlan the night after the shooting and that she told him Willie King did not do it. (T: 767) On redirect examination, she stated that no one ever asked her to come to court and lie about what she saw. (T: 770)

The defendant also presented the testimony of his investigator, Anthony Dawkins, who testified that he interviewed the witness Sabrina Osborne at her home and that he identified himself as a licensed investigator working for the defendant's attorney. (T: 772-775) He said that after the interview, he contacted the defendant's attorney and then brought Sabrina to the attorney's office for a deposition. (T: 775-776) He stated that Sabrina came to the office willingly and that he did not force her, threaten her, intimidate her or make her any promises to get her to come to the office. (T: 776) After the attorney took her statement, Dawkins took her back home. (T: 776)

Dawkins further testified that he also took a statement from Cheryl Ogletree and that he never intimidated or threatened her to give a statement. (T: 777) He said he never told her anything to make her change her story and never told her what to say. (T: 777, 799) He stated he never did anything in this case that was improper or would jeopardize his investigator's license. (T: 799)

On cross examination, Dawkins stated that Sabrina seemed reluctant to get involved and was upset at the state forcing her to come to court. (T: 783) Sabrina told Dawkins that she was having some problems with her family over her involvement in this case. (T: 783) Dawkins admitted he taped Sabrina's statement at her house and that he stopped the tape a number of times during the statement when the kids in the house would scream or open the door and come into the room. (T: 786-788, 795) The state then played the tape for the jury. (T: 793) Dawkins testified he never told Sabrina they had charged the wrong guy with the murder. (T: 787)

The defendant then rested his case and the state put on two rebuttal witnesses. (T: 800) Detective Torriente testified he measured the distance that Cheryl Ogletree was from the

shooting and it was 110 yards. (T: 802) He measured the distance that Jerry Nelson was from the shooting and it was 30 yards. (T: 802) He further stated that he interviewed Ogletree four months after the incident and that she told him she looked up when she heard the shot ring out and that she had not been paying attention prior to the shot. (T: 805) According to Detective Torriente, she also told him she saw the gun in the hand of the person without a shirt on, but she had no idea who shot the victim. (T: 805) On cross examination, Detective Torriente admitted that Ogletree told him that the defendant was not the shooter. (T: 807)

The other rebuttal witness was Detective Harlan who knew Cheryl Ogletree and her family well. (T: 808) He testified that on the night of the shooting, Cheryl Ogletree told him she did not know anything about the shooting. (T: 810) He stated that was normal for that area of Coconut Grove for people to deny knowledge in front of other people, then to call the police privately at some point later. (T: 810) He stated that Ogletree called him the next night and told him that one of the people involved in the shooting was in custody and there were two to three other guys that were involved who had not been caught. (T: 810) He said she did not tell him whether they had the right guy or the wrong guy. (T: 811)

The state rested its rebuttal case and the attorneys presented their closing arguments. (T: 814-817) During his closing argument, the prosecutor told the jury that Cheryl Ogletree received two telephone calls from the defendant after the shooting and pointed out that no one else was getting any phone calls from the defendant:

> She got two phone calls from the defendant. Nobody else is getting phone calls from the defendant about what they may or may not have seen. (T: 886)

The defendant objected to this comment and the court withheld ruling until after arguments. (T: 886) When the prosecutor concluded his argument, the defendant again objected and moved for a mistrial. (T: 888-889) The defendant argued the prosecutor's comment implied that the defendant had improperly influenced Ogletree during the calls, for which there had been no evidence. (T: 888-889) The court denied the motion. (T: 889)

Further in closing argument, the prosecutor told the jury that "a mother was gunned

down:"

> On January the 10th of 1990, two unsuspecting human beings from Costa Rica came to this community for business. A mother was gunned down. (T: 887)

The defendant objected to this comment and the court sustained the objection. (T: 887) At the conclusion of the argument, the defendant moved for mistrial, which the court denied. (T: 889)

The prosecutor also told the jury that all four men were equally responsible for the shooting and that the defendant was liable as a principal. (T: 823) The jury was instructed on the law of principals. (T: 902, 910-911)

On March 12, 1991, the jury returned a verdict of guilty as charged of first degree murder in count 1, guilty as charged of attempted first degree murder with a firearm in count 2, guilty as charged of attempted armed robbery in count 3, guilty as charged of shooting into an open vehicle in count 4, and guilty as charged of possession of a firearm during a criminal offense in count 5. (R: 1075-1077; T: 925-926)

The penalty phase of the trial commenced on March 20, 1991. (T: 934) Prior to taking testimony, the defendant announced to the court there was an agreement between the defendant and the state with respect to the deposition of Dr. Leonard Haber, a psychologist who examined the defendant. (T: 941) The agreement was that the deposition of Dr. Haber had been edited by the parties and would be read into the record before the jury as evidence. (T: 941-942, 951-953) The trial judge permitted the defense attorney to read the edited deposition into the record. (T: 942, 953)

The state's first witness at the penalty phase was Sergeant Herr from the City of Miami Police Department. (T: 944) He testified that in 1981 he investigated a robbery that occurred in Coconut Grove on October 5, 1981, where a black male, Phillip Lowry, and a black female were walking down the street about noon when two black males rode up to them on bicycles. (T: 946) One of the males took out a 45-caliber handgun from his waistband, pointed it at Lowry and demanded his large radio and jewelry. (T: 946-947) Sergeant Herr testified he

subsequently showed a photo spread to both Lowry and the female independently and that they both identified the defendant as the man with the gun who demanded the property. (T: 946-947) They told Sergeant Herr the defendant told them to "give up the radio," then when Lowry put the radio down, the defendant demanded Lowry's jewelry. (T: 948) The sergeant testified Lowry told him the defendant said, "So just try something and I'll shoot you." (T: 948) Sergeant Herr stated he arrested the defendant for that crime on October 7, 1981, and that the defendant had Lowry's radio. (T: 949) The defendant told the sergeant he did not commit the crime and that he had obtained the radio from another man who did the robbery. (T: 949) On cross examination, Sergeant Herr stated that at the time of that robbery, the defendant was 17 years old. (T: 950)

The state then introduced into evidence certified copies of the defendant's information, judgment, and sentence for armed robbery in that case, Case No: 81-23131. (SR: 159-165; T: 949-950) The judgment shows the defendant pled guilty to robbery and was sentenced on March 10, 1982, pursuant to the youthful offender act, chapter 958 of the Florida Statutes, to 6 years in the custody of the department, the first 4 years to be served in prison to be followed by 2 years in a community control program. (SR: 162) The sentence shows that on April 10, 1985, the court revoked the community control and sentenced him to 10 years. (SR: 164)

The state also introduced into evidence certified copies of the defendant's information, judgment, and sentence in Case No: 81-23366. (SR: 166-172; T: 951) The information charges the defendant with the strong arm robbery of April Hayes by taking her purse on September 25, 1981. (SR: 167) The judgment shows the defendant plead guilty to the strong arm robbery on March 10, 1982, and was sentenced pursuant to the youthful offender act to 6 years in the department, the first 4 years to be served in prison to be followed by 2 years in a community control program. (SR: 169) This plea and sentence were made at the same time as the other case, Case No: 81-23131. (SR: 169) On April 10, 1985, the court revoked the community control and sentenced him to 10 years, concurrent with Case No: 81-23131. (SR: 171-172)

The state then rested its case in the penalty phase. (T: 951) The trial judge informed the jury, pursuant to the agreement of the defense and the state, that Dr. Haber, a licensed psychologist hired by the defense attorney to assist the defense in this case, was unavailable to testify at that time but that if he were called, he would testify in accordance with the deposition the defense attorney was going to read to them and that the jury should consider that testimony as if he were there testifying. (T: 954)

The deposition of Dr. Haber stated that he had met with the defendant on two separate occasions and had spent over an hour with him on each occasion. (SR: 179-220; T: 954-955) Dr. Haber stated he estimated the defendant's intelligence level based upon the history, the verbal presentation, and the defendant's performance on the Bender-Gestalt test and the human figure drawing test. (T: 955-956) He said he did not perform an I.Q. test on the defendant. (T: 956) The defendant told him he had a ninth-grade education and that he could read and write poorly. (T: 956-957) Dr. Haber also took the defendant's handwriting sample and determined the defendant was "not literal, he reads and writes poorly." (T: 957) Dr. Haber concluded the defendant was of low intelligence, "between borderline and low average," with an estimated I.Q. "somewhere between mid-seventies to mid-eighties," and that his low level of vocabulary and speech suggested impoverishment. (T: 961, 964-965, 967) Dr. Haber testified that although he found no direct relationship between the defendant's low intelligence and the crime that was committed, a person with the defendant's characteristics of a poor education, low intelligence, little school, prison record, and low family relationship would have a bearing on the crime in that they are more likely to commit a crime because their adjustment potential and ability to maintain a living is low:

> Let me say no direct relationship. If I wanted to stretch out for potential relationships - and it wouldn't be a long stretch - it may or may not be given any weight whatsoever by the judge and jury.
>
> But a person with a poor education, a person with low intelligence, a person with a learning disability, a person with little school, a person with a prison record, etcetera, a person with a low family relationship is going to have a relationship between those factors and a crime, because it's more likely that they are

> going to commit a crime since their adjustment potential is less and their ability to maintain a living and sustain themselves is less.
>
> But it's what I would call a general force factor, it's not specific to any crime. Any crime might do that doesn't require a great deal of intelligence or great planning skills. But it is easier to fall into illegal activities under those conditions than if an individual has the capacity to exercise other sources.
>
> In that general way, somebody could make a connection. I wouldn't say there is no connection, but there is certainly is no direct connection. (T: 962-963)

Dr. Haber also stated the defendant displayed a street awareness or street smartness, was able to appreciate what was going on and to accomplish what he wanted, and would be able to plan with three other guys to rob somebody. (T: 958-960)

Dr. Haber further stated that although the defendant did not reveal any history of psychological or psychiatric treatment and, assuming he were free of drug involvement, would be able to hold down a job physically, the defendant would only be able to "hold certain jobs, quite low-level jobs, but - no jobs depending upon intellectual skills." (T: 964) Dr. Haber had no indication that the defendant was under the influence of alcohol or drugs at the time of the shooting. (T: 963) Dr. Haber testified the defendant had been a student at MacArthur South Opportunity School, which is a school for troubled youngsters and that he left because he was getting in trouble and skipping school. (T: 968)

Dr. Haber further stated the defendant told him regarding the incident that he had heard a shot and "knew that spelled trouble and the best thing is to get away," and that he got in his car and left the area. (T: 971) The defendant was cooperative and indicated to Dr. Haber he had an understanding of what was going on at the time of the incident. (T: 972) The doctor also stated he gave no indication that he had ever been abused as a child and that the defendant told him "he got along good with his mother, good with his father and good with everybody, it's just hard to believe, in light of this history." (T: 973) He also told him he was happy about his upbringing and had no complaints. (T: 973)

The defendant then called his father, James King, to the stand. (T: 974) Mr. King testified he was almost 65 years old and still lived in Coconut Grove. (T: 974) He said the

defendant's mother was Essa Mae King and that they had two children, Willie and his sister Marion, and that the defendant also had stepbrothers and stepsisters. (T: 975, 979) Mr. King testified he left the house in 1968 when the defendant was 4 years old and that the defendant was raised by Essa alone. (T: 975-976) He stated that Essa remarried when the defendant "was in the twenties." (T: 976) Essa worked a couple of days a week "waiting," earning $15 a week to support herself and her children. (T: 978) He testified he knew that the defendant had problems in school, but that he did not know what they were and that he himself had no problems with the defendant and "thought he had been a good boy." (T: 967-978)

On cross examination, Mr. King stated that he had never in his life been in trouble with the law and that he had worked hard all his life and still worked part time in the same business he had been working in for the past eight years. (T: 978-979) Mr. King stated that the defendant and his sister Marion were his natural children, and that he also helped to raise a number of other children as his own with the defendant, including James Wilson and Vann Wilson. (T: 979-980) He stated that although he was separated from the defendant's mother, he still stayed close to the defendant and saw him about twice a week, that he tried to be a good father, tried to give him counseling and advice, tried to teach him the difference between right and wrong, got him to go to church, told him to stay away from drugs, told him to stay away from hurting people, taught him to stay away from guns and that robbing people was wrong, and to be respectful of other people. (T: 980-981) He stated he taught the defendant all important values of life and he taught all his children and that he never hit or abused any of his children. (T: 981-982) Mr. King testified he tried to be the best father that he could. (T: 982) Mr. King stated he never had any problems with James or Vann Wilson and that all his children had basically the same education, love and advice. (T: 984) He further testified that although the defendant was raised by Essa, he considered himself close to the defendant and that the defendant loved him so much he wanted to live with him rather than his mother. (T: 985) Mr. King admitted the defendant was the one who least followed his advice. (T: 985-986)

The defendant then rested on the penalty phase. (T: 987) The prosecutor presented his penalty argument to the jury. (T: 990-1014) The prosecutor stated that this particular crime was not "so atrocious itself it would scream out for the ultimate penalty," stated that the defendant was not such a bad guy with such a bad background as to compel the death penalty, and concluded this "is a case that falls in the middle." (T: 998-999) He argued that death was "the appropriate penalty" because the defendant had led "a life of crime . . . a life of robbery," and despite having been sent to prison, he had not been rehabilitated and that if the jury recommended a life sentence, he would get out of prison in twenty five years on parole. (T: 996-1000) He then told the jury that perhaps the reason why the defendant has committed crimes is that "he is evil and an evil person cannot be rehabilitated." (T: 1000) The prosecutor quoted Joseph Conrad that "belief in a supernatural source of evil is not necessary. Men alone are quite capable of every wickedness." (T: 1000; CT) He also paraphrased a quote from Martin Luther King that "he who passively accepts evil is as much involved in it as he who helps perpetuate, and he who accepts evil without protesting against it is really cooperating with it." (T: 1001; CT) The prosecutor then told the jury: "Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death." (T: 1001) This portion of the transcript is as follows:

> MR. KASTRENAKES: [prosecutor] I think this man indicated we failed. We have failed with Willie James King. He has not been rehabilitated over the years and he is not rehabilitatable.
>
> In some cases the death penalty is, as you know, a legal sentence. You all, in jury selection, said, "This is the right case or the right defendant." You believe in it. You would have no problem considering it in some cases.
>
> The crime itself. If it was just a defendant's first incident the crime itself would be -- the behavior would be so atrocious itself it would scream out for the ultimate penalty. This is not such a case. I am not telling you it is.
>
> In some cases the defendant himself is so bad -- and the crime is -- you could find justification for it with domestic or where the victim was perhaps a participant in a bank robbery with the defendant, and the defendant killed the victim and the crime you could think -- normally, you would recommend life but the

background of the man is so bad that that [sic] -- those aggravating factors are so strong they would compel the ultimate penalty. This is not such a case either.

This is a case that falls in the middle. You have a situation where the defendant, through his background, is a man who has lived a life of crime of robberies and the facts of the case, the justification for homicide, are such that in combination together the death penalty is the appropriate sanction.

What has the evidence shown that the defendant learned through his prison record, through his convictions of prior violent felonies?

What has he learned? Nothing. He has learned to continue to take what is not his. He has learned to kill those who resist so apparently he cannot be rehabilitated.

The defense attorney is going to argue to you --

MR. KASSIER: [defense attorney] Objection as to what I am going to argue, Judge.

THE COURT: Sustain the objection.

MR. KASTRENAKES: The argument made by defense counsel would be that since he was back from prison --

MR. KASSIER: Same objection.

THE COURT: Sustain the objection.

