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IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,

Appellant,

vs.

Case No. 78,031

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM A SENTENCE OF DEATH IMPOSED IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,

Appellant,

vs. Case No. 78,031

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

I. PRELIMINARY STATEMENT

This appeal is from an April 26, 1991 sentence of death imposed upon Appellant Rufus E. Stevens by Hon. Michael R. Weatherby, of the Fourth Judicial Circuit Court, Duval County. The proceeding appealed from was conducted pursuant to this Court's decision reversing Stevens' prior death sentence and ordering a resentencing. Stevens *v.* State, *552* So. 2d 1082 (Fla. 1989). The resentencing proceedings were conducted solely before Judge Weatherby, the trial jury having recommended a sentence of life imprisonment. The principal issue on appeal is the court below's failure to give appropriate weight to that life recommendation and to apply the *Tedder* standard so often enunciated by this Court.

This Court has jurisdiction of this appeal. Art. V, §3(b)(1), Fla. Const.

II. STATEMENT OF THE CASE[1]

Stevens was arrested on March 20, 1979 for the murder one week earlier of Eleanor Kathy Tolin, and he and **Gregory** Scott Engle were indicted for murder in the first degree (R 1).[2] Stevens was convicted of that crime on July 20, 1979 (TT 1190). The next day the jury recommended that he be sentenced to life imprisonment (TT 1192). On August 17, 1979 Hon. John E. Santora, Jr., the trial and original sentencing judge, ignored the jury's recommendation and imposed a sentence of death (TT 1298-1307).

On direct appeal this Court affirmed both the conviction and the sentence. *Stevens v. State*, 419 So. 2d 1058 (Fla. 1982). Justice McDonald, joined by Justice Overton, dissented as to the sentence, stating at 1065:

> The jury could have concluded that Stevens participated in the robbery and rape, but that Engle was the sole perpetrator of the homicide. There was, therefore, a rational basis for the jury's recommendation and it should have been followed by the trial judge. (Emphasis added.)

Review by the United States Supreme Court was denied on February 22, 1983. *Stevens v. Florida*, 459 U.S. 1228 (1983).[3]

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[1] A comprehensive statement of all the motions and other proceedings in this matter would be unduly lengthy. We therefore give the Court an overview of the procedural history of this cause. Other proceedings will be discussed below when relevant to a particular argument.

[2] Parenthetical references preceded by "R" are to the appropriate pages of the record on appeal for the instant matter (Case No. 78,031); those preceded by "T" are to the stenographer's transcript in the instant appeal; those preceded by "TT" are to the stenographer's transcript of the trial proceedings (Case No. 57,738); those preceded by "PCT" are to the stenographer's transcript of the post-conviction proceedings (Case No. 68,581); those preceded by "DRE" are to the appropriate exhibit and page numbers of defendant's resentencing exhibits; and those preceded by "DSHE" are to the appropriate exhibit and page numbers of defendant's exhibits at the suppression hearing conducted during the resentencing proceedings. References to testimony will be preceded by the name of the witness. In that regard, "C. Stevens" refers to Clifford Stevens, Rufus' brother; "R. Stevens" to Robert Stevens, another brother; "L. Stevens" to Leonard Stevens, Rufus' son; and "Stevens" to Rufus Stevens,

[3] Engle was also convicted of murder in the first degree and sentenced to death by Judge Santora. Engle's trial and sentencing proceedings were conducted separately, pursuant to his

On March 22, 1984 Stevens filed a motion seeking post-conviction relief. Following an evidentiary hearing Judge Santora denied that motion. On appeal this Court affirmed the denial of the post-conviction motion with respect to Stevens' conviction, but reversed with respect to his sentence on the ground that counsel had been constitutionally ineffective. The sentence was vacated and a resentencing was ordered before a new judge, who was to give Stevens the benefit of the trial jury's recommendation of life imprisonment. *Stevens v. State,* 552 So. 2d 1082 (Fla. 1989).[5]

During the more than five and one-half years that Stevens' post-conviction motion and the appeal therefrom were pending, an application for clemency was pending first before Governor Graham and then Governor Martinez. No death warrant has ever been signed for Stevens' execution.

On the remand, now-Chief Judge Santora assigned Judge Weatherby to this matter. The prosecution indicated that it intended to proffer the trial testimony as its primary proof of aggravation. Stevens moved to suppress various portions of that testimony as being violative of the Federal and State Constitutions (R 95-113). An evidentiary hearing was conducted on November 13-15, 1990. On March 6, 1991 Judge Weatherby denied the motion to suppress in its entirety (R 224-26).