MR. KASTRENAKES: Life does not mean life. Ten years does not mean ten years. He was released in less than five.

MR. KASSIER: Objection. It is not a proper statement of the law.

THE COURT: Sustain the objection.

MR. KASTRENAKES: The Court will tell you that in twenty-five years this man will be eligible for parole. In the book, which is the adult life of this man, it is a testament to a life of crime. A life of robbery, a failure of the criminal justice system. And why? Perhaps the simple reason is that he is evil and an evil person cannot be rehabilitated.

Joseph Conrad, who was an author back at the turn of the century, wrote that belief in a supernatural source of evil is not necessary. Men alone are quite capable of every wickedness. [see certificate of correction in CT]

Your solemn duty in this case is to assess the aggravating factors, give it its weight and make the appropriate recom-

mendation.

I submit to you that this factor alone upholds the imposition of the ultimate penalty. You have to do your duty in this case.

Martin Luther King wrote in 1958, that he who passively accepts evil is as much involved in it as he who helps perpetuate, and he who accepts evil without protesting against it is really cooperating with it. [see certificate of correction in CT]

Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death. (T: 1000-1001, includes corrected portions from certificate of correction in CT)

* * * *

Be true to your oath. Be true to yourselves. Follow the law. Follow your duties.

An American patron once said about duty, "Duty is a subliminal word in our language so do your duty in all things. You cannot do more. You should never wish to do less.

I am asking you on behalf of the people in this state and this community to do your duty. I cannot ask any more. I expect no less.

There can be only one lawful recommendation in this case and that recommendation is a recommendation of death.

The aggravating factors overwhelm any argument in mitigation.

Do the right thing. Thank you. (T: 1013-1014)

During his penalty instructions, the trial judge instructed the jury on three aggravating factors: (1) the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person, (2) the crime for which the defendant is to be sentenced was committed while he was engaged in, or an accomplice in the commission of, or an attempt to commit the crime of robbery, and (3) the crime for which the defendant is to be sentenced was committed for financial gain. (T: 1027-1028) The trial judge instructed the jury on two mitigating factors: (1) the victim was a participant in the defendant's conduct or consented to the act, and (2) any other aspect of the defendant's character or record, and any other circumstance of the offense. (T: 1028) At the conclusion of their deliberations,

the jury returned a recommendation of a sentence of death by a vote of 9 to 3. (T: 1035)

The sentencing hearing took place on April 15, 1991. (T: 1041) At the hearing, the state presented a guidelines scoresheet for the noncapital offenses which scored the defendant to 312 points for a presumptive sentence of 22-27 years. (R: 1139) The parties also acknowledged that prior to trial, the state had offered the defendant a plea to first degree murder and life imprisonment, but the defendant had refused the offer. (T: 1059) The state admitted the reason for their plea offer was for rehabilitation of the defendant and opportunity to assist the state in prosecuting the other men involved in the crime. (T: 1059-1060) The trial judge found the two aggravating circumstances were proven beyond a reasonable doubt, and found that neither mitigating circumstance was proven, and further, even if they had been proven, they would not outweigh the aggravating. (T: 1061) The judge then sentenced the defendant to death on count 1. (R: 1129; T: 1061) With respect to count 2, the attempted murder, the judge departed from the guidelines and sentenced the defendant to life in prison. (R: 1130; T: 1062) On counts 3, 4, and 5, the judge sentenced the defendant to 15 years in prison under the sentencing guidelines, to run concurrently with count 2. (R: 1131-1133; T: 1062)

The judge's written order of death sentence was filed at the sentencing on April 15, 1991. (A: 1-5; R: 1134-1138; T: 1061) In this written order, the judge found that two aggravating circumstances were proven: (1) the defendant was previously convicted of two violent felonies, one strong arm robbery and one armed robbery, committed within a week of each other in 1981 when the defendant was 17 years old, and (2) the capital felony for which the defendant was sentenced was committed while the defendant and others were engaged in the commission of an attempted robbery. (A: 1-2; R: 1134-1135) The judge found evidence of two mitigating factors: (1) the victim was a participant in the defendant's conduct in that the victim and her husband went to the place where the murder occurred to purchase some drugs, and (2) the nonstatutory circumstance that the defendant is of below average intelligence. (A: 2; R: 1135) The court first stated the mitigating factors did not outweigh the aggravating

circumstances and that the "necessary conclusion" is that the aggravating factors outweighed the mitigating factors and the jury "could reasonably recommend the imposition of the death penalty." (A: 2-3; R: 1135-1136) The court then stated that the two aggravating factors, conviction of prior violent felony and commission of crime during attempted robbery, had been proven and did exist, but that "[m]itigating factors do not exist." (A: 4; R: 1137)

The court also stated that although the state urged the imposition of the death penalty, it did not always do so and had offered to drop the penalty if the defendant would plead guilty. (A: 4; R: 1137) The judge stated that although this case "may not fit the class of cases in which one would ordinarily believe the death penalty is appropriate; this murder was not especially wicked, nor was it cold, calculated or even premeditated . . . [H]owever, this court cannot state that there is no basis for the jury recommendation and, therefore, the recommendation of the jury should be followed." (A: 4; R: 1137) The judge further stated that the jury, as the conscience of the community, recommended death, and that the jury recommendation "is entitled to great weight and should not be overturned unless no reasonable basis exists for the opinion." (A: 4; R: 1137)

SUMMARY OF ARGUMENT

The defendant submits that numerous errors occurred during the guilt phase of his trial: (I) the trial judge erred in overruling the defendant's Neil objection and in permitting the prosecutor to peremptorily challenge prospective juror Ashley, where the state failed in its burden of showing record support for its reason and absence of pretext in the challenge and where the record shows the presence of three Slappy factors; (II) the trial judge erred in overruling the defendant's objections and in denying his motions for mistrial when the prosecutor improperly commented during opening statement and closing argument regarding appeal to sympathy, victim impact, and the defendant improperly influencing his witness; (III) the trial judge erred in admitting into evidence, over the defendant's objection, state's exhibit 20, a gruesome photograph depicting the victim's body in the morgue, where its gruesome nature was caused by factors apart from the crime itself and where its probative value was minimal.

The defendant further submits that numerous errors occurred during the penalty phase and sentencing: (IV) the prosecutor's arguments to the jury during the penalty phase that unless the jury recommended death, the defendant would eventually be released from prison to commit further crimes, and comments regarding the jury's duty to return a death recommendation and to not cooperate with evil or else they would be evil like the defendant, were improper and inflammatory and constituted a nonstatutory aggravating factor; (V) the trial court erred in imposing a departure sentence of life imprisonment on count 2, the attempted murder with a firearm, where the judge never filed a contemporaneous written reason for departure; (VI) the trial judge's consideration of the defendant's exercise of his right to plead not guilty as a factor in imposing the death sentence was impermissible and constituted an improper nonstatutory aggravating factor; (VII) the trial judge erred in failing to consider and weigh all mitigating circumstances available in the record, in according the mitigating factors no weight in imposing the death sentence, and in failing to prepare a clear and unambiguous written sentencing order; (VIII) the trial judge erred in giving undue weight to

the jury recommendation of death and in failing to make an independent judgment as to the imposition of the death penalty after acknowledging the death penalty would normally not be appropriate in this case; (IX) the defendant's sentence of death is disproportional to the life sentences of similarly situated defendants convicted of similar felony murders. This is a straight felony murder by a single impulsive gunshot during a simple, quickly attempted robbery of a vehicle driver that resulted in immediate unconsciousness and virtually instantaneous death, with no other injuries, no additional acts of torture or violence, no apprehension of death by the victim, and with nothing taken. The defendant's prior record is not egregious and the underlying factual circumstances of his record did not result in death or physical injury to another. The only two aggravating factors, felony murder and prior violent felony, are weak, and important mitigating circumstances do exist. The defendant is not the most culpable of murderers as he had no intent to kill but shot out impulsively, the evidence was actually conflicting as to who fired the shot, the defendant is borderline retarded and came from a disadvantaged background, and further, the defendant is not a man of such reprehensible character that he deserves to be executed for a crime that by itself does not deserve the death penalty.

GUILT PHASE ARGUMENT

I

THE TRIAL JUDGE ERRED IN OVERRULING THE DEFENDANT'S NEIL OBJECTION AND IN PERMITTING THE PROSECUTOR TO PEREMPTORILY CHALLENGE PROSPECTIVE JUROR ASHLEY WHERE THE STATE'S REASONS WERE NOT SUPPORTED BY THE RECORD, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL AND EQUAL PROTECTION OF LAW UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

During jury selection, the prosecutor exercised a peremptory challenge against Mr. Ashley, a black man; the defendant objected to the strike on Neil grounds, stating there was no basis from his answers to strike him other than racial reasons. (T: 270-272) The defendant is also a black man. (T: 253) The court agreed and told the state that unless they could give him a reason, he could find no basis for the strike against Mr. Ashley. (T: 270) The prosecutor proffered his reason that Mr. Ashley was the victim of a crime, he was shot at and unable to identify the person, and that the prosecutor did not want "anybody on this jury that feels that there is a problem or a possibility that the victim of a crime who was shot at could not identify the shooter." (T: 270) He said he was not striking Mr. Ashley for racial reasons, but that he did not "want the jury to feel that he's not in a position to look at a witness and say he had an opportunity to not make an identification or to make an identification." (T: 271) The court, after hesitation, accepted the reason over the defendant's objection. (T: 272) This ruling by the court was error.

It is now well settled that excluding even a single person from jury service solely on the basis of race violates the defendant's right to a fair and impartial jury trial under Article I, sections 2 and 16, of the Florida Constitution, and the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. Tillman v. State, 522 So.2d 14, 17 (Fla. 1988); State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The principles governing the procedure for determining whether a peremptory challenge has been improperly made in a discriminatory

manner are also well established. Once the defendant establishes and the trial judge finds there is a strong likelihood that the peremptory challenge is being exercised solely on the basis of race, the burden shifts to the prosecutor to provide a clear and reasonably specific racially neutral explanation of legitimate reasons for the state's use of its peremptory challenge. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988); State v. Neil, supra at 486; Foster v. State, 557 So.2d 634 (Fla. 3d DCA 1990). The judge's duty at this point is to evaluate the credibility of the persons and the reasons given in light of the circumstances of the case, and to decide whether the reasons proffered by the state are first, neutral and reasonable, related to the particular case to be tried, and second, supported by the record and not a pretext for subtle discrimination. State v. Slappy, supra at 22. The judge may not merely accept the reasons proffered by the state at face value, "but must evaluate those reasons as he or she would weigh any disputed fact." State v. Slappy, supra at 22.

In Slappy, this Court set forth a nonexclusive list of five factors which weigh against the legitimacy of the prosecutor's proffered race neutral explanation. This Court stated that "the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext." These factors are:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling out the juror for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to jurors who were not challenged. 522 So.2d at 22.

Thus, even when a court finds the prosecutor's reason to be race neutral and reasonable on its face, the state must still demonstrate the second factor: record support for the reasons offered and the absence of pretext. When one or more of the Slappy factors are present and the state fails to offer "convincing rebuttal," the state's explanation must be deemed a pretext. State v. Slappy, 522 So.2d at 22-23; Roundtree v. State, 546 So.2d 1042, 1044 (Fla. 1989); Reynolds v. State, 576 So.2d 1300 (Fla. 1991); Parrish v. State, 540 So.2d 870, 872 (Fla. 3d DCA 1989), approved sub nom, Reynolds v. State, 576 So.2d 1300 (Fla. 1991).

This is precisely what occurred in this case. The prosecutor's reason for challenging Mr. Ashley was that he was the victim of a shooting and was unable to identify his assailant and, according to the prosecutor, thereby understood that victims may have problems identifying their defendants. (T: 270-272) As the trial judge observed, this reason on its face could be reasonable and race neutral. (T: 271) See Parrish v. State, 540 So.2d 870 (Fla. 3d DCA 1989), approved sub nom, Reynolds v. State, 576 So.2d 1300 (Fla. 1991).

However, the state then failed in its burden of showing record support for this reason and absence of pretext in the challenge. A review of the record shows the presence of three Slappy factors: (1) alleged group bias not shared by Mr. Ashley, (2) failure to examine Mr. Ashley regarding the alleged bias, and (3) singling out Mr. Ashley for special questioning regarding the alleged bias. As Slappy instructs, the presence of these factors strongly weighs against the legitimacy of the prosecutor's explanation.

The record demonstrates the court first asked the prospective jurors if anyone had ever seen anybody shot, and three jurors answered affirmatively. (T: 55) Mr. Ashley replied that someone had driven by and "shot out," and Mr. Forcine replied he saw someone shot in a bar incident. (T: 55)[7] In response to the court's question as to whether anyone had been the victim of a crime, Ms. Gonzalez stated she had been the victim of two robberies, and twelve prospective jurors indicated they had been the victims of burglaries of homes, cars or businesses. (T: 55-57) Mr. Asmus stated he was an eyewitness to a bank robbery. (T: 135)

Despite this overwhelming number of jurors who had been either witnesses to or victims of crime, the prosecutor singled out and only asked only one of them regarding his ability to identify the perpetrator: Mr. Ashley. (T: 75-77, 87, 93-94, 97, 99, 101, 108, 110-111, 119, 122-126, 128-130, 135, 137-139, 140-144, 145-150, 155-158, 161-162, 168-171, 175) Even though Mr. Forcine had been an eyewitness to a bar shooting, the prosecutor never questioned him regarding his ability to identify the person. (T: 55, 87, 93-94, 97, 139) Even though Mr.

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[7]The third juror, Mr. Burt, was involved in a hunting accident during which his cousin accidentally shot him. (T: 55, 86)

Asmus had been an eyewitness to a bank robbery, the prosecutor never asked him about his experience in identifying the person. (T: 135) Although the prosecutor did question the jurors as to whether anyone was caught, this question hardly touches the prosecutor's alleged concern over jurors having personal experience with the foibles of defendant identification. (T: 75-77, 122-124, 129, 135, 137-138, 147, 155-159, 162, 168, 175)[8] Thus, it is clear the prosecutor singled out Mr. Ashley and specifically questioned only him as to whether he recognized the person (Slappy factor 1). Hicks v. State, 591 So.2d 662 (Fla. 4th DCA 1991) (state's reason for challenging juror on basis of prior jury service was impermissible pretext where state only questioned that juror and failed to similarly question two other jurors who also had prior jury service).[9]

Moreover, the record conclusively demonstrates the prosecutor failed to examine Mr. Ashley regarding "the alleged bias," i.e. his inability to identify the person (Slappy factor 2), and further failed to establish that this issue of identification was shared by Mr. Ashley (Slappy factor 3). The trial judge pointed out, and the prosecutor admitted, that no one questioned Mr. Ashley as to whether he even had the opportunity to view the person. (T: 271) Mr. Ashley himself described the incident as a drive-by shooting, which suggests that he may have seen nothing more than a fleeing car. (T: 55) A few questions from the prosecutor could have established the existence or nonexistence of this basis for the challenge. Williams v. State, 574 So.2d 136, 137 (Fla. 1991) (juror improperly excused for failure to understand felony murder doctrine where prosecutor failed to question juror regarding that doctrine); State v. Slappy,

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[8]Although a number of these crimes were residential, auto or business burglaries, this does not render moot a discussion of eyewitness identification. The prosecutor never asked the jurors whether they were present during these burglaries and whether they had the opportunity to identify the perpetrator. (T: 56-57, 75-76, 124, 129, 137, 158-159, 161-162, 168, 175) Although two jurors indicated they were not home during the burglary, the record is silent with respect to the other ten jurors. (T: 56, 148-149)

[9]Of the 16 prospective jurors who were eyewitnesses or victims of crimes, Mr. Ashley and Ms. Douglas were the only blacks. Ms. Douglas stated that she was not present during the burglaries to her house. (T: 56) The record shows that there were five black prospective jurors altogether: Mr. Ashley (challenged by the state), Mr. Allen (challenged by the defendant as the alternate), and the three black women who sat on the jury: Ms. Douglas, Ms. Rolle and Ms. McDonald. (T: 296)

522 So.2d 18, 23 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988) (failure of prosecutor to question black prospective jurors regarding the existence or nonexistence of the trait rendered the state's explanation suspect); Hicks v. State, 591 So.2d 663 (Fla. 4th DCA 1991) (juror improperly excused where state never questioned her concerning her occupation as music teacher and what effect it might have on her ability to serve as juror); St. Louis v. State, 584 So.2d 180 (Fla. 4th DCA 1991) (court erred in failing to sustain defendant's objection to prosecutor's challenge to juror on grounds he was not well educated where prosecutor failed to question juror regarding his educational background); Gadson v. State, 561 So.2d 1316 (Fla. 4th DCA 1990) (reason for prosecutor's challenge to two jurors on ground teachers are more open to entertaining doubt was pretext where state failed to question any juror about his teaching background and thereby failed to establish the reason for the challenges); Shelton v. State, 563 So.2d 820 (Fla. 4th DCA 1990) (prosecutor's failure to question juror about the grounds for the challenge rendered explanation suspect); Mayes v. State, 550 So.2d 496, 498 (Fla. 4th DCA 1989) (same). Consequently, the first two Slappy factors are also present here.

As previously stated, the presence of any of the Slappy factors renders the state's explanation immediately suspect. Here we have three factors. When the trial judge expressed his concern over the prosecutor's challenge, the prosecutor offered no further explanation as to why he challenged Mr. Ashley other than to say he was not striking him for racial reasons. (T: 271-272) This is insufficient to overcome the strong showing of lack of record support for the explanation and the strong suspicion of pretext. The trial court then simply accepted the prosecutor's explanation. (T: 272) Consequently, the trial court erred in overruling the defendant's objection and in permitting the prosecutor to peremptorily challenge Mr. Ashley. The defendant's rights were violated under Article I, sections 2, 16 and 22, of the Florida Constitution, and the Fourteenth Amendment to the United States Constitution. A new trial is mandated.

II

THE TRIAL JUDGE ERRED IN OVERRULING THE DEFENDANT'S OBJECTIONS AND DENYING HIS MOTIONS FOR MISTRIAL WHEN THE PROSECUTOR MADE IMPROPER COMMENTS DURING OPENING STATEMENT AND CLOSING ARGUMENT REGARDING APPEAL TO SYMPATHY, VICTIM IMPACT, AND THE DEFENDANT IMPROPERLY INFLUENCING HIS WITNESS, THEREBY VIOLATING WILLIE KING'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY AND DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The prosecutor made several prejudicial comments during opening statement and closing argument in violation of the defendant's right to a fair trial before an impartial jury and due process of law under Article I, sections 9 and 16, of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

A. APPEAL TO SYMPATHY

It is well settled that a prosecutor, in seeking the return of a guilty verdict, must confine his comments and argument to the merits of the case without indulging in appeals to prejudice, passion or sympathy. Grant v. State, 194 So.2d 612 (Fla. 1967); Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983); Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982). Prosecutorial argument or comment that shifts the juror's attention away from the evidence and toward sympathy for the victim and the victim's family and hostility for the defendant is prohibited. In the present case, the prosecutor indulged in such improper appeal to sympathy during the guilt phase of the trial, and the resulting prejudice to the defendant requires a new trial.

During his opening statement, the prosecutor told the jury that the victim's husband will never forget the face of the man who "wiped off the face of this earth the mother of his children":

> And the Defense will raise questions during this trial whether he actually had an opportunity to see what the victim saw. And he can try as he might or may, but he will never forget the face of the man who, for no other reason than greed, wiped off the face of the earth the mother of his children. (T: 301-302)

The defendant immediately objected to this comment and moved for a mistrial on the grounds it was irrelevant and inflammatory. (T: 302) The judge denied the motion. (T: 302)

During closing, the prosecutor told the jury that "a mother was gunned down":

> On January the 10th of 1990, two unsuspecting human beings from Costa Rica came to this community for business. A mother was gunned down. (T: 887)

The defendant objected to this comment and the court sustained the objection. (T: 887) At the conclusion of the argument, the defendant moved for mistrial on the comment and the court denied the motion. (T: 889)

These two comments are highly improper. Florida courts have repeatedly condemned such prosecutorial comments. In Nevels v. State, 351 So.2d 762, 763 (Fla. 1st DCA 1977), the court held it was error for the state attorney, in his opening statement, to call the jurors' attention to the fact that the deceased was married and had a 13 year old daughter. In Gomez v. State, 415 So.2d 822, 823 (Fla. 3d DCA 1982), the court reversed the defendant's conviction when the prosecutor told the jury not to let the victim "with three children and a wife walk away without justice in this case." In Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982), the court found it improper for the prosecutor to comment that the victim's wife and three children were sorry the defendant killed the victim. See also Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983) (prosecutor's comment asking for justice on behalf of victim's wife and children was "an improper appeal to the jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused"); Macias v. State, 447 So.2d 1020, 1021 (Fla.3d DCA 1984) (prosecutor's question as to whether victim had ever seen his posthumously born child was improper appeal to sympathy of jury).

In the present case, the effect of the two improper comments by the prosecutor appealing to sympathy are equally prejudicial. Of course, the victim's position as a mother of three children was wholly irrelevant to the issues and was indisputably sympathetic. And the prosecutor's description of the mother of the children being "gunned down" and "wiped off the

face of the earth" was too graphic to be harmless. The sole purpose for these comments was to inflame the passions of the jury and to create hostility toward the defendant. Consequently, the court erred in overruling the defendant's objection and in denying his motions for mistrial.

B. VICTIM IMPACT STATEMENTS

These improper comments also constituted victim impact and character evidence, the admission of which violated Florida law under §921.141(5), Florida Statutes (1989), and Article I, sections 9 and 16, Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court reversed a death sentence pursuant to the Eighth and Fourteenth Amendments where victim related information including personal characteristics of the victim was admitted for the jury's consideration during the sentencing phase of a capital murder trial. In South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court extended the rule of Booth to include the argument by a prosecutor during the sentencing phase of a capital murder case wherein the prosecutor commented on personal qualities of the victim. This Court has extended these rules to prosecutorial comments and evidence introduced during the guilt phase of a capital murder trial. Burns v. State, ___ So.2d ___, 16 FLW S-389, S-391 (Fla., May 16, 1991), reh. pending; Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990).

Although both Booth and Gathers have been overruled by Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), to the extent the Eighth Amendment does not per se prohibit a capital sentencing jury from considering victim impact evidence, such victim impact evidence is still not admissible in Florida capital proceedings as it is irrelevant to a capital sentencing decision and is not related to one of the statutorily limited aggravating factors. Jackson v. Dugger, 547 So.2d 1197, 1199 (Fla. 1989); Grossman v. State, 525 So.2d 833, 842 (Fla. 1988); cert. denied, 489 U.S. 1071 (1989). Its introduction during the guilt

phase may call for reversal of the death sentence if it cannot be said beyond a reasonable doubt that the jury would have recommended a sentence of death had it not heard the improper comments regarding the victim. Burns v. State, supra at S-391; Jones v. State, supra at 1240; Jackson v. Dugger, supra at 1199. Here, given the conflicting testimony regarding the defendant's involvement in the crime and considering other improper arguments by the prosecutor during the penalty phase during which he basically told the jury they would be cooperating with evil if they returned a life recommendation (see Argument IV, infra), it cannot be said beyond a reasonable doubt that the jury would have recommended a sentence of death if it had not heard these improper comments. Consequently, the erroneous admission of these comments during the guilt phase entitles the defendant to a new sentencing hearing before a new jury.

C. IMPROPER INFLUENCE

The prosecutor also committed reversible error when he directly insinuated, with no basis for support, that the defendant had improperly influenced Cheryl Ogletree to testify on his behalf at trial.

During closing argument, the prosecutor told the jury that Ogletree received two telephone calls from the defendant after the shooting.[10] (T: 765) However, the prosecutor then told the jury that no one else got any telephone calls from the defendant:

> She got two phone calls from the defendant. Nobody else is getting phone calls from the defendant about what they may or may not have seen. (T: 886)

The defendant objected to this comment and the court withheld ruling until after the arguments. (T: 886) When the prosecutor concluded his argument, the defendant again objected and

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[10]Ogletree testified that she grew up in the same neighborhood with the defendant and, although they are not close friends, she has known him since they were children. (T: 734-736) Shortly after the shooting, she told the defendant's girlfriend, Michelle, what she had seen and Michelle gave the defendant Ogletree's phone number. (T: 764-765) Ogletree stated that no one told her they needed her to be a witness and that no one asked her to come to court to lie about what she saw. (T: 764-765, 770)

moved for a mistrial. (T: 888-889) The defendant argued the prosecutor's comment implied that he had improperly influenced Ogletree during the calls, for which there was no evidence. (T: 888) The court denied the motion. (T: 889)

A review of the record shows there was no evidence at all as to whether the defendant had called other witnesses by telephone and certainly no evidence that the defendant had improperly influenced Ogletree. The prosecutor's comment directly insinuated that the only witness who received a phone call from the defendant was the witness who testified on his behalf because she was the only witness he had influenced. The prosecutor all but directly accused the defendant of procuring false testimony. In Gonzalez v. State, 572 So.2d 999 (Fla. 3d DCA 1990), the prosecutor insinuated to the jury that the defendant was hired to "get rid of" the victim. The court found this was not supported by the evidence and was not relevant, and further, it was so inflammatory it violated the defendant's right to fair trial, requiring reversal of the conviction. In Glantz v. State, 343 So.2d 88 (Fla. 3d DCA 1977), the court reversed a conviction where the prosecutor had referred to the defendant in a theft case as a "fence," for which there was no evidence, and had suggested unrelated cocaine dealings involving the defendant. In Shorter v. State, 532 So.2d 1110 (Fla. 3d DCA 1988), the defendant's conviction was reversed when the prosecutor suggested on cross examination that the defendant had put three police officers in the hospital when he was arrested. See also Glassman v. State, 377 So.2d 208, 210 (Fla. 3d DCA 1979) (improper for prosecutor to argue defendant has committed other crimes when there is no evidence to support this assertion); State v. Wheeler, 468 So.2d 978 (Fla. 1985) (same).

The prosecutor's comment here is equally improper and its only purpose was to plant in the jury's mind the suggestion that the defendant had improperly influenced Ogletree. Since the evidence in this case was conflicting, it was highly prejudicial for the prosecutor to essentially accuse Willie King of improperly influencing the only important witness on his behalf. His motion for mistrial should have been granted.

III

THE TRIAL JUDGE ERRED IN ADMITTING INTO EVIDENCE A GRUESOME PHOTOGRAPH WHERE ITS GRUESOME NATURE WAS CAUSED BY FACTORS APART FROM THE CRIME ITSELF AND WHERE ITS PROBATIVE VALUE WAS MINIMAL, IN VIOLATION OF WILLIE KING'S RIGHT TO A FAIR AND IMPARTIAL TRIAL AND DUE PROCESS OF LAW UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The defendant submits the trial court erred in admitting into evidence a gruesome photograph, state's exhibit 20, depicting the victim's body in the morgue. (SR: 100; T: 418-421)

The basic test of a photograph's admissibility is relevance. Nixon v. State, 572 So.2d 1336, 1342 (Fla. 1990), cert. denied, 112 S.Ct. 164 (1991); Bush v. State, 461 So.2d 936, 939 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986); Bauldree v. State, 402 So.2d 1159, 1163 (Fla. 1981). Even gruesome photographs may be relevant when they are used in connection with testimony regarding the cause of death and the nature of the injuries. Czubak v. State, 570 So.2d 925, 928 (Fla. 1990); Edwards v. State, 414 So.2d 1174, 1175 (Fla. 5th DCA 1982). However, such photographs are admissible if they are "not so shocking in nature as to defeat the value of their relevance," and even relevant photographs may be excluded if they are unduly prejudicial. Czubak v. State, supra at 928; Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986); Straight v. State, 397 So.2d 903, 907 (Fla. 1981), cert. denied, 454 U.S. 1022 (1981). In assessing the admissibility of such gruesome photographs, this Court has said that "the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and distract them from a fair and unimpassioned consideration of the evidence." Czubak v. State, supra at 928; Beagles v. State, 273 So.2d 796, 798 (Fla. 1973). When the relevance of the photographs is outweighed by their shocking and inflammatory nature, it is an abuse of discretion for the trial judge to admit them into evidence. Czubak v. State, supra at 929.

In the present case, the trial judge abused his discretion when he admitted state's exhibit 20 into evidence. (SR: 100; T: 418-421) The prosecutor sought to have this photograph admitted into evidence during the testimony of Dr. Rionda, the medical examiner who performed the autopsy. (T: 412, 417) The prosecutor presented Dr. Rionda with several photographs of the deceased victim, and the defendant objected to the admission of state's identification 1-X, which become state's exhibit 20. (SR: 100; T: 418-420) This photograph depicts the victim's full back naked body, including the buttocks, showing the bullet hole in her neck and the extreme markings and discoloration to the skin from medical procedures. (SR: 100; T: 418-419) The defendant argued the photograph was inflammatory and that it was of limited relevance since the prosecutor was already introducing two less prejudicial pictures, identification 1-Y (which became state's exhibit 21) and 2-A (which became state's exhibit 22), which also depicted the gunshot wound in relation to the body. (SR: 101-102; T: 419-420) The court expressed concern over the prejudice arising from introducing 1-X and asked Dr. Rionda whether she needed to use that particular photograph for her testimony. (T: 420) Dr. Rionda replied she did because the photograph "depicts the directionality and the only way to really show that is to show a picture of the wound here." (T: 420) The court asked her why she needed the full body when she had two other photographs showing the full neck and the wound; she replied it would be difficult for the jury "to imagine where exactly on the neck it is." (T: 420-421) The judge reluctantly let the photograph into evidence as state's exhibit 20, expressing his concern about doing so. (T: 421)

The judge's concern was well founded. The doctor never used exhibit 20 to explain her testimony to the jury. (T: 424-426) Instead, she used the other two photographs, exhibit 21 and 22, and also used the prosecutor as an anatomical model. (T: 424-426) Dr. Rionda testified that her examination of exhibits 21 and 22 aided her in determining the directionality of the projectile and she described for the jury how the abrasion marks depicted on exhibits 21 and 22 revealed the directionality of the bullet as it entered the neck. (T: 424-425) The doctor used the prosecutor as a model and pointed out to the jury precisely where the wound

was located in relation to the body and the direction and angle the projectile would have to travel to leave that type of abrasion. (T: 423-426)

Thus, the judge's suspicion that exhibit 20 was unnecessary for the doctor's testimony was correct, yet this photograph was admitted into evidence and left its impression on the jury. The record shows the judge was even more concerned when he realized he had let the photograph into evidence and it was never used. (T: 433) It can be seen the relevant value of the photograph was minimal and that its gruesome nature was caused by the medical examiner's office apart from the crime itself. This Court has held that where such a photograph is of minimal relevance and its gruesome nature is caused by factors apart from the crime itself, the relevance of the photograph is outweighed by its shocking and inflammatory nature. Czubak v. State, 570 So.2d 925, 929 (Fla. 1990). Consequently, it was error for the judge to admit exhibit 20 in violation of Article I, sections 9 and 16, of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The case must be reversed for a new trial. Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982); Beagles v. State, 273 So.2d 796, 798 (Fla. 1973); Dyken v. State, 89 So.2d 866 (Fla. 1956).