With respect to the resentencing hearing on March 12, 1991, the prosecution

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rights under *Bruton v. United States,* 391 U.S. 123 (1968). On direct appeal, this Court affirmed his conviction but vacated his death sentence. *Engle v. State,* 438 So. 2d 803 (Fla. 1983), *cert. denied,* 465 U.S. 1074 (1984). Judge Santora resentenced Engle to death. On direct appeal, this Court affirmed that resentence. *Engle v. State,* 510 So. 2d 881 (Fla. 1987), *cert. denied,* 485 U.S. 924 (1988). Most recently, this Court denied Engle's petition for habeas corpus and affirmed the denial of his motion for post-conviction relief, but extended the statute of limitations for the filing of any claims he saw fit to raise upon the release (ordered by this Court) of the law enforcement files pertaining to his prosecution, *Engle v. Dugger,* 576 So. 2d 696 (Fla. 1991).

Trial counsel also handled Stevens' direct appeal to this Court. Since then, Stevens has been represented by present counsel --- first on a *pro bono* basis and, since the resentencing was ordered, on an appointed basis.

[5]The State's petition for rehearing was denied on December 19, 1989.

called one witness (T 465-504), as well as relying on the trial testimony (TT 12-89, 438-903, 920-95). Stevens called 12 witnesses (T 302-16, 410-43, 512-55; R 415-651[6]), introduced 20 exhibits, as well as relying on the transcripts of three witnesses who testified at the 1984-85 hearing on the motion for post-conviction relief (R 356-400; and certain portions of PCT 895-929[7]).

On April 26, 1991 Judge Weatherby imposed a new sentence of death on Stevens (R 303-07; T 681-92). The sentencing court found four aggravating circumstances, no statutory mitigating circumstances and 16 non-statutory mitigating circumstances, which it grouped into six categories. Only one of those six categories --- Stevens' deprived childhood[8] --- was found to be "so out of the ordinary as to [be] consider[ed] by this Court as to mitigate against a sentence of death" (R 307). Judge Weatherby concluded that (R 307):

> ... [the] non-statutory mitigating circumstances presented by the defense are insufficient to outweigh the aggravating circumstances established and that no reasonable person could conclude otherwise.

The only mention in the sentencing order of the jury's recommendation of life imprisonment was a statement in the opening paragraph (R 303) that this Court "affirmed" that recommendation in its decision vacating the original death sentence and

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[6]By agreement among the parties and Judge Weatherby, nine of the defendant's witnesses --- all of whom lived in Kentucky --- were deposed in Lexington, Kentucky, in January of 1991 and the transcript of their testimony was considered by Judge Weatherby as if the witnesses had testified before him.

[7]The specific portions submitted to Judge Weatherby for consideration were 895, lines 4-12; 901, line 11 to 902, line 5; 903, lines 3 to 20; 904, line 23 to 905, line 9; 911, line 23 to 916, line 16; 917, line 12 to 918, line 19; 919, line 24 to 923, line 1; and 927, line 25 to 929, line 20.

[8]In discussing the compelling evidence of Stevens' deprived childhood, Judge Weatherby commented that that mitigating evidence was "insufficient to explain or excuse the crime for which he [Stevens] stands convicted" (R 307).

remanding for resentence,

III. STATEMENT OF FACTS[9]

A. The Prosecution's Case

On the evening of March 12, 1979 Stevens and Nathaniel Hamilton were barhopping and riding around in Stevens' car on Jacksonville's Westside. Stevens was drinking heavily, consuming 14 or 15 beers between 8 p.m. and 2 a.m. During the course of the evening Stevens suggested that they rob the motel where he worked. Hamilton declined the suggestion. Stevens then suggested that they rob a Majik Market convenience store. Hamilton demurred because he and Stevens lived nearby and were known in the neighborhood (Hamilton: TT 565-70).[10]

About 2 a.m. Stevens and Hamilton picked up Engle from his house. Stevens suggested to Engle that they rob the Majik Market and Engle agreed. Shortly thereafter, Hamilton was dropped off at his home (Hamilton: TT 570-71).

At the Majik Market Engle robbed Tolin at knifepoint of $67.77.[11] Stevens and Engle then took Tolin in the car with them so that she would not be able to call the police immediately. After driving to a deserted location Engle and Stevens told her to get undressed and each raped her in the back seat of the car. After the rapes Tolin got

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[9] We focus in the statement of facts primarily on evidence relevant to aggravation and mitigation --- guilt or innocence not being an issue on this appeal, Various additional facts relevant to specific points we make below are discussed in connection with the arguments to which they are relevant.