PENALTY PHASE ARGUMENT

IV

THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE REGARDING THEIR DUTY TO RETURN A DEATH RECOMMENDATION AND TO NOT COOPERATE WITH EVIL WAS IMPROPER AND INFLAMMATORY AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR, VIOLATING WILLIE KING'S RIGHTS UNDER FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

It is well settled that egregious prosecutorial misconduct during the penalty phase of a capital murder trial may warrant vacating the death sentence and remanding the case for a new penalty phase proceeding. Garron v. State, 528 So.2d 353, 359 (Fla. 1988); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Such prosecutorial misconduct occurs when, in his determination to win a death sentence for the defendant, the prosecutor makes comments that inject elements of emotion and fear into the jury's deliberations or urge consideration of factors outside the scope of the jury's deliberations. Jackson v. State, 522 So.2d 802, 809 (Fla. 1988), cert. denied, 488 U.S. 871 (1988); Garron v. State, supra at 359. In Bertolotti, this Court described the prosecutor's duty during penalty phase argument as follows:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. 476 So.2d at 134.

Accord Jackson v. State, supra at 809. Thus, 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, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983); Gardner v. Florida, 430 U.S. 349, 358 , 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In the present case during the penalty phase, the prosecutor made a series of comments to the jury that were so improper and prejudicial as to constitute a fundamental due process

violation requiring a new sentencing hearing. This series of comments culminated in the prosecutor's outrageous admonition to the jury that if they returned a recommendation of life, they would be cooperating with evil and would themselves be involved in evil just like the defendant himself. The relevant portions of the transcript are as follows:

> MR. KASTRENAKES: [prosecutor] I think this man indicated we failed. We have failed with Willie James King. He has not been rehabilitated over the years and he is not rehabilitatable.
>
> In some cases the death penalty is, as you know, a legal sentence. You all, in jury selection, said, "This is the right case or the right defendant." You believe in it. You would have no problem considering it in some cases.
>
> The crime itself. If it was just a defendant's first incident the crime itself would be -- the behavior would be so atrocious itself it would scream out for the ultimate penalty. This is not such a case. I am not telling you it is.
>
> In some cases the defendant himself is so bad -- and the crime is -- you could find justification for it with domestic or where the victim was perhaps a participant in a bank robbery with the defendant, and the defendant killed the victim and the crime you could think -- normally, you would recommend life but the background of the man is so bad that that -- those aggravating factors are so strong they would compel the ultimate penalty. This is not such a case either.
>
> This is a case that falls in the middle. You have a situation where the defendant, through his background, is a man who has lived a life of crime of robberies and the facts of the case, the justification for homicide, are such that in combination together the death penalty is the appropriate sanction.
>
> What has the evidence shown that the defendant learned through his prison record, through his convictions of prior violent felonies?
>
> What has he learned? Nothing. He has learned to continue to take what is not his. He has learned to kill those who resist so apparently he cannot be rehabilitated.
>
> The defense attorney is going to argue to you --
>
> MR. KASSIER: [defense attorney] Objection as to what I am going to argue, Judge.
>
> THE COURT: Sustain the objection.
>
> MR. KASTRENAKES: The argument made by defense

counsel would be that since he was back from prison --

MR. KASSIER: Same objection.

THE COURT: Sustain the objection.

MR. KASTRENAKES: Life does not mean life. Ten years does not mean ten years. He was released in less than five.

MR. KASSIER: Objection. It is not a proper statement of the law.

THE COURT: Sustain the objection.

MR. KASTRENAKES: The Court will tell you that in twenty-five years this man will be eligible for parole. In the book, which is the adult life of this man, it is a testament to a life of crime. A life of robbery, a failure of the criminal justice system. And why? Perhaps the simple reason is that he is evil and an evil person cannot be rehabilitated.

Joseph Conrad, who was an author back at the turn of the century, wrote that belief in a supernatural source of evil is not necessary. Men alone are quite capable of every wickedness. [see CT certificate of correction]

Your solemn duty in this case is to assess the aggravating factors, give it its weight and make the appropriate recommendation.

I submit to you that this factor alone upholds the imposition of the ultimate penalty. You have to do your duty in this case.

Martin Luther King wrote in 1958, that he who passively accepts evil is as much involved in it as he who helps perpetuate, and he who accepts evil without protesting against it is really cooperating with it. [see CT, certificate of correction]

Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death. (T: 998-1001, CT certificate of correction)

* * * *

Be true to your oath. Be true to yourselves. Follow the law. Follow your duties.

An American patron once said about duty, "Duty is a subliminal word in our language so do your duty in all things. You cannot do more. You should never wish to do less.

I am asking you on behalf of the people in this state and this community to do your duty. I cannot ask any more. I expect no less.

> There can be only one lawful recommendation in this case and that recommendation is a recommendation of death.
>
> The aggravating factors overwhelm any argument in mitigation.
>
> Do the right thing. Thank you. (emphasis supplied) (T: 1013-1014; CT, certificate of correction)

Thus, it can be seen from the foregoing that the prosecutor began the subject with a discussion of crime and rehabilitation and the appropriateness of the death penalty. (T: 998-1000) The prosecutor acknowledged that this particular crime was not "so atrocious itself it would scream out for the ultimate penalty." (T: 998) The prosecutor further admitted that Willie King was not such a bad guy with such a bad background as to compel the death penalty. (T: 999) The prosecutor acknowledged this "is a case that falls in the middle." (T: 999) Nonetheless, he sought the death penalty anyway because he felt the defendant was nonrehabilitatable. (T: 996-1000)

The prosecutor argued that death was "the appropriate penalty" because Willie King had led "a life of crime"[11] and, despite having been sent to prison, he had not been rehabilitated (as if prison ever rehabilitated anybody), and further, that if the jury recommended a life sentence, he would get out of prison in twenty five years on parole. (T: 996-1000) The intended message to the jury was obvious: unless the jury recommended the death penalty, the defendant would eventually be released from prison and, because he was nonrehabilitatable, he would continue to commit such crimes. This Court has found similar statements to be improper. Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984) (prosecutor's argument improper when it implied that unless the jury recommended death penalty, the defendant would be released from prison and kill again); Freeman v. State, 563 So.2d 73, 76 (Fla. 1976) (prosecutor in penalty phase asking rhetorical question "How many times is this going to happen to this defendant" was impermissible implication that

[11]This was a sensational and inaccurate statement, as it can hardly be said that two prior robberies a week apart many years earlier denotes a "life of crime."

defendant was likely to commit future crimes if not incarcerated), cert. denied, 111 S.Ct. 2910 (1991); see also Miller v. State, 373 So.2d 882, 885 (Fla. 1979) (error for judge to consider in imposing death sentence fact that defendant might commit similar acts of violence if ever released on parole).

The prosecutor then spiced up his argument with a discussion of evil. He said that perhaps the reason why Willie King has committed crimes is that "he is evil and an evil person cannot be rehabilitated." (T: 1000) The prosecutor continued with a cryptic thought from Joseph Conrad that "belief in a supernatural source of evil is not necessary. Men alone are quite capable of every wickedness." (T: 1000; CT, certificate of correction) Although it is unclear what the prosecutor meant with this reference, he brought this up shortly after he told the jury that this case fell "in the middle" of cases, that this was not a case where the facts were so terrible and where the defendant was "so bad," but was a case that "falls in the middle." (T: 998-999) Thus, what he meant was that even though Willie King was not such a bad guy, he was a man and could still be evil. (T: 1000) By labeling Willie King as "evil," the prosecutor sought to fire up what he acknowledged was a weak case for the death penalty. It has long been found improper for a prosecutor to paint a defendant with an inflammatory stereotype that is not derived from the testimony of witnesses but rather from the prosecutor's own prejudicial characterizations. Ryan v. State, 457 So.2d 1084, 1089 (Fla. 4th DCA 1984); Green v. State, 427 So.2d 1036, 1038 (Fla. 3d DCA 1983).

At this point, the prosecutor shifted the focus away from Willie King and directed it to the jury. He paraphrased a quote from Martin Luther King that "he who passively accepts evil is as much involved in it as he who helps perpetuate, and he who accepts evil without protesting against it is really cooperating with it." (T: 1001; CT) He thus told the jury that he who passively accepts evil is just as involved in it as the person who commits evil and that he who accepts evil without protesting against it is really cooperating with evil. The prosecutor then iced the cake. He warned the jury: "Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death." (T: 1001)

These are outrageous statements to make to a jury. The clear and unmistakable message is that their duty is to recommend death and that any juror who sits back and fails to protest against the evil Willie King and his evil ways by recommending death is violating their duty, is also involved in evil, is also cooperating with Willie, condoning what he did and in fact, is just as evil as the defendant himself. The prosecutor exhorted the jury to recommend death, told them it was their duty to recommend death, otherwise they were evil.

These outrageous comments shifted the focus away from Willie King and set up a judgment of the jury. Indeed, the jury sat in judgment of themselves. They had only two alternatives before them: a vote for life or death. But since a vote for life meant they were cooperating with evil and were evil themselves, it would be a disreputable indictment of themselves and as such, it was not a realistic alternative. But a vote for death meant they were not cooperating with evil. They had done their duty to help stamp out crime.

The prosecutor's argument was highly improper and very inflammatory. It simply had nothing to do with the relevant issues of weighing aggravating and mitigating factors. Instead, it was intended to and did "inject elements of emotion and fear into the jury's deliberations" and thus went "far outside the scope of proper argument." Garron v. State, 528 So.2d 353, 359 (Fla. 1988).

These remarks are error for several additional reasons. First, it is 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, 528 So.2d 353, 359 (Fla. 1988). The jury's duty is to consider from the facts presented to them whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty. Dixon v. State, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Lucas v. State, 417 So.2d 250, 251 (Fla. 1982). The jury's duty is to weigh the aggravating and mitigating factors, not to recommend death to help fight the war against crime. Here, however, the prosecutor told the jury their "solemn duty" was to "assess the aggravating

factors, give it its weight and make the appropriate recommendation" which, he told them, was death. (T: 1000-1001, 1013-1014) He further told them to "not violate your duties in this case," but to return the "appropriate penalty" of death. (T: 1001)

It is also improper to suggest to the jury during the penalty phase that they consider the impact or message their sentence recommendation will have on the community. Here, the prosecutor did just that when he told the jury to return a recommendation of death and to not cooperate with evil by failing to protest against it. (T: 999-1001) In Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), this Court found it improper for the prosecutor to urge the jury to consider the message its verdict would send to the community at large. The prosecutor told the jury that anything less than death in the case "would only confirm . . . that only the victim gets the death penalty." Although due to the heinous and atrocious nature of the aggravating factors in that case, the misconduct was ultimately found not so outrageous as to taint the validity of the jury's recommendation, this Court stated these considerations "are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely win a death recommendation." Id., at 133. See also Garron v. State, 528 So.2d 353, 359 (Fla. 1988) (error to ask to jury in penalty phase to bring back punishment that will "tell the people of Florida, that will deter people . . . deter others from walking down the streets and gunning down"); Boatwright v. State, 452 So.2d 666, 667 (Fla. 4th DCA 1984) (reversible error for prosecutor to ask jury to "do something" about this "type of conduct," to "do your job today" and send the community and the criminals the message that "we're not going to tolerate it any more"; the "send 'em a message" argument is grossly improper in a court of law); Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1982) (error for prosecutor to ask jury to tell the community they are not going to tolerate the violence that took place). Unlike the circumstances in Bertolotti, the aggravating circumstances in this case are weak and do not involve heinous, atrocious and cruel or cold, calculated, premeditated facts. Consequently, the prosecutor's improper comments here are far more prejudicial and simply cannot be deemed

harmless error.[12]

Moreover, the argument constituted an improper nonstatutory aggravating factor which is forbidden by Florida law. Florida's death penalty statute, section 921.141, expressly limits the aggravating factors that may be considered in imposing the death sentence to those enumerated in the statute. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Miller v. State, 373 So.2d 882, 885 (Fla. 1979); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). In Elledge, this Court stated that

> we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death. 346 So.2d at 1003.

Asking the jury to consider the possibility that Willie King might commit other crimes if they returned a life recommendation and he were ever released on parole is an impermissible consideration of a nonstatutory aggravating circumstance weighing in favor of death for the protection of the public. Miller v. State, supra at 886 (reversible error for trial court to consider as nonstatutory aggravating circumstance the possibility that defendant might commit similar acts of violence if ever released on parole); see also Dougan v. State, 470 So.2d 697, 702 (Fla. 1985) (the attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance). Labeling the defendant as evil and exhorting the jury not to cooperate with evil, but to do their duty and protest against it by recommending death is likewise an improper consideration of a nonstatutory aggravating factor. Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985) (defendant entitled to new death penalty proceeding where jury heard argument that did not properly relate to any statutory aggravating circumstances, thereby

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[12]The prosecutor's argument is also a version of the equally improper if-you-condone-what-happened-then-walk-him-out-the-door argument which has been soundly trounced by Florida courts. Salazar-Rodriguez v. State, 436 So.2d 269 (Fla. 3d DCA 1983) (prosecutor's remark to jury that "if you all condone what happened in Hialeah . . . well there is the front door. You can all walk them right through that front door," was improper); Perdomo v. State, 439 So.2d 314, 315 (Fla. 3d DCA 1983) (error for prosecutor to tell jury to walk defendant out the door if this is the type of conduct they wanted to happen in Dade County); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982) (error for prosecutor to question jury whether they wanted to let the defendant walk out and let this kind of horrible crime go on in Dade County).

tainting the jury recommendation); e.g. Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990) (prosecutor's comments regarding defendant's lack of remorse constituted impermissible nonstatutory aggravating circumstance); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988) (same).

For all the foregoing reasons, the prosecutor's comments are fundamental error and the lack of defense objection is no bar to review of the error on appeal. In Pait v. State, 112 So.2d 380, 385 (Fla. 1959), this Court stated that the absence of an objection to improper remarks made by the prosecutor during the penalty portion of a death case was no bar to the reversal of the death sentence on appeal where the remark was so prejudicial to the rights of the accused that neither rebuke nor retraction could eradicate its sinister influence.

Here, the prosecutor's remarks are of such magnitude. In particular, the comments about evil went directly to the jury's very soul. They did not merely influence the jury, they were more than just something the jury heard. The comments went right to the jurors' very image of themselves as human beings. The jurors themselves as people were prejudiced. A vote for life meant they were evil jurors and it was their fault such crime continued to exist.

This is the essence of fundamental due process error. This violation is even more glaring under the circumstances of this case where the trial judge, in imposing his sentence of death, deferred to the jury recommendation. (A: 1-4; R: 1134-1137) The jury's recommendation was the product of proceedings tainted by error and this jury error was not cured by any sort of independent judicial sentencing because the judge here expressly deferred to the jury. See Mikenas v. Dugger, 519 So.2d 601 (Fla. 1988) (jury error requires new jury sentencing proceeding); Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992) (violation of Eighth Amendment for judge to give great weight to jury recommendation that was based on invalid aggravating factor). The result is a violation of the defendant's rights under Article I, sections 2, 9, 16, 17, 21 and 22, of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, Willie King's death sentence must be reversed for a new penalty phase proceeding untainted by references to such irrelevant, prejudicial and constitutionally impermissible factors.