[10] At the resentencing hearing Hamilton, called as the prosecution's sole witness, testified that, while Stevens and he were riding around, Stevens proposed killing the convenience store clerk after kidnapping her so as to prevent their identification (Hamilton: T 466-67). Judge Weatherby rejected that testimony as incredible in light of the fact that, despite being a critical prosecution witness at Stevens' trial (and Engle's), Hamilton never so testified at any of the proceedings held in 1979 (T 678).

[11] Engle subsequently gave Stevens $8 or $9 of the robbery proceeds (Parmenter: TT 920-21).

dressed outside the car and then ran into the **woods.** Engle chased her. Fifteen or 20 minutes later Engle returned dragging Tolin's lifeless body, which he put in the trunk of Stevens' car. They drove to another deserted location and left the body there where it was found the next day (DRE4 8-28; Blalock: TT 476-78; Imler: TT 480).

The medical examiner found the causes **of** death to be strangulation with some **sort** of cord and three stab wounds to the back. Additionally, Tolin's vagina received a long internal laceration from a foreign object (other than a **sexual** organ) while she was still alive (Floro: TT 522-40).

Six days after the homicide, Hamilton was in a car, the driver of which was stopped for driving under the influence. Hamilton subsequently told **the** police **that** Engle **and** Stevens had **been** involved in Tolin's murder. He stated that Stevens had told him that Engle's knife was the murder weapon. **He** also said that Engle had told him that the clerk had been taken out of the store and into the country to get her away from a telephone and that "Rufus went crazy and started saying she's going to identify us" (Hamilton: TT 573-78; Godbee: TT 655-59).

As a result of the information received from Hamilton, Engle and Stevens were arrested in their beds early the next morning. Later that morning Stevens admitted his involvement in the robbery, kidnapping and **rape** of Tolin and stated that Engle alone had committed the homicide (Parmenter: TT 664-69, 863-67, 877, 895-903; DRE4).

B. The Defendant's Case[12]

1. Deprived childhood. Steven's mother, Gladys, ran away from home when she was 13, and married Stevens' father, Newt, who had **served** a penitentiary

[12]To present the extensive mitigating evidence most coherently, we have organized it (in the same order **used** in the court below) according to the various mitigating circumstances upon which we relied (and which, **with** one exception, Judge Weatherby determined that we had established).

sentence in Kentucky (Netherly: PCT 182; C. Stevens: T 550-51). Rufus, the eldest of 12 children, was born when Gladys was 14. When he was only six days old, his parents hitchhiked in the sleet and rain from Kentucky to Ohio. As a result of that and similar treatment, Rufus had to be hospitalized when he was three months old (Netherly: PCT 181-82; DRE8).

Most of the time until he was five, Rufus lived with his maternal grandmother in Ohio, while his parents lived with other relatives and went back and forth between Kentucky and Ohio. At the age of five, his parents moved with him into a dilapidated chicken coop near his grandmother's house in Franklin, Ohio (Netherly: PCT 183-84). Rufus and his siblings often did not have sufficient food, largely because of his father's gambling (Netherly: PCT 187-88; R. Stevens: R 476; C. Stevens: T 518). Three of Rufus' siblings died in infancy or early childhood, one of malnutrition (Netherly: PCT 186-88).

In Rufus' first year of school he smelled so badly and was so dirty that the teacher would not let the other children play with him. Understandably, this upset Rufus (Netherly: PCT 185). A teacher's report notes that Rufus came to school "very dirty most of the time" (DRE9 4). Throughout the years in Ohio the school authorities gave Rufus and his siblings enforced showers several times a week, haircuts and used clothing. None or next-to-none of the other families in the schools received such treatment (R. Stevens: R 477-78, 535-36, 539-40; C. Stevens: T 518-21).

On one occasion the welfare authorities in Ohio temporarily removed the three youngest children from the family home. When Rufus was about 15, his father learned that the welfare authorities were coming to take away all the children. To avoid that, the family fled to Kentucky in the middle of the night (Netherly: PCT 188-89; R. Stevens: R 480-81; C. Stevens: T 522).

In Kentucky the family lived in the shabbiest and filthiest house in the locality ---

a dozen people in two small rooms.[13] The outhouse was often filled with excrement to above the level of its seat (Netherly: PCT 193-94; Wagoner:[14] 439; R. Stevens: R 487-90, 537; C. Stevens: T 524; L. Stevens: R 569).

2. Physically/psychologically abused as a child. Particularly when he was drinking, Newt Stevens was a terribly brutal and violent father and Rufus, the eldest, received worse treatment than the other children. Beatings of the children and of Gladys --- with such objects as a board, a broom and a length of hose --- were a daily occurrence. One time the family dog was run over by a car. Although Rufus was not at fault, his father beat him *so* severely with a length of hose that Rufus could not sit down for several days. Another time Newt poured whiskey over Rufus' hands and set them on fire, causing painful burns. One time Newt pushed Robert out of a moving car and another time he poured acid on Robert's leg, leaving scars which Robert exhibited when he testified. The beatings were *so* bad[15] that Robert, when only seven, sought to escape them by hanging himself. If Gladys tried to intervene on behalf of the children, Newt would beat her also (R. Stevens: R 472-76, 479-80, 510-14; C. Stevens: T 514-17, 523, 545-46).

In Kentucky Newt and Gladys filled their house with guns[16] and carried them everywhere, even to church. Not only were guns a constant presence, but so was their

[13]In later years the house was expanded to three rooms, but sometimes as many as 23 persons were living there (Netherly: PCT 193-94).

[14]Roger Wagoner is currently one of the seven county commissioners of Elliott County, Kentucky, where Rufus once lived and where his parents still reside (Wagoner: R 436-37).

[15]Robert has been told by doctors that his present total disability may have been caused in part by the severe beatings he received as a child (R. Stevens: R 469, 475).

[16]Clifford described his parents' involvement with guns as follows (T 523): "You can walk into my mommy and daddy's house right now -- and it's been this way as long as I can remember -- you can stand anywhere in that house, and if you want to reach and take hold of a gun, you can. ... [T]hey have enough guns to start a war, if they want to, on their own."

use. Newt shot and wounded Rufus twice. On the first Occasion, Newt shot Rufus in the back --- nearly killing him --- because Rufus, then aged 21, had moved to his aunt's house against his father's wishes. On the second occasion, Newt shot **Rufus** in the arm. On another occasion Newt and Gladys both fired guns at Rufus, hitting the **car** but narrowly missing him, as he drove by their house with two friends (Netherly: PCT 190-**93;** R. Stevens: R 481-85; C. Stevens: T 523, 525-28; DRE 11).

Rufus was by no means the only one shot at. Among other things, his parents, whom Robert stated "lived by the gun" (R 481), shot at each other on a number **of** occasions. Newt also shot at several of **his** other sons, doing so recently enough that Rufus' older son remembers one such incident. Newt also attacked various neighbors with gunfire and kept holes in the side of the house in case he was **attacked** by a neighboring family with whom he had **a** running feud (R. Stevens: R 481-83, 485-86; L. Stevens: R 574-75; C. Stevens: T 528-31, 549-50).

Newt also abused the children in other ways. In Ohio, he had the boys, from the age of four upward, climb trees around their house to keep a lookout for the police who might be coming to raid the poker game Newt ran. The boys worked in shifts, day and night, rain or shine. Many days of school were lost as a result (R. Stevens: R 470-71, 476-77; C. Stevens: T 513-14, 521).

Newt often kept the children from receiving medical care --- not out of poverty (for they had governmental medical coverage) but out of meanness. Rufus' school records show that, when he was seven, his teacher felt compelled to urge his parents to take Rufus to the doctor when he had trench mouth (DRE9 3). When Robert broke an ankle playing basketball, Newt would not let him **go** to the hospital for three days and beat him repeatedly because he was not able to **hoe** the cornfield fast enough. On the other hand, once when Newt was sick, the children had to stay in the chicken coop **so as** not to disturb their father (R. Stevens: R 496-98; C. Stevens: T 517-18).

The Stevens parents also exercised undue control over their adult children's lives, being particularly tough with Rufus. They insisted on adult children living in the parental home to increase the amount of food stamps the parents could collect. They arranged to have Rufus discharged from the Army after six months for the same reason. They interfered in and arranged marriages, including Rufus' first marriage to a 13- or 14-year-old. Newt would track his sons down if they left home and force them to return. When he was 18 or 20 years old, Rufus was sometimes not even allowed to go for a walk simply because his parents insisted that he stay at home (Netherly: PCT 194-95; Wagoner: R 439-43; R. Stevens: R 490-93; C. Stevens: T 531-34).

3. **Learning disabled/lack of education.** From the time he first went to school, Rufus was a very poor student. It took him two years to complete each of the first, second and third grades. Rufus' last two years in Ohio were spent in special education classes --- his school transcript noting that he was doing fifth grade work at the age of 15. In Kentucky, he completed his education at the age of 18 as an ostensible eighth grader, although his grades were more failing than passing. As an adult he was often turned down for jobs because of his poor reading ability (DRE9; DRE10; Cobb: R 640).