V

WILLIE KING'S LIFE SENTENCE ON COUNT 2, THE ATTEMPTED MURDER WITH A FIREARM, MUST BE REVERSED AND REMANDED FOR A GUIDELINES SENTENCE BECAUSE THE TRIAL COURT DEPARTED FROM THE GUIDELINES WITHOUT FILING CONTEMPORANEOUS WRITTEN REASONS FOR DEPARTURE.

In count 2, the defendant was convicted of attempted first degree murder with a firearm, a life felony. (R: 1076, 1116; T: 925-926) The sentencing guidelines scoresheet for the noncapital offenses scored 312 points with a presumptive sentence of 22-27 years. (R: 1139) The state moved for a departure from the guidelines and at the sentencing on April 15, 1991, the court departed from the guidelines and sentenced the defendant on count 2 to life in prison. (R: 1130; T: 1043, 1052, 1062) The judge's oral reason for departure was that the capital conviction in count 1 was not scoreable and thus could serve as a basis for guidelines departure. (T: 1062)

This departure sentence for count 2 must be reversed because the trial judge never filed written reasons for departure. When a trial court fails to provide contemporaneous written reasons for departure, the departure sentence must be reversed and remanded for resentencing with no possibility of departure from the guidelines. Pope v. State, 561 So.2d 554 (Fla. 1990). Consequently, Willie King's life sentence on count 2 must be reversed and remanded for resentencing within the guidelines. Stewart v. State, 588 So.2d 972, 974 (Fla. 1991); Bruno v. State, 574 So.2d 76, 83 (Fla. 1991); Ferguson v. State, 554 So.2d 1214 (Fla. 2d DCA 1990) (even though unscored capital conviction would be valid reason for upward departure, that reason had not been reduced to writing).

VI

THE TRIAL COURT'S CONSIDERATION OF WILLIE KING'S EXERCISE OF HIS RIGHT TO PLEAD NOT GUILTY AS A FACTOR IN IMPOSING THE DEATH SENTENCE WAS IMPERMISSIBLE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

It is unconstitutional for a trial judge to impose a penalty which discourages or infringes upon the defendant's assertion of his Fifth Amendment right to plead not guilty and his Sixth Amendment right to demand a jury trial. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); City of Daytona Beach v. Del Percio, 476 So.2d 197, 205 (Fla. 1985); Fraley v. State, 426 So.2d 983, 985 (Fla. 3d DCA 1983); McEachern v. State, 388 So.2d 244, 248 (Fla. 5th DCA 1980); Gillman v. State, 373 So.2d 935, 938 (Fla. 2d DCA 1979), quashed in part on other grounds, 390 So.2d 62 (Fla. 1980). As the Fourth District stated in Pasley v. State, 559 So.2d 1167 (Fla. 4th DCA 1990):

> No extended citation of authority is necessary to show that the court may not punish a defendant for going to trial as opposed to 'pleading out.' He has a constitutional right to trial and may assert it with impunity vis-a-vis the ultimate sentence to be imposed. Id., at 1168.

Moreover, not only is it constitutionally impermissible to punish a defendant for going to trial, it is equally impermissible for a trial judge to even consider the exercise of this right to trial in imposing sentence. Peters v. State, 485 So.2d 30, 31 (Fla. 3d DCA 1986); Gillman v. State, 373 So.2d 935, 939 (Fla. 2d DCA 1979), quashed in part on other grounds, 390 So.2d 62 (1980). In City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985), this Court reversed a defendant's sentence for indecent public exposure where the trial judge's reasoning for imposing sentence demonstrated that the defendant's exercise of her right to trial "was a factor." This Court stated that "the defendant's exercise of the right to trial cannot be a factor in the sentencing decision." Id., at 205. In Gillman, the Second District reversed a defendant's sentence for vehicular homicide, stating that even though the record clearly indicated the defendant's prior record was of "at least equal weight in the formulation of the

sentencing judge's decision," the defendant's "choice of plea should not have played any part in the determination of his sentence." 373 So.2d at 939 (emphasis in original).

This right to go to trial and to not have one's refusal to take a plea be factored into the sentencing process applies to the penalty phase of a death case as well as to the guilt phase. Holton v. State, 573 So.2d 284, 292 (Fla. 1990), cert. denied, 111 S.Ct. 2275 (1991). In Holton, this Court stated that under Article I, section 22, of the Florida Constitution, a defendant "has the right to maintain his or her innocence and have a trial by jury." Id., at 292. This Court further stated:

> The protection provided by the fifth amendment to the United States Constitution guarantees an accused the right against self-incrimination. The fact that a defendant has pled not guilty cannot be used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt. A trial court violates due process by using a protestation of innocence against a defendant. This applies to the penalty phase as well as to the guilt phase under article I, section 9 of the Florida Constitution. Id., at 292.

In the present case, the trial judge, in his written sentencing order imposing the death penalty, pointed out that although the state urged the imposition of the death penalty, it had not always done so and had offered to not seek the death penalty if the defendant would plead guilty:

> The State also urges the imposition of the death penalty, although it did not always do so. Prior to trial the State offered not to seek the death penalty if the defendant would plead guilty, a fact not known to the jury. (A: 4; R: 1137)

Thus, the trial judge, in his assessment of the proper sentence, clearly reviewed the fact that the state had once offered a pretrial plea to the defendant in exchange for dropping the death penalty and that the defendant did not plead guilty and went to trial instead, for which the state reinstated its demand for the death penalty. This plea offer and the consequences of the defendant's refusal to plead were irrelevant to the sentencing process and should not have been considered by the court.

Moreover, this constituted an improper nonstatutory aggravating factor which is

forbidden by Florida law. Florida's death penalty statute, section 921.141, Florida Statutes (1989), expressly limits the aggravating factors that may be considered in imposing the death sentence to those enumerated in the statute. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Miller v. State, 373 So.2d 882, 885 (Fla. 1979); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). In Elledge, this Court stated that

> we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death. Id., at 1003.

The trial court's review of the fact that Willie King had not taken the state's plea offer and had instead exercised his right to a jury trial constitutes an impermissible consideration of a nonstatutory aggravating circumstance. See Huff v. State, 495 So.2d 145, 153 (Fla. 1986) (trial judge impermissibly considered nonstatutory aggravating factor of defendant's lack of remorse in imposing death sentence); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985) (same).

Although the judge ostensibly based his sentence of death on other factors as well, it cannot be said that consideration of this unconstitutional factor played no part in the sentencing process. Gillman v. State, 373 So.2d 935, 939 (Fla. 2d DCA 1979) (the defendant's "choice of plea should not have played any part in the determination of his sentence") (emphasis in original), quashed in part on other grounds, 390 So.2d 62 (Fla. 1980); McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980). It is a violation of the defendant's rights to plead not guilty and demand a fair and impartial jury trial, his right to be free from arbitrary and capricious, cruel and/or unusual punishment, and his right to due process of law under Article I, sections 2, 9, 16, 17, 21 and 22, of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Consequently, Willie King's sentence of death must be reversed and remanded for resentencing on this basis alone.

VII

THE TRIAL JUDGE FAILED TO CONSIDER AND WEIGH ALL MITIGATING CIRCUMSTANCES, IMPROPERLY DISMISSED THE EVIDENCE IN MITIGATION AS HAVING NO WEIGHT, AND WROTE A SENTENCING ORDER THAT IS NOT CLEAR AND UNAMBIGUOUS, IN VIOLATION OF WILLIE KING'S RIGHTS UNDER FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

It is well established that in addressing mitigating circumstances, the sentencing court must first consider whether the facts alleged in mitigation are supported by the evidence, then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Mitigating circumstances are "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Wickham v. State, 593 So.2d 191 (Fla. 1991), pet. for cert. filed, (Case No: 91-8126); Rogers v. State, supra at 534. The sentencing court must find as a mitigating circumstance each factor "that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Campbell v. State, supra at 419. In this regard, this Court has stated the "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." Maxwell v. State, ___ So.2d ___, 17 FLW S-396 (Fla. June 25, 1992); Wickham v. State, supra at 194; Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990).

In fulfilling this obligation, the sentencing court must ultimately determine whether the mitigating circumstances are of sufficient weight to counterbalance the aggravating factors. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Both this Court and the United States Supreme Court have stated that "although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell v. State, supra at 420; citing Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876, 71 L.Ed.2d 1 (1982) ("The

sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration"); see also Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 740, 112 L.Ed.2d 812 (1991). Thus, once the existence of mitigating evidence has been recognized, it may not be given no weight at all by the sentencing judge. Dailey v. State, 594 So.2d 254 (Fla. 1992). A sentencing judge may not refuse to consider relevant mitigating circumstances. Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988); Brown v. State, 526 So.2d 903, 908 (Fla. 1988), cert. denied, 488 U.S. 944 (1988).

In the present case, the judge's sentencing order mentions several statutory and nonstatutory mitigating circumstances: the defendant's low intelligence, the victim was a participant in the defendant's conduct, the absence of heinous, atrocious or cruel conduct, and the fact this crime was a straight felony murder with the absence of premeditation and intent to kill. (A: 1-4; R: 1134-1137) The record supports the existence of these mitigatory factors. However, the record contains a fair amount of other important and uncontroverted mitigating evidence that was ignored by the trial judge. Consequently, the trial judge made two serious errors in his sentencing order with respect to the mitigating circumstances. First, he failed to acknowledge, find and weigh all valid mitigating evidence available in the record. Second, even though he recognized there was evidence supporting several mitigating circumstances, he accorded them no weight in imposing his death sentence. And finally, the judge's written sentencing order is not clear and unambiguous as required by Florida law. These errors are in violation of Article I, sections 2, 9, 16 and 17, of the Florida Constitution, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

A. FAILURE TO FIND AND WEIGH ALL MITIGATING EVIDENCE

The undisputed evidence from Dr. Haber showed that the defendant was of low intelligence, "between borderline and low average," with an estimated I.Q. "somewhere between mid-seventies to mid-eighties," and that his low level of vocabulary and speech

suggested impoverishment. (T: 961, 964-965) The defendant had problems in school and dropped out early. (T: 957, 967-978) His father left home when he was four years old and he was raised by his mother who worked a couple of days a week "waiting," earning $15 a week to support herself and her children. (T: 975-978) Thus, the defendant's background was disadvantaged and his opportunities limited and, according to Dr. Haber, this had a relationship on his adjustment potential and criminal activity. (T: 962-963, 967) Dr. Haber specifically stated these factors were relevant to understanding the defendant and his crime and should be considered as nonstatutory mitigating circumstances relevant to passing sentence on him. (T: 960-961)

The judge's sentencing order, however, fails to consider any of these mitigatory circumstances except "low intelligence." (A: 1-4; R: 1134-1137) Indeed, the judge failed to even acknowledge the extent of this factor, as the uncontroverted evidence was that the defendant was borderline retarded. (T: 961) Consequently, the judge's sentencing order ignores proper mitigating evidence available in the record which the judge was obligated to consider and weigh. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (mitigating factors of impaired mental capacity, poor reasoning skills, and poor reading ability); Brown v. State, 526 So.2d 903, 908 (Fla. 1988), cert. denied 488 U.S. 944 (1988) (mitigating factors of lack of education and training, disadvantaged childhood, borderline defective IQ of 70-75)); Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988) (mitigating factor of low emotional age), cert. denied, 490 U.S. 1037 (1989); see also DuBoise v. State, 520 So.2d 260, 266 (Fla. 1988) (defendant's IQ of 79 was nonstatutory mitigating circumstance jury could consider in recommending life).

B. GIVING MITIGATING EVIDENCE NO WEIGHT

Moreover, the trial judge gave no weight to the mitigating circumstances that he did find. When the judge found the defendant was of "low intelligence," he first stated the lack of intelligence "does not outweigh the aggravating circumstances." (A: 2; R: 1135) He later found, however, that although the defendant "presented psychological expert testimony"

showing that "he was of low intelligence," the defendant had no impairment affecting his ability to appreciate his criminal conduct or to conform his conduct to the requirements of the law and "it was not to such a degree that would reach the level of a mitigating circumstance." (A: 3; R: 1136) Thus, despite the uncontroverted establishment of the defendant's borderline retardation, the judge refused to consider it as a mitigating factor and, although he mentioned it, he failed to weigh it into his sentencing decision.

The same is true for other mitigating circumstances. The judge noted that the facts and circumstances of this crime were mitigatory in nature. He expressly stated: "This case may not fit the class of cases in which one would ordinarily believe the death penalty is appropriate." He stated this crime was committed during an armed robbery and was not heinous, atrocious or cruel, was "not especially wicked," and was not "cold, calculated or even premeditated." (A: 2,4; R: 1135, 1137) This was proper mitigating evidence available in the record which the judge was obligated to consider and weigh. White v. State, 403 So.2d 331, 336 (Fla. 1981) (fact that defendant does not intend to kill is valid nonstatutory mitigating circumstance), cert. denied, 463 U.S. 1229 (1983); Van Poyck v. State, 564 So.2d 1066, 1069 (Fla. 1990) (same), cert. denied, 111 S.Ct. 1339 (1991); Wickham v. State, 593 So.2d 191 (Fla. 1991) (judge's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record), pet. for cert. filed (Case No: 91-8126); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990) (same); Campbell v. State, 571 So.2d 415, 419, n.4 (Fla. 1990), quoting from Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (a mitigating circumstance is "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death) (emphasis supplied). However, instead of weighing this, the judge found "mitigating factors do not exist." (A: 4; R: 1137)

The judge also acknowledged the uncontroverted fact that the victim and her husband came into this dangerous area of Miami to buy drugs. (A: 2-3; R: 1135-1136) It was undisputed that Marcela and her husband drove around for about twenty minutes in Coconut

Grove at 10:00 at night in their rental car with their personal jewelry and packages visible through the windows of their car. (T: 356-359) They drove from location to location where different members of the community were assisting them to find drugs to purchase; this murder occurred while they were sitting in their car in this area waiting for another person to deliver them their drugs. (T: 359-368) In his sentencing order, the trial judge found this was established by the evidence. (A: 2; R: 1135) However, he first stated this "does not outweigh the aggravating circumstances," then later found it not to be a mitigator at all. (A: 3; R: 1136) While the circumstances of the crime do not excuse the defendant's actions, nonetheless the fact remains he took advantage of a tempting situation presented to him by persons committing a crime of their own and this mitigatory aspect is to be weighed along with the other factors.

Thus, it is clear from the foregoing that the trial judge initially found evidence to support several mitigating circumstances and stated he weighed them against the aggravating factors. The judge wrote he had "considered and weighed" the jury recommendation, all statutory and nonstatutory mitigating factors, and the evidence from the guilt and sentencing phases, and that the "necessary conclusion is that the proven aggravating factors outweigh the mitigating factors" and that the jury "was correct when it failed to find mitigating circumstances sufficient to outweigh the aggravating ones." (A: 3; R: 1136) See Elledge v. State, 346 So.2d 998 (Fla. 1977) (trial judge's order stating he weighed aggravating and mitigating factors and that insufficient mitigating circumstances existed to outweigh the aggravating must mean the judge found that some mitigating factors existed, else there would be nothing to weigh); Parker v.Dugger, 498 U.S. ___, 111 S.Ct. 731, 737, 112 L.Ed.2d 812 (1991) (judge must have found nonstatutory mitigating factors for if judge had found no mitigating circumstances, he would have had nothing to balance against the aggravating).