4, **Good worker/held jobs.** Stevens worked consistently --- often at two jobs (Stevens: PCT 915-16) --- supported his family and was well-thought-of by his employers. Wick Harper, who later was Sheriff of Elliott County (Kentucky) for six years, supervised Stevens' work as a farm hand and found him to be a good worker who did not get into trouble (Harper: R 416-19). Thomas Ward, the owner of a number of businesses and several farms in Kentucky, employed Stevens as a farm hand approximately 50 per cent of the time during the busy seasons (May through December) for five years. He characterized Stevens as a "very dependable" worker (Ward: R 621-27). William White, a foreman from a job in Lexington, Kentucky, testified that Stevens was

a "very good" worker who did not need a lot of supervision and who was promoted to be an assistant foreman (White: R 594-97). Another witness knew him to be a "hard worker" **(Cobb:** R **634).**

During the year Stevens was in Florida prior to his arrest, he **was** employed **as** **a** maintenance man, and later as the maintenance supervisor, at **a** Best Western Motel in Orange **Park** (Stevens: PCT 904-05; Netherly: PCT **203;** Hamilton: TT 586). The chief detective on the homicide case confirmed that Stevens **was** well-thought-of by the manager of the motel (Parmenter: **TT 948).**[17]

5. **Militarv service.** Stevens served six months in the Army in 1967-68 until his father arranged for his release from active duty on hardship grounds. **He** was granted an honorable discharge in 1971 after three and one-half years in the Army Reserve (DRE12; C. Stevens: T **533-34).**

6. **Good parent/family member.** Stevens was a good husband and provider (to the extent of his limited abilities) and was and is a concerned father. His wife Patricia, whom he **married** in 1972, divorced him in 1984 (five years after his conviction in this matter), not because she no longer loved him but because she needed a man to help provide for and raise Rufus' and her two sons. She has since remarried. At the time of his arrest, Rufus' and Patricia's older son, Leonard, was almost six **and** their younger son, Christopher, was an infant.

Leonard has been deeply hurt by his father's arrest, seeing his father on television in handcuffs, and the twelve years of enforced separation. Before his arrest, **Rufus** spent a considerable amount of time with Leonard. He played with Leonard on **a** consistent basis and never used any violence against him, not even **a** spanking. Nor did he ever use

[17]**The detective's investigation also revealed** that **Stevens had** only "a minor **[prior] arrest record**" (Parmenter: **TT 948).**

violence against his wife Patricia.[18] Indeed, one of Leonard's pre-arrest memories was his father teaching him at the age of four or five that it was wrong to hit a girl.

Even while in prison, Rufus has played a positive role in his son's upbringing. Once when Leonard was thinking of dropping out of school, Rufus advised him not to and he has consistently encouraged Leonard to do well in school. Rufus has also stressed to Leonard that he should respect his stepfather (Patricia's new husband), particularly since most men would not be willing to support two boys who were not his own sons (L. Stevens: R 131-40, 146-68, 141; PSI 3). Rufus' good qualities as a husband and father were confirmed by witnesses who had known the family in both Kentucky and Florida (Evans: R 580-81; Cobb: R 634, 636, 637; Allen: PCT 217-18).

7. Mental/psychological problems. Dr. Clifford Levin, a licensed psychologist who examined Stevens in 1990 and 1991, testified about his mental condition since he was sent to the Florida State Prison in 1979. Dr. Levin found that Stevens was suffering from an Axis One (*i.e.*, extreme) delusional disorder of the grandiose type (a DSM diagnosis formerly known as "paranoid disorder"). Although Stevens is oriented as to person, place and time, and is able to conduct conversations which are internally logical and consistent, his system of beliefs is not based upon reality. For instance, Stevens believes that his body functions as a wireless microphone which allows him to converse with others, regardless of their location. Among those with whom he believes he can communicate are God and various prominent people, such as Senator Graham. He believes that he has special powers, including the ability to cure cancer and AIDS. He also has auditory hallucinations.

Stevens has no insight into his mental illness and has no conscious control over his delusions. When confronted with the inaccuracy and irrationality of his beliefs, he

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[18]One witness described seeing Patricia get angry at Rufus on occasions and hit him, but Rufus never retaliated physically (Cobb: R 637).

simply insists upon their accuracy, notwithstanding facts to the contrary (Levin: T 410-23).

Dr. Levin's findings were corroborated by Stevens' prison medical records (DRE3 --- see, ***e.g.*,** **36, 48,** 50, 63, 80, 95-106, **108,** 116, 201). For instance: "**...** delusions. Bizarre thoughts. **...** deterioration in mental process ..." (63); "Grandiose ideas **...** delusional thoughts and inappropriate affect." (96); "Received call from wing officer --- stating inmate had been **talking** to wall, shaking his finger at wall, etc." **(116);** "**...** systematic presentation of delusional material with persecutory themes and grandiosity. Denies any psi [psychiatric] problems ..." **(201).** Consistent with Dr. Levin's observations, the prison medical records contain many denials by Stevens that he suffers from mental problems.

Also corroborative of Dr. Levin's findings were the affidavits of six inmates who at different times over the years had cells near Stevens'. Most frequently mentioned in those affidavits was the fact that Stevens often spoke to or yelled at (sometimes for hours) persons he imagined were in his cell and that, when he was not talking to these imaginary persons, he was staring blankly into space (DRE7A-F). One inmate discussed **how** Stevens' yelling at invisible people wakes him up every night, how sometimes Stevens does not focus on the fact that his meal has been brought to him **and** has to be reminded to eat, how he consistently talks about the imagined **fact** that two prison guards killed his wife, and how inmates take advantage of his befuddled mental state (DRE7F).

Stevens has attempted suicide twice while in prison. In 1984 he slashed his right wrist three times with a razor blade (Levin: T 429, 441; DRE3 145-47).[19] On May 1, 1991 --- the day after his return from being resentenced in Jacksonville --- **he** took an overdose of a medication prescribed for his chronic obstructive pulmonary disease and

[19]Following this suicide attempt, Stevens verbalized a continued desire to kill himself (DRE3 210).

lost consciousness before he was transferred to an outside hospital (R 669-93).

8. Drinking or intoxicated at the time of the crime. According to Hamilton, Stevens drank 14 to 15 beers from 8 p.m.[20] on March 12, 1979 until 2 a.m. the next morning when Hamilton and he parted company (Hamilton: TT 567). In his statement the morning he was arrested, Stevens said that while with Hamilton he was "drinking pretty heavy"[21] (DRE4 9). After Hamilton was dropped off, Engle and Stevens split approximately another case of beer (Parmenter: TT 951; DRE4 12). When Engle was disposing of the body at the place where it was found, Stevens was "still drunk" (DRE4 37).

9. History of alcohol problems. Stevens began drinking at about age 15. During the three years before his arrest he generally drank one to two cases of beer a day. He also drank whiskey. In the year he was in Florida before his arrest, Stevens drank on the average of one and one half cases of beer a day, starting when he arrived at work. He became intoxicated most days, including on the job. Numerous people (including Hamilton, the prosecution's key witness) observed and testified about his excessive drinking, both in Kentucky and in Florida (Stevens: TT 34, 38, 44; PCT 919-23; Custer: TT 79-81; Hamilton: TT 584-86; Parmenter: TT 948,951; Netherly: PCT 196-97, 203; R. Stevens: R 493-94, 528-30; L. Stevens: R 560-63; Gillis: R 611-12; Cobb: R 636-37).

10. Question of which participant committed the homicide. Engle alone committed the homicide --- outside of Stevens' presence. After Tolin fled, Engle chased her, disappearing from Stevens' sight. Fifteen or 20 minutes later, Engle returned, dragging Tolin's lifeless and bloody body (DRE4 19-21).

[20]The record does not reflect how much alcohol Stevens drank before he met Hamilton on March 12.

[21]Based upon the information set forth in connection with the next mitigating factor, it is clear that "pretty heavy" for Stevens in 1979 would be "extremely heavy" for most people.

Engle's knife was the murder weapon. Before the murder Engle was noted for his close attachment to and constant possession of his knife. He continued to **possess** it in the days between the crime and his arrest. On the night before the arrest --- after there had been speculation that Hamilton might have given information to the police --- Engle had his landlord hide the knife for him (Hamilton: TT 582-83; M. Wemmer: TT 592-93; J. Wemmer: TT 628-36; Floro: TT 797-98).

Engle was known to have committed other robberies in Jacksonville and he bragged about having a robbery conviction and convictions for 56 counts of **arson** in **Ohio** (Hamilton: TT 583-84; DRE4 31; DRE15 21). At least four or five times a day Engle **talked** about committing robberies (DRE4 31; DRE15 21-22).

Stevens was known to be easily influenced by others (Netherly: PCT 195; Cobb: R 636).