However, the judge then, in his analysis imposing his death sentence, gave these mitigating circumstances no weight and expressly stated that "mitigating factors do not exist." (A: 3-4; R: 1136) He stated that since the two aggravating factors did exist and there were no mitigating factors, he "cannot state that there is no basis for the jury recommendation, and,

therefore, the recommendation of the jury should be followed." (A: 4; R: 1134)

Thus, although the judge initially found evidence to support mitigation, he ultimately gave it no weight and concluded that since no mitigating factors existed, the only appropriate penalty was that of death. As previously noted, however, once the sentencing judge has found evidence in mitigation, the judge must weigh the evidence and may not dismiss it as having no weight. Dailey v. State, 594 So.2d 254 (Fla. 1992); Campbell v. State, 571 So.2d 415, 420 (Fla. 1990); Santos v. State, 591 So.2d 160 (Fla. 1991) ("mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence"). Although the sentencing judge may determine the weight to be given relevant mitigating evidence, he may not give it no weight by excluding such evidence from his consideration, as the trial judge did here. Eddings v. Oklahoma, 455 U.S. 104, 114-115, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert denied, 484 U.S. 1020 (1988); Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988); Brown v. State, 526 So.2d 903, 908 (Fla. 1988), cert. denied, 488 U.S. 944 (1988). Consequently, the trial court failed to properly consider and weigh all the mitigating circumstances and the defendant's sentence of death must be reversed and remanded for a proper resentencing. Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

C. SENTENCING ORDER IS NOT CLEAR AND UNAMBIGUOUS

And finally, reversal for resentencing is also mandated on the mere face of this sentencing order. The best that can be said about this rambling written sentencing order is that it is ambiguous as to the judge's true sentencing analysis with respect to weighing the mitigating circumstances. A sentence of death, however, requires a clear and unambiguous order. Florida law specifically requires the judge to lay out his written reasons for finding aggravating and mitigating factors, then to personally weigh the aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to

impose. Lucas v. State, 417 So.2d 250, 251 (Fla. 1982) The record must be clear the trial judge "fulfilled that responsibility." Id., at 251. In Mann v. State, 420 So.2d 578, 581 (Fla. 1982), this Court stated that the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found."

Here, the judge's analysis is not "of unmistakable clarity" and it cannot be said with confidence that he "fulfilled that responsibility" of weighing the mitigating circumstances in imposing the death sentence. First he found mitigating circumstances outweighed by aggravating, then he found no mitigating even existed. At minimum, the death sentence must be reversed on this basis alone. Santos v. State, 591 So.2d 160 (Fla. 1991) (death sentence reversed for new sentencing before trial court where record not clear that trial court adhered to the procedure required by Rogers and Campbell and reaffirmed in Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991)); Lamb v. State, 532 So.2d 1051 (Fla. 1988) (death sentence reversed and remanded where unclear whether court properly considered all mitigating evidence or whether it found that aggravating outweighed mitigating); Mann v. State, 420 So.2d 578 (Fla. 1982); Lucas v. State, 417 So.2d 250 (Fla. 1982).

VIII

THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY RECOMMENDATION OF DEATH AND FAILED TO MAKE AN INDEPENDENT JUDGMENT AS TO THE IMPOSITION OF THE DEATH PENALTY, WHICH ERROR WAS FURTHER EXACERBATED BY IMPROPER PENALTY PHASE JURY INSTRUCTIONS, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

The Florida statutory scheme for imposition of the death penalty, section 921.141, Florida Statutes (1989), requires first a jury recommendation as to the penalty and then an independent, reasoned judgment by the trial judge as to whether the death sentence should be imposed. In the present case, the judge gave undue weight to the jury's recommendation of death and believed he should follow that recommendation in imposing death despite his acknowledgment this case was not the type of case that normally called for the death penalty.

The jury's role in the penalty phase is to "hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). This role is set forth in subsection (2) of §921.141, entitled "Advisory Sentence by the Jury," which directs that the jury "deliberate and render an advisory sentence to the court" as to "whether the defendant should be sentenced to life imprisonment or death" based upon a weighing of the aggravating and mitigating circumstances. Thus, the jury's decision as to sentence is designed by the legislature to be a recommendation and is expressly delineated as "advisory."

The statutory scheme further directs that the actual sentence be determined and imposed by the trial judge. Subsection (3) of §921.141 states that "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . ." The legislature thus instructs the judge to exercise his independent assessment of the case in imposing sentence and states he should do so "notwithstanding the recommendation" of the jury. In his role, the judge "actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

In the present case, the trial judge abdicated his duty to exercise his own independent, reasoned judgment in imposing the death sentence and instead deferred to the jury recommendation of death. In his written sentencing order, the judge stated that the jury "as the conscience of the community, by an overwhelming vote[13] has recommended a sentence of death" and that the "jury's recommendation is entitled to great weight and should not be overturned unless no reasonable basis exists for the opinion":

> In sum, this was a senseless killing by a twice convicted felon (who was a juvenile when he committed them), committed during the perpetration of an armed robbery for which there was neither justification nor mitigating circumstances. Unfortunately, this seems to be a much too common occurrence. The jury, as the conscience of the community, by an overwhelming vote has recommended a sentence of death. The jury's recommendation is entitled to great weight and should not be overturned unless no reasonable basis exists for the opinion. (A: 4; R: 1137)

The judge further stated that although this case did not "fit the class of cases in which one would ordinarily believe the death penalty was appropriate" because it was not especially wicked, heinous, atrocious or cruel, or cold, calculated or premeditated, nonetheless he could not state "there is no basis for the jury recommendation, and, therefore, the recommendation of the jury should be followed":

> In sum, the murder was not committed in a cold, calculated or premeditated manner, nor was it especially heinous, atrocious, or cruel.
>
> * * * *
>
> This case may not fit the class of cases in which one would ordinarily believe the death penalty is appropriate; this murder was not especially wicked, nor was it cold, calculated or premeditated. However, this court cannot state that there is no basis for the jury recommendation, and, therefore, the recom-mendation of the jury should be followed. (A: 2, 4; R: 1135, 1137)

Thus, it can be seen from the foregoing the judge believed the jury recommendation was entitled to such great weight that he should not overturn the recommendation of death unless

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[13]It should be noted the jury's vote was not "an overwhelming vote." The vote was 9 to 3, which means fully one quarter of the jurors voted for life and did not vote for the death penalty. See Omelus v. State, 584 So.2d 563 (Fla. 1991) (improper aggravating factor given to jury; the 8 to 4 vote for death considered as factor mitigating against harmless error).

there was "no reasonable basis" for the opinion. Even after acknowledging this was not the type of case for which the death penalty was ordinarily appropriate, the judge believed he should nonetheless follow the jury recommendation unless there was "no basis" for it.

The judge's application of the law is incorrect. It is true that a jury recommendation is entitled to great weight. Grossman v. State, 525 So.2d 833, 845 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The "great weight" given the jury recommendation allows the judge to seriously consider the advice as a reflection of the conscience of the community. See Grossman v. State, supra at 846; Richardson v. State, 437 So.2d 1091 (Fla. 1983); Odom v. State, 403 So.2d 936 (Fla. 1981), cert. denied, 456 U.S. 925 (1982). However, despite being accorded great weight, a jury recommendation of death is nonetheless a "recommendation" that is "advisory" only. Grossman v. State, supra at 840, 845-846; Combs v. State, 525 So.2d 853, 857 (Fla. 1988); Randolph v. State, 463 So.2d 186, 192 (Fla. 1984), cert. denied, 473 U.S. 907 (1985); Engle v. State, 438 So.2d 803, 813 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984); Lucas v. State, 417 So.2d 250, 251 (Fla. 1982); Ross v. State, supra at 1197. As this Court stated in Grossman, the weight given to the jury's advisory recommendation is not so heavy as to make it a de facto sentence. The trial judge is still required to make his own independent determination of sentence based on his weighing of the circumstances. 525 So.2d at 840. His role is not to follow the jury recommendation of death unless there is "no basis" for it; his role is to be "the final decision-maker and the sentencer." Combs v. State, supra at 857.

In the present case, the trial judge passed up his role. His action is similar to Ross v. State, 386 So.2d 1191 (Fla. 1980), where this Court reversed a death sentence because the trial judge gave similar undue weight to the jury recommendation of death. In Ross, the trial judge used Tedder v. State, 322 So.2d 908 (Fla. 1975), and Thompson v. State, 328 So.2d 1 (Fla. 1976), which held the court should give great weight and serious consideration to a jury's recommendation of life, and applied it to the jury's death recommendation. The trial judge

reasoned the advisory sentence of the jury should be followed unless there was a compelling reason to override the recommendation, stating, "[T]his Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed." Id., at 1197. The judge then sentenced the defendant to death.

On appeal, this Court reversed Ross's death sentence, holding the trial judge gave undue weight to the jury's recommendation of death and failed to make an independent judgment as to whether the death penalty should be imposed. This Court stated that "the third step in Florida's statutory scheme requires the reasoned judgment of the trial judge to be interposed between the emotions of the jurors and a death sentence." Id., at 1197. This Court further stated that although Tedder and Thompson held that jury recommendations should be given great weight and serious consideration, "this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed." This Court then remanded the case for reconsideration of the sentence.[14]

The present case is even stronger than Ross. Here, the judge not only deferred to the jury, but he did so even after acknowledging this was not the type of case for which the death penalty was ordinarily considered appropriate. (A: 4; R: 1137) This is precisely the reason why the Florida death penalty scheme requires the sentencing judge to exercise his own independent assessment of the case in imposing sentence. In Ross v. State, 386 So.2d 1191 (Fla. 1980), quoting from State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), this Court observed that to the average juror, death may seem the appropriate penalty because no capital crime might appear to be less than heinous, but to the trial judge with his experience in the criminal courts, this capital crime, in comparison to other far more heinous crimes, may not deserve the ultimate penalty:

> The third step added to the process of prosecution for

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[14]In Combs v. State, 525 So.2d 853, 857 (Fla. 1988), this Court reiterated that, even with Tedder, the role of the jury is advisory only and the role of the judge is as "the final decision-maker and the sentencer."

> capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience. 386 So.2d at 1197.

This is precisely the situation here. By treating the jury recommendation of death as a de facto sentence, the judge failed to interpose his reasoned judgment between the emotions of the jurors and the death sentence. It is clear from the written sentencing order that the judge knew the jury's death recommendation was not proportional. He knew a death sentence here would be out of the ordinary. But he nonetheless followed the jury recommendation because he believed he had to unless there was "no basis" not to. The judge incorrectly applied the law and his death sentence is unlawful.

The judge's error is exacerbated by the instructions given the jury in the penalty phase in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The judge instructed the jury that their sentencing decision would be advisory and that the final sentencing decision rested with the trial judge. (T: 26, 220, 943, 1026-1027, 1030) During his voir dire and his argument to the jury, the prosecutor told the jury their decision was a recommendation to the judge entitled to great weight. (T: 70, 990, 993) Although this Court has held that the standard Florida jury instructions in the penalty phase properly explain the jury's role and do not violate Caldwell,[15] see Combs v. State, 525 So.2d 853, 857 (Fla. 1988), Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), cert. denied, 480 U.S. 951 (1987), but see Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989), the fact remains that these instructions do inform the jury their decision is advisory only and their sentence is merely a recommendation and further, that the ultimate sentencer is

[15]The defendant disagrees and submits that Caldwell is applicable to Florida's death sentencing scheme as outlined in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989).

the judge. However, when the judge sentenced Willie King, he did not treat the jury recommendation as advisory; he treated it as a de facto sentence unless there was "no basis" for it.

Thus, the instructions and comments to the jury shifted the responsibility for the death decision to the judge, but the judge passed up his responsibility and deferred back to the jury. Caldwell, however, specifically holds that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328, 105 S.Ct. at 2639. Here, the defendant's death sentence violates Caldwell because it rests upon a determination by a sentencer, the judge, who believed that the responsibility for determination of the appropriateness of the death sentence lay elsewhere, with the jury. Consequently, under these circumstances, the defendant would be executed, "although no sentencer had ever made a determination that death was the appropriate sentence." Caldwell v. Mississippi, 472 U.S. 320, 331, 105 S.Ct. 2633, 2641, 86 L.Ed.2d 231 (1985). This is patently unconstitutional.

This is also exacerbated by the inclusion of pecuniary gain as an aggravating factor in the penalty phase jury instructions and argument. During his argument to the jury, the prosecutor stressed as an aggravating factor that the defendant committed this crime for pecuniary gain. (T: 1001-1003) The judge instructed the jury on three aggravating factors: prior violent felonies, felony murder during robbery, and pecuniary gain. (T: 1027-1028)

It is well settled, however, that pecuniary gain merges with the felony murder during a robbery when, as here, they refer to the same aspect of the crime. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Although this Court has held that it is not improper to instruct the jury as to both aggravators, Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986); Clark v. State, 443 So.2d 973, 977 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984), nonetheless, the fact remains the jury was instructed as to three aggravating factors to weigh against the mitigating. And although the

trial judge correctly did not use the pecuniary gain aggravator in imposing his death sentence, the judge did give undue weight to the jury recommendation which was based on consideration of three aggravating factors, only two of which could have been considered in the sentencing decision. See Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926 (1992) (violation of Eighth Amendment for judge to directly or indirectly weigh invalid aggravating factor); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990) (reversible error to instruct jury on inapplicable aggravating factor even though judge did not find factor in his sentencing order). Thus, Willie King's death sentence is partially based on an improper doubling of aggravating factors and an indirect judicial weighing of an invalid aggravating factor.

In sum, the judge incorrectly applied the law and gave undue weight to the jury recommendation. Taking into consideration the instructions given the jury during the penalty phase, it is clear the entire penalty phase proceeding was improperly done and tainted by error in violation of Article I, sections 9, 16, 17, 21 and 22, of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Willie King's death sentence must be reversed for resentencing.

IX

WILLIE KING'S SENTENCE OF DEATH IS UNCONSTITUTIONAL AND DISPROPORTIONAL TO THE LIFE SENTENCES OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF FELONY MURDER UNDER SIMILAR CIRCUMSTANCES, IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION.

In each death penalty case, this Court has a special duty to conduct a proportionality review, to examine the case "in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 111 S.Ct. 1024 (1991); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1989); Proffitt v. State, 510 So.2d 896, 897 (Fla. 1987); Menendez v. State, 419 So.2d 312, 315 (Fla. 1982); Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

The importance of proportionality review is emphasized in Tillman v. State, 591 So.2d 167 (Fla. 1991), where this Court stated that "proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law." In Tillman, this Court described proportionality review as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not comparison between the number of aggravating and mitigating circumstances. Id., at 168.

Accord Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 111 S.Ct. 1024 (1991). Thus, proportionality review requires an examination of "the totality of circumstances in a case," and is not merely a "comparison between the number of aggravating and mitigating circumstances." The totality of circumstances include the factual circumstances surrounding the crime itself, Provence v. State, 337 So.2d 783, 787 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); the magnitude of the criminal conduct, White v. State, 403 So.2d 331, 339 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983); the nature of the particular aggravating factors, Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); Hardwick v. State, 521 So.2d 1071, 1077

(Fla. 1988), cert. denied, 488 U.S. 871 (1988); the nature of the defendant's prior record, Blakely v. State, 561 So.2d 560, 561 (Fla. 1990); Freeman v. State, 563 So.2d 73, 77 (Fla 1990), cert. denied, 111 S.Ct. 2910 (1991); the nature of the mitigating evidence, Nibert v. State, 574 So.2d 1059 (Fla. 1990); and the defendant's culpability and mental state with which he committed the crime. Jackson v. State, 575 So.2d 181, 190 (1991). Thus, not only must the death penalty be proportional with respect to the crime, but it must also be proportional with respect to the defendant.