13.[22] **Remorse.** From the time he saw Engle return dragging Tolin's body, Stevens showed significant remorse in having participated in the events which led to the homicide by Engle. He was "sick, disgusted" and "upset" (DRE4 22, 26). A few hours later, Hamilton was teasing Stevens about his involvement **with** those events. Stevens responded, "For God's sake, look what we've done" (DRE4 32). One week later, in his post-arrest statement, he told Parmenter: "I ... can't forget her face. It's always been in my mind ever since that night. I see it in my sleep, when I'm awake" (DRE4 32). When he spoke of Tolin during that statement, he wept (Parmenter: TT 952).

Dr. Levin noted that Stevens had compassion for others and was not an anti-social personality. As a result, his psychological pain **from** the memory of the crime led or contributed to his delusional disorder (Levin: T 422-24).

14. **Good prison record.** Stevens spent almost **six** years in the Florida State

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[22]**Mitigating factors 11 and 12 upon which Stevens relied --- and which Judge Weatherby found proven --- relate to weaknesses in the prosecution's proof.** They **will be discussed in Point One,** ***infra*****.**

Prison before receiving the first of the only five disciplinary reports he has received during his eleven and one-half years there, The disciplinary reports were received after his mental illness became decidedly worse (*see* DRE3) and only one of the five is even arguably of more than a minor nature.

In May, 1985 Stevens broke a food tray in his cell. Some of his statements to the authorities (he referred to a lawyer who works with death row inmates as two persons, one black and the other white) were clearly delusional. In September, 1985 Stevens was cited for having a filthy cell. After these two infractions, a then-annual evaluation report *stated:* "Other than Inmate Stevens'"] somewhat unusual behavior within his cell, he is not considered to be a management problem and his overall prison adjustment is satisfactory, given his condition" (DRE6 14).

In March, 1986 Stevens was raving delusionally and profanely about a former sexual relationship with a prison psychologist and that the psychologist was now causing him to be denied medical treatment. A medical technician told him he was writing up an infraction for verbal disrespect. Stevens then swore and spat at the technician. Dr. Levin concluded that this, the only incident involving aggression against another, was caused by agitation from Stevens' delusions. In November, 1986 Stevens was cited for playing his television without headphones after hours. And in March, 1989 he received a disciplinary report for damaging his television set.

Eased upon his experience with many prisoners, Dr. Levin stated that five disciplinary reports over eleven and one-half years was an unusually low number of infractions (DRE6; Levin: T 420, 424-26).

15. Positive potential for rehabilitation. Dr. Levin found that Stevens had a positive potential for rehabilitation in prison. He also specifically noted the lack of violence in Stevens' record after more than eleven years in prison (Levin: T 426-29)

16. Physical condition, In May, 1986 another inmate threw a caustic liquid

in Steven's face (DRE14). Much of the corneal tissue in his eyes was burned away, causing him severe pain for months and leaving him legally blind.

Dr. Jesse Halpern[23] examined Stevens in 1990 and determined that he was legally blind, unable to perform adequately in the usual workplace situation, and unable to read. There is vision-blocking scar tissue on both corneas --- a condition which cannot be corrected with glasses or contact lenses. The prognosis is for neither improvement nor deterioration. Stevens' vision in one eye is a little worse than 20/400 and in the other about 20/600, meaning that at 20 feet Stevens is able to see what the normally-sighted person can see at a little more than 400 feet and at 600 feet.[24]

In addition to the evidence of blindness, a photograph of Stevens on the date of his arrest was introduced (DRE13). Judge Weatherby was asked to compare Stevens' appearance at the resentencing proceedings with his appearance in 1979 and to conclude that Stevens' severe physical deterioration over those 12 years was caused by much more than the passage of time (T 651). Stevens also suffers from chronic obstructive pulmonary disease (R 677, 680-81, 688, 689).

17. Charitable/humanitarian deeds. Throughout his life, up until the time of his arrest, Stevens went out of his way to help others when they were in need. We cite below numerous examples of and comments about his generous spirit, which demonstrate what a giving, caring person Stevens was --- not only to family and friends, but also to strangers and people from a different racial background.

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[23] The index (T 4, 204) renders Dr. Halpern's first name as "Jeffrey." This innocuous mistake is but one example of the hundreds, if not thousands, of transcription and typographical errors in the transcript of the resentencing proceedings. Some of those errors so garble the proceedings as to leave counsel who participated in them unable to reconstruct what was actually said.

[24] Dr. Halpern's findings are in agreement with the 1986 reports of the treating doctor at Shands Teaching Hospital, whose reports are part of Stevens' prison medical file (Halpern: T 304-16; DRE1; DRE2).