The defendant submits the imposition of the death penalty here is disproportional with respect to both the crime and the defendant. It is undisputed this is a straight felony murder case. The record demonstrates this was an impulsive murder by a single gunshot during a simple, quickly attempted robbery of a vehicle driver that resulted in immediate unconsciousness and, for all practical purposes, instantaneous death.[16] No one else was injured and nothing was taken. The defendant committed no additional acts of torture or harm, and there was no apprehension of death by the victim. The trial judge found the murder was not especially wicked, was not heinous, atrocious or cruel, was not cold or calculated, and was not even premeditated.[17] (A: 2, 4; R: 1135, 1137) Only two aggravating factors were

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[16]The single bullet entered the victim's neck, fractured part of the first cervical vertebra of the spinal column, then lodged itself into the base of the skull at the spinal canal. (T: 427)

The undisputed testimony was that the victim slumped onto the car seat immediately after being shot and never moved again. (T: 317-319, 369, 373) Officer Fleitas arrived at the scene within minutes of the victim being shot and found her pulse faint and her breathing "real shallow." (T: 319) The officer soon "lost her pulse and she appeared to stop breathing." (T: 319) He testified the victim never responded when he spoke to her. (T: 319)

The undisputed medical evidence was that the victim lost consciousness almost immediately after being shot and that she never regained consciousness. (SR: 38-75; T: 439) The hospital records showed she never had movement or reaction to pain. (SR: 50, 61, 70-74; T: 433-434) The hospital neurologist determined this was a nonsurvivable wound with complete paralyzing damage to the spinal cord and the respiratory centers of the brain. (SR: 43, 55; T: 433-435, 438)

[17]It is well established that where death results from a single gunshot wound, as here, or even multiple gunshot wounds, but with a quick death and no additional acts of torture or harm and virtually no apprehension of death by the victim, the murder is not heinous, atrocious or cruel. Shere v. State, 579 So.2d 86 (Fla. 1991); McKinney v. State, 579 So.2d 80 (Fla. 1991); Hallman v. State, 560 So.2d 223, 225 (Fla. 1990); Cochran v. State, 547 So.2d 406 (Fla. 1989); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920 (1987).

applicable and they are not particularly compelling. The first was that this crime occurred during the course of an attempted robbery, which is a repetition of the fact this is a felony murder. The second was that the defendant had a prior record of two violent felonies, during which, however, no one was hurt and which the trial court noted were committed many years earlier when the defendant was a juvenile. (A: 1; R: 1134) The defendant has never killed anyone before. It is undisputed that Willie King is of low intelligence, borderline retarded, and that he was raised in an impoverished environment by his mother. (A: 2; R: 1135; T: 961, 964-965, 967)

Quite simply, this is not the type of crime for which the death penalty was intended. Indeed, this Court has reversed the death penalty under similar factual circumstances. In Rembert v. State, 445 So.2d 337 (Fla. 1984), the state even conceded that in similar felony murder circumstances, many people receive a less severe sentence. Id., at 340. In Rembert, the defendant was given a death sentence following his conviction for a murder during the course of a robbery. The evidence showed the defendant entered an elderly victim's bait and tackle shop, hit the victim in the head once or twice with a club, took some money from the cash drawer and left. The victim was found, bleeding from his head, shortly thereafter and died several hours later of severe injury to the brain. The one valid aggravating factor was that the murder occurred during the commission of a felony. There were no mitigating circumstances. The jury recommendation was death. Despite the absence of mitigation, this Court nonetheless reversed the death sentence, stating: "Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here." Id., at 340.

In Menendez v. State, 419 So.2d 312 (Fla. 1982), the defendant was sentenced to death following his conviction for felony murder during a jewelry store robbery. The defendant had entered the jewelry store, shot the jeweler to death, and was emptying the store's safe when a customer walked in. The defendant grabbed for the customer, but she eluded his grasp and the defendant ran out of the store. The one aggravating factor was the murder having been

committed in the course of the robbery. The jury recommendation was death. This Court reversed the death sentence, stating that "the facts of this felony murder do not call for the death penalty." Id., at 315.

In Lloyd v. State, 524 So.2d 396 (Fla. 1988), the defendant was sentenced to death after being convicted of the murder of a young woman in her home. The defendant came to the door of the home with a gun demanding money and told the woman and her five-year old son to go into the bathroom. As the woman tried to give him money from her wallet, the defendant shot her twice and ran away. The one valid aggravating factor was that the murder was committed during the attempted robbery. The jury recommendation was death. This Court found the death penalty was "proportionately incorrect" and reversed the death sentence.

Thus, in looking first at the factual circumstances of this crime and comparing them to other similar felony murders where the defendant received life imprisonment, it is clear the death penalty imposed in this case is disproportionate. This type of murder can only be described as the least aggravated of capital murders. The death penalty, however, is reserved for "only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied, 416 So.2d 943 (1974). The nature of this crime simply does not justify the ultimate penalty.

In fact, this Court has rarely upheld the death sentence for any type of straight felony murder, and defendants who have committed more reprehensible felony murders than Willie King frequently have their death sentences reduced to life imprisonment. For example, in McKinney v. State, 579 So.2d 80 (Fla. 1991), the defendant received the death penalty for murder during the armed robbery, kidnapping and burglary of a tourist who had stopped his rental car to ask directions. The defendant and his accomplices entered the victim's car and kidnapped him, murdered him, then dumped his body in an alley and drove away in his car, stealing the victim's jewelry and money. The victim was semiconscious after being found and gave the police a description of the crime. The one valid aggravating factor was that the murder was committed in the course of a violent felony. The jury recommended death, but

this Court reversed the death sentence as disproportional.

In Caruthers v. State, 465 So.2d 496 (Fla. 1985), the defendant robbed a convenience store at gunpoint and when the cashier "jumped," he just started firing, shooting her three times, then took some money and fled. The aggravating circumstance was felony murder and the jury recommended death. This Court reversed the death sentence as disproportional. And in Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant first broke into a house and stole cameras, jewelry, and a pistol, then later that evening he entered a convenience store, shot the cashier twice, fired a shot at another woman inside, and carried off the cash register. There were two aggravating circumstances of felony murder and convictions for prior violent felonies. The jury recommended death. This Court reversed the death sentence as disproportional.

In contrast, death sentences that are upheld for felony murders usually involve horrible facts, Freeman v. State, 563 So.2d 77 (Fla. 1990) (affirming death penalty for murder that occurred during burglary; defendant repeatedly struck the victim on head at least twelve times with object as the victim tried to crawl away; victim died from profuse bleeding several hours later), cert. denied, 111 S.Ct. 2910 (1991); involve multiple murders during the course of the felony, Carter v. State, 576 So.2d 1291 (Fla. 1989) (death sentence affirmed for defendant who shot and killed two people during store robbery), cert. denied, 112 S.Ct. 225 (1991); Armstrong v. State, 399 So.2d 953 (Fla. 1981) (death sentence affirmed where defendant shot and killed elderly couple during robbery in their home); involve felony murder in association with a number of other very violent crimes, Watts v. State, 593 So.2d 198 (Fla. 1992) (death penalty affirmed for defendant who entered victim's home, robbed victim and his wife, sexually battered the wife, then fought with the victim, shooting him in mouth; victim collapsed and died shortly thereafter); or involve felony murder occurring within the sanctity of the victim's home. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882 (1982) (affirming death penalty for murder where defendant stabbed victim in his bed in his home; victim suffered considerable pain and did not die immediately); Perry v. State, 522 So.2d 817

(Fla. 1988) (crime committed in one's own home adds to atrocity of crime); Troedel v. State, 462 So.2d 392 (Fla. 1984) (fact that victim shot in own home sets crime apart from norm).

Clearly, the present case is the least aggravated of capital felony murders. Since this crime does not warrant the death penalty, the death sentence rests on the defendant himself. As noted, proportionality review involves examination of the totality of factors and this includes the nature of the defendant's character, his mental state, and all aspects of culpability and mitigation. Jackson v. State, 575 So.2d 181, 190 (fla. 1991); Blakely v. State, 561 So.2d 560, 561 (Fla. 1990); Freeman v. State, 563 So.2d 73, 77 (Fla. 1990), cert. denied, 111 S.Ct. 2910 (1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990).

In this regard, the only distinction between Willie King and the defendants in Menendez and Lloyd is that Menendez and Lloyd had the mitigating circumstance of no significant history of prior criminal activity whereas Willie King has a prior record comprising the aggravating factor of prior violent felony. This distinction, however, is not so significant under the circumstances as to permit the execution of the defendant while sparing the lives of Menendez and Lloyd.

First, it is important to note that Rembert also apparently had a prior record. In Rembert v. State, 445 So.2d 337 (Fla. 1984), there were no mitigating circumstances. Since the mitigating circumstance of no significant prior criminal history was inapplicable, Rembert obviously had a prior criminal history. Despite the absence of this mitigating factor and the absence of any mitigation, this Court reversed the death penalty due to the facts of what was termed a "classic" felony murder. Id., at 340. Rembert is very similar to the present case and compels reversal.

Moreover, a defendant may not be executed because he has a prior record, especially when the prior record does not involve a homicide. In fact, even where a defendant has previously been convicted of murder, which is not the case here, the prior record does not necessarily justify the death penalty. In Cochran v. State, 547 So.2d 928, 932 (Fla. 1989), this Court stated that the fact a defendant has the aggravating factor of a prior murder does not and

cannot justify a death sentence or nullify a jury's life recommendation. This Court further stated:

> Indeed, to suggest that death always is justified when a defendant previously has been convicted of murder is tantamount to saying that the judge need not consider the mitigating evidence at all in such instances. The United States Supreme Court consistently has overturned cases in which mitigating evidence was deliberately and directly ignored. Id., at 933. (citations omitted)

See also Fead v. State, 512 So.2d 176 (Fla. 1987) (jury override improper despite defendant's prior murder conviction).

And finally, although Willie King's prior record is factored into the sentencing decision as the aggravating circumstance of prior "violent" felony, the fact remains his prior criminal record is not egregious and did not involve death or physical violence. The circumstances of a prior record are considered in assessing the propriety of a death sentence. Freeman v. State, 563 So.2d 73, 77 (Fla. 1990) (nature of prior violent felony used in proportionality analysis), cert. denied, 111 S.Ct. 2910 (1991); Blakely v. State, 561 So.2d 560 (Fla. 1990) (nature of prior crime examined in proportionality review); Cochran v. State, 547 So.2d 928, 932 (Fla. 1989) (facts of prior crime used in weighing process); Rhodes v. State, 547 So.2d 1201 (Fla. 1989) (facts underlying priors assist in evaluating the defendant's character and circumstances of crime); King v. State, 436 So.2d 50, 55 (Fla. 1983) (nature of prior crime examined in proportionality review), cert. denied, 466 U.S. 909 (1984); Elledge v. State, 346 So.2d 998 (Fla. 1977) (evidence regarding details of prior offenses admissible for character analysis of defendant to ascertain whether ultimate penalty is called for); see also Hallman v. State, 560 So.2d 223 (Fla. 1990) (jury is entitled to examine the nature of the defendant's priors and give little weight to them based on their facts).

Here, the record shows the defendant has two prior violent offenses: a strong arm robbery on September 25, 1981, and an armed robbery with a gun about a week later on October 5, 1981. (SR: 167; T: 946, 949, 951) All robberies, however, are not equally violent. Although these two prior robberies are classified as violent felonies, see Clark v. State, 443 So.2d 973, 978 (Fla. 1983) (any robbery is, as a matter of law for purpose of the

capital penalty aggravating factor, a felony involving the use or threat of violence), cert. denied, 467 U.S. 1210 (1984), in actual fact no one was hurt or injured during either incident. In the strong arm robbery, the defendant was unarmed and took the purse of April Hayes. (SR: 166-167; T: 951) In the robbery a week later, the defendant rode up on his bicycle to a man, took out a handgun from his waistband, pointed it at the man and demanded his radio and jewelry. (T: 946-948) Although he told the man he would shoot if he tried anything, the man handed over the radio and jewelry and the defendant rode away. (T: 946-948) The defendant was a juvenile 17 years old at the time of these two incidents. (T: 950) The trial judge noted these two priors all took place many years prior to the instant offense when the defendant was a juvenile. (A: 1; R: 1134)

Thus, although Willie King does have a prior record and this comprises the aggravating factor of prior violent felony, the prior record is not egregious and the underlying factual circumstances did not result in death or any physical injury to another. Willie King has never killed anyone before. This is not the record of a man of such despicable character and violent propensities that he deserves to be executed. Willie King's prior record simply does not warrant his execution for a crime that by itself does not deserve the death penalty.[18]

This Court has stated over and over again that it is not the number of aggravating and mitigating factors that is important, but the totality of circumstances in the case. Tillman v. State, 591 So.2d 167 (Fla. 1991); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert.

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[18]Compare this with Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 111 S.Ct. 2910 (1991), where this Court affirmed a death sentence for the felony murder of a homeowner, specifically noting that the defendant's extensive prior record included first degree murder, armed robbery, and burglary to a dwelling with an assault, all committed just three weeks prior to the killing in that case; Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988), affirming the death penalty where the defendant's prior record included an armed robbery, two escapes, assault and battery of corrections officers, and the murder of the director of a drug rehabilitation center by stabbing him nineteen times while he slept; King v. State, 436 So.2d 50, 55 (Fla. 1983), cert. denied, 466 U.S. 909 (1984), affirming a death sentence where the defendant had a prior conviction for the similar very violent felony of the ax murder of his common-law wife; and Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), affirming the death sentence for a defendant convicted of breaking into a home and stabbing a woman while she slept where his prior record included attempted murder and arson as well as the rape and robbery of another woman just two days after that incident.

denied, 111 S.Ct. 1024 (1991); Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Although two aggravating factors were found in this case, they are not strong aggravators and the quality of the aggravating factors is an important consideration. Maxwell v. State, ___ So.2d ___, 17 FLW S-396 (Fla. June 25, 1992). As this Court recognized in White v. State, 403 So.2d 331, 335 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983), the aggravating factor that the murder was committed during another felony is always present in the felony murder context and does not automatically justify imposition of the death penalty. See also Clark v. State, 443 So.2d 973, 978 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984). And as just noted, the aggravating factor of prior violent felony is simply insufficient to permit the death penalty in this case. In short, there are no truly aggravating circumstances here. See Maxwell v. State, supra at S-397, n.4 ("By any standards, the factors of heinous, atrocious, or cruel, and cold, calculated premeditation are of the most serious order."); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (death penalty reversed, even though jury recommended death, in felony murder/kidnapping case where "the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent").

Moreover, important mitigating circumstances exist here. It must be remembered that Willie King had no intent to kill the victim. The undisputed evidence shows that he shot impulsively as the victim's car started moving; the trial judge found, and the record demonstrates, no premeditation. See Jackson v. State, 575 So.2d 181, 186 (Fla. 1991) (no premeditated murder where shopkeeper resisted the robbery, inducing the gunman to fire a single shot reflexively). This Court has previously recognized the mitigating quality of crimes committed impulsively during the course of other felonies and has found them to be unworthy of a death sentence. See Jackson v. State, supra at 186 (single gunshot was reflexive reaction to the victim's resistance); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during burglary of his residence); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (defendant shot convenience store clerk three times during armed robbery when victim

"jumped"); Rembert v. State, 445 So.2d 337 (Fla. 1984) (defendant hit store owner in the head during robbery); c.f., Asay v. State, 580 So.2d 610, 613 (Fla. 1991) (death sentence proportional where evidence failed to support claim that murder was spontaneous, impulsive killing such as occurs in felony murder context), cert. denied, 112 S.Ct. 265 (1991).

This Court has also observed that the fact a defendant does not intend to kill is a valid nonstatutory mitigating circumstance that exists in a case as a matter of law, notwithstanding the trial court's failure to recognize it as such. White v. State, 403 So.2d 331, 336 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983). The absence of premeditation and intent to kill is a factor that should be considered in determining whether death is the appropriate sentence. Van Poyck v. State, 564 So.2d 1066, 1069 (Fla. 1990), cert. denied, 111 S.Ct. 1339 (1991); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In the present case, Willie King's lack of intent to kill is an important factor militating against the death penalty. The mental state with which a defendant commits the crime is "a critical facet of the individualized determination of culpability required in capital cases." Jackson v. State, 575 So.2d 181, 190 (Fla. 1991), quoting from Tison v. Arizona, 481 U.S. 137, 156, 107 S.Ct. 1676, 1687, 95 L.Ed.2d 127 (1987). In Jackson, this Court further stated that "a fundamental requirement of the eighth amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant." 575 So.2d at 190. Willie King's mental state was certainly far less culpable than that of defendants who engage in far more egregious felony murders.[19]

Moreover, although this argument has been based on the state's view of the evidence that Willie King was the shooter, the evidence is actually conflicting on that point. Three witnesses, the passenger Diego, Jerry Nelson and Sabrina Osborne, testified that the defendant

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[19]While the circumstances of this case do not excuse the defendant's actions, nonetheless the fact remains he took advantage of a tempting situation presented to him. The victims came into this very dangerous area of Miami to buy drugs and, with their gold jewelry and department store shopping bags clearly visible through the windows of their rental car, they drove slowly around the area for twenty minutes shopping for drugs. (T: 361-367, 376, 466) The trial judge gave the mitigating instruction that the victim was a participant in the defendant's conduct or consented to the act. (T: 1028)

was the shooter, and one witness, Vernice Rechourse, testified she saw the defendant's hand come down after the shot. (370, 471-473, 614-617, 651) However, another eyewitness, Cheryl Ogletree, testified the defendant was not the shooter. (T: 736, 740-742, 759, 807) And one of the witnesses who said the defendant did it, Sabrina Osborne, admitted changing her story and lying under oath during a deposition when she said he did not do it. (T: 622-627, 631-637, 775-777) Moreover, Vernice Rechourse admitted the defendant looks very similar to one of the co-perpetrators, Robert Smith, who was not wearing a shirt that night, and several witnesses testified that the shirtless man was near the car and had the gun after the incident. (T: 490, 620, 652, 743) Criminologist Hart testified the projectile recovered in this case came from a Colt firearm, either a .38 Special or a .357 Magnum revolver, and Vann Wilson testified that Vincent "Dog" as well as the defendant carried a .38 caliber gun that night. (T: 456, 459-461, 685-686)

Thus, there is conflicting evidence as to whether Willie King was the actual shooter. Indeed, this issue came up throughout the trial. During voir dire, the issue of principals was discussed and prospective juror Wayne, who was ultimately excused, expressed concern about the non-shooter receiving the death penalty. (T: 83-86, 94-97, 128) The prosecutor expressly told the prospective jurors that "that is certainly something you can and should consider in the second phase of the trial as one of the mitigating circumstances." (T: 95) During his opening statement, the prosecutor again told the jury that the issue is whether the defendant was the shooter. (T: 301) During his closing argument, the prosecutor told the jury that all four men were equally responsible for the shooting and that the defendant was liable as a principal. (T: 823) The jury was instructed on the law of principals and was not given a special verdict form as to whether the defendant was the shooter. (T: 902, 910-911) Therefore, the jury's guilty verdict does not necessarily mean they found that Willie King was the actual shooter. (T: 902, 910-911) Neither was the jury ever instructed during the penalty phase that in order to recommend a sentence of death, they must first find that he killed or attempted to kill or intended that a killing take place or that lethal force be employed. (T: 1026-1031) See Diaz

v. State, 513 So.2d 1045, 1048, n.2 (Fla. 1987) (Florida Supreme Court directed trial judges to instruct juries that, in order to recommend death, they must make findings satisfying Enmund and Tison culpability requirement), cert. denied, 484 U.S. 1079 (1988); Jackson v. State, 502 So.2d 409, 413 (Fla. 1986), cert. denied, 482 U.S. 920 (1987) (same).

When a defendant in a felony murder case is not the actual shooter, his death sentence is supportable under the Eighth Amendment only upon a finding that he intended that the killing take place or that lethal force be used, or that he was a major participant in the felony and recklessly indifferent to human life. Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); DuBoise v. State, 520 So.2d 260, 265 (Fla. 1988). This is a difficult culpability requirement in situations as here where the killing was an impulsive act during a robbery. This case is very similar to Jackson v. State, 575 So.2d 181, 193 (Fla. 1991), where this Court reversed the death sentence for a defendant who may or may not have been the shooter in a straight felony murder during the attempted robbery of a shopkeeper. In Jackson, as in the present case, there was no evidence that the defendant intended to kill or "expected violence to erupt during the robbery" and there was "no real opportunity for him to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance." Id., at 193. This Court stated "we find insufficient evidence to establish that Jackson's state of mind was culpable enough to rise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder." Id., at 193. This is also true in the present case as well.

In addition, other important mitigating circumstances exist. It is undisputed that Willie King is of low intelligence, borderline retarded, and that his low level of vocabulary and speech suggest impoverishment. (A: 2; R: 1135; T: 961, 964-965, 967) His father left home when he was four years old and he was raised by his mother who worked a couple of days a week "waiting," earning $15 a week to support herself and her children. (T: 975-978) He had problems in school and dropped out early. (T: 967-978) Thus, his background was

disadvantaged and his opportunities limited and, according to Dr. Haber, this had a relationship to his adjustment potential and criminal activity. (T: 962-963, 967)

On the other hand, the evidence also shows that Willie King's family was basically a good family with no abusive past and that he got along well with both parents. (T: 973, 981-982, 985) Although the parents were separated, the defendant's father stayed somewhat close to him, tried to be a good father, tried to give him counseling and advice and teach him the difference between right and wrong. (T: 980-981) The defendant's father testified he "had been a good boy" and that most of the other children had jobs and were never in trouble. (T: 982-984) Thus, taking the defendant's background in conjunction with the fact his prior record does not involve murder or actual physical violence and the fact this crime was an impulsive killing, it is clear that Willie King is not a man of unmitigated reprehensible character and unredeemable value, but a young man with some good family support and some potential for rehabilitation who does not deserve to be executed. Even the prosecutor recognized this when he offered the defendant a plea to life imprisonment because he felt the defendant had the potential for rehabilitation. (T: 1059) Even Dr. Haber recognized this when he said that based upon Willie King's history, it was hard to believe he committed this. (T: 973)

As this Court has stated, the purpose of proportionality review is to ensure consistency in the imposition of death sentences in Florida and to eliminate the irrationality of imposing the death sentence upon a defendant when similarly situated defendants, convicted of similar crimes, have received lesser sentences and escaped the death penalty. Tillman v. State, 591 So.2d 167 (Fla. 1991); Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988); Sullivan v. State, 441 So.2d 609, 613 (Fla. 1983); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Imposing the death penalty here is disproportionate to the decisions in Rembert, Menendez, and Lloyd where this Court gave similarly situated defendants life imprisonment for similar crimes. The death penalty is also disproportionate to the life sentences given defendants who committed far more egregious felony murders. See McKinney v. State, 579 So.2d 80 (Fla. 1991); Livingston v. State, 565 So.2d 1288 (Fla. 1988);

Caruthers v. State, 465 So.2d 496 (Fla. 1985).

Moreover, the death penalty here is truly unfair when we consider that undoubtedly hundreds of defendants with similar prior records are convicted in Florida every year of this same type of simple felony murder and receive lesser sentences. The trial judge himself recognized this in his sentencing order when he said this is not the type of case for which the death penalty is ordinarily considered appropriate. (A: 4; R: 1137) Even the prosecutor recognized this when he told the jury during penalty phase argument that this particular crime was not "so atrocious itself it would scream out for the ultimate penalty," and that Willie King was not such a bad guy with such a bad background as to compel the death penalty. (T: 998-999) The prosecutor acknowledged this "is a case that falls in the middle." (T: 999) An affirmance of the death penalty here would mean that any defendant who "falls in the middle," any defendant with a prior record who impulsively shoots and kills someone during a simple robbery could receive the death penalty. See Jackson v. State, 575 So.2d 181, 193 (Fla. 1991) (to give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty; death penalty reversed); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987) (to hold that Proffitt's circumstances justified the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty; court reversed death sentence).[20]

Clearly this was not the intent of the legislature and it certainly would violate the long standing directive of this Court that the death penalty be reserved for "only the most aggravated and unmitigated of most serious crimes" and the most culpable of murderers. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988);

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[20]This crime was highly publicized by the Miami media because it involved an out-of-town tourist getting shot by a young black man in the dangerous black area of Coconut Grove. (T: 16, 101, 219, 260-263, 312, 519, 848) The police testified they even had such difficulty investigating the case because of the media involvement that they had to call a press conference. (T: 580, 587-589) It is unlikely that such an undistinguished robbery-murder would have attracted such media attention if it had not been for the eye-catching tourist victim facts. And a reasonable inference is that the prosecutor might have been more inclined to treat this as a straight felony murder deserving of life in prison if it had not been for the media attention.

State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); see also Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). It would also be unconstitutional as failing to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), cert. denied, 111 S.Ct. 1024 (1991); Jackson v. State, 575 So.2d 181, 193 (Fla. 1991).

Consequently, upon proportionality review, "the entire picture of mitigation and aggravation" is that of a case which does not warrant the death penalty. See Smalley v. State, 546 So.2d 720, 723 (Fla. 1989). Willie King's death sentence is disproportional and unconstitutional in violation of Article I, sections 2, 9, 16 and 17, of the Florida Constitution, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. His death sentence must be reversed for life imprisonment.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court reverse his conviction and sentence of death and remand the case to the trial court for a new trial and new sentencing or, in the alternative, reverse his sentence of death for imposition of a life sentence, or in the alternative, remand the case for a new sentencing hearing before a new sentencing jury or, in the alternative, remand the case for a new sentencing before the judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida 33101, this 17th day of August, 1992.

By: Marti Rothenberg
MARTI ROTHENBERG
Assistant Public Defender

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,

Plaintiff,

CRIMINAL DIVISION

vs.

CASE NO. 90-1739

WILLIE JAMES KING,

Defendant.

FILED
APR 15 1991
I. ROMAN
CLERK

SENTENCE

The defendant, Willie James King, was convicted by a jury of the crime of First Degree Murder. The same jury, by a vote of 9 in favor, 3 opposed, advised the court to impose the death sentence.

Upon the record of trial and the sentencing proceedings the Court finds:

The defendant was convicted of the violent felony of robbery in cases numbered 81-23131 and 81-23366, one of which involved the use of a firearm. These crimes were committed in 1981, within a week of each other, at a time when the defendant was a juvenile. He was originally sentenced as a youthful offender in 1982 and when he violated the community control conditions of the sentence he was sentenced to the state penitentiary.

The capital felony for which the defendant is to be sentenced was committed while the defendant and others, was engaged in the commission of an attempted robbery. The victim and her husband were about to be robbed by the defendant and his accomplices when the defendant fired a bullet into the victims' car and killed her for what seems to be no other reason than the fact that the victim started to accelerate her car to leave

APPENDIX: A:1

from what was perceived to be the imminent commission of a robbery. These two aggravaring circumstances were proven beyond a reasonable doubt. No other aggravating factor was proven.

The Court instructed the jury to consider two mitigating factors: (3) the victim was a participant in defendant's conduct, and (8) any other aspect of the defendant's character or record, and any other circumstances of the offense.

The evidence showed that the victim and her husband, who may have strayed into the area where the crime took place, did decide to purchase some illegal drugs. They drove from location to location, with the aid of members of the community who were apparently assisting them to find drugs to purchase, and went to the place where the murder occurred to complete the purchase.

The evidence also showed that the defendant is probably of below average intelligence.

In sum, the murder was not committed in a cold, calculated or premeditated manner, nor was it especially heinous, atrocious, or cruel. But it was committed by a person twice convicted of violent felonies, and while the defendant was committing a violent crime, armed robbery.

The fact that the victim was about to purchase drugs does not outweigh the aggravating circumstances. Nor does the defendant's claimed lack of intelligence.

The court has considered and weighed the jury recommendations as well as the evidence presented during both phases of the trial, and the matters presented at the sentencing hearing.

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The necessary conclusion is that the proven agggravating factors outweigh the mitigating factors, and the jury could reasonably recommend imposition of the death penalty.

The court also finds that two aggravating circumstances have been proven beyond a reasonable doubt, and that the jury was correct when it failed to find mitigating circumstances sufficient to outweigh the aggravating ones.

The court has considered and weighed all statutory and non-statutory mitigating factors, and finds that none exist. The defendant was not under the influence of extreme mental or emotional disturbance. Although the victim was engaged in attempting to buy drugs at the time of the murder, she was not buying them from the defendant, and even if she was, the action did not constitute consent, nor was she a participant in the defendant's conduct. The defendant's participation in this crime was not minor. Although there were participants, the defendant was deeply involved in the planning of the robbery, and he is the person who shot and killed the victim. There is no evidence to suggest that the defendant was under duress or the domination of another person. The defendant, although of low intelligence, had no impairment affecting his ability to appreciate his criminal conduct or to conform his conduct to the requirements of law. At the time of the commission of the crime the defendant was twenty-five years of age. The defendant presented psychological expert testimony; it showed that he was of low intelligence, but not to a degree that would reach the level of a mitigating circumstance. After reviewing all the evidence and matters of record, the court finds no other non-statutory mitigating circumstances were shown.

In sum, this was a senseless killing by a twice convicted felon (who was a juvenile when he committed them), committed during the perpetration of an armed robbery for which there was neither justification nor mitigating circumstances. Unfortunately, this seems to be a much too common occurence. The jury, as the conscience of the community, by an overwhelming vote has recommended a sentence of death. The jury's recommendation is entitled to great weight and should not be overturned unless no reasonable basis exists for the opinion.

The aggravating factors claimed in this case exist. No subjective test is required, certified copies of the prior convictions were introduced during the penalty phase. The second aggravating factor, the fact that the killing occurred during the commission of an armed robbery, was proved beyond a reasonable doubt. Mitigating factors do not exist. The State also urges the imposition of the death penalty, although it did not always do so. Prior to trial the State offered not to seek the death penalty if the defendant would plead guilty, a fact not known to the jury.[1] This case may not fit the class of cases in which one would ordinarily believe the death penalty is appropriate; this murder was not especially wicked, nor was it cold, calculated or even premeditated. However, this court cannot state that there is no basis for the jury recommendation,and, therefore, the recommendation of the jury should be followed.

The defendant, being personally before this Court, accompanied by his attorney, Andrew Kassier, and having been

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[1] See letter to defendant's counsel, dated November 27, 1990.

adjudicated guilty herein, and the Court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law.

In reaching this sentence no factual informatioin not known to the defendant or his counsel has been used, although the court has done legal research.

IT IS THEREFORE the judgment and sentence of this court that for the First Degree Murder of Marcela Fumero-Vargas, WILLIE JAMES KING, be sentenced to death, and be taken by the proper authority to the Florida State Prison and there be kept under close confinement until the date of your execution.

MAY GOD HAVE MERCY ON YOUR SOUL.

The defendant, WILLIE JAMES KING, is hereby notified that this judgment and conviction of sentence to death under Florida Law are subject to automatic review by the Florida Supreme Court.

ORDERED at Miami, Dade County, Florida this the 15th day of April, 1991.

Michael H. Salmon

MICHAEL SALMON

CIRCUIT JUDGE

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