Marsha Lowery Evans was a teenage neighbor of Stevens' in-laws in Lexington, Kentucky, during the seven years Rufus and Patricia lived there much of the time. Evans' father did not live with the family and her mother was often ill with heart problems and emphysema. On more than ten occasions Stevens performed **repairs** or did other heavy work around the Lowerys' house free of charge. Stevens and Patricia often stopped by, when they were going to the store, to see if they could pick up anything for the Lowerys. When Mrs. Lowery was dying in late 1977 and early **1978,** Stevens and his wife would come over to the house and sit with Marsha's terminally-ill mother, giving Marsha a respite. When Stevens drove an ice cream truck for a living, he **would** entertain Marsha and other neighborhood children by allowing them to ride on the truck. On cross-examination, Evans characterized Stevens as a caring and loving person (Evans: R 578-84, 586).

Louvertia Gillis was another neighbor from Lexington. **Hers** was the first black family on the block where Rufus lived with his in-laws about 75 per cent of the time. Before Rufus started living with Patricia, her younger brothers often fought with, threw mud clods at and used racial epithets against Gillis' still-younger sons. On his own initiative, Rufus stopped Patricia's brothers from fighting with the Gillis boys and from calling them names. One **of** Gillis' sons and two of Stevens brothers-in-laws eventually became very close friends. Rufus often played outdoor games with the children on the block. **He** assisted at a neighborhood picnic. He helped Gillis fix a broken water pipe in her house and gave her rides on a number **of** occasions when her car was not working. When another neighbor named Nolan was seriously ill, **Stevens** went over to his **house** to help out (Gillis: R **604-07,** 608-13, 618-19).

Sandra Cobb, a good friend of Patricia, knew Stevens from **1972** until he and his family moved to Jacksonville in 1978. On a number **of** occasions Stevens prevented Cobb's rather volatile boyfriend from hitting her. Rufus was against fighting and

violence, particularly against women. He often intervened to stop fights (Cobb: R 633-38, 645).

Stevens often went out of his way to help others. Leonard's great-grandmother (Patricia's grandmother) lived in a nursing home in Lexington. Rufus regularly took her out to lunch or for a walk or to a store.[25] Often he stopped to help stranded motorists and used his good mechanical abilities (free of charge) to help neighbors fix their cars (L. Stevens: R 546-48).

Jeanne Allen and her husband ran a grocery store near the trailer park where Stevens lived in Jacksonville. When Allen's husband was sick, she was in the store alone until 10 or 11 p.m. Stevens would often come to the store or ride by on his bike to make sure that she was all right and having no problems (Allen: PCT 215-17).[26]

Rufus' eagerness to help others was also demonstrated in the crucible that was the severely-abusive household in which he was raised. One Christmas the Stevens parents had not given his brother Robert a present. Rufus, who had received some socks from his parents, rewrapped the socks and tried (unsuccessfully) to have Robert believe that the gift was from their parents. When Robert's ankle was broken and his father forced him to work in the cornfield for three days, beat him because he was not moving fast enough, and refused to allow Robert to get medical treatment, Rufus and Patricia helped Robert sneak out a window and took him to a hospital where he received a cast. When Rufus was managing a store his aunt and her husband owned, he frequently gave food away to people who did not have the money to pay for it. Rufus habitually helped others

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[25]Even if it was late at night and Rufus was about to go to bed, he would get dressed and go to Patricia's grandmother if she telephoned needing something (R. Stevens: R 494).

[26]Allen's willingness to testify for Stevens, who was convicted of killing a convenience store clerk, was particularly noteworthy because in 1980 or 1981 Allen herself was the victim of a convenience store robbery in which she was so badly beaten that she needed three operations (Allen: PCT 218).

(R. Stevens: R 494-99).

When Rufus was a boy he carried his cousin, who had badly cut her foot, approximately three miles on his back to get her home (Netherly: PCT 197-98). When he was growing up, he never got into fights, unlike many of his peers. Once, when his friend Roger Wagoner was angry that his (Wagoner's) girlfriend was seeing someone else, Rufus spent the evening with Wagoner (who was drinking and "hunting" for his girlfriend) to ensure that there would be no violence. Rufus also would help around the Wagoner family farm (Wagoner: R 437-38, 445-46). Rufus was the type of person who would rather give than receive (Harper: R 419). He was always helping people out. If a person asked him for a dollar and Rufus had it, he would give it away. If a person needed something to eat or drink, Rufus would get it for him. He once lent his car to someone for a week. He would stop to help people with flat tires (C. Stevens: T 535).

IV. SUMMARY OF ARGUMENT

Stevens presented extensive mitigation evidence to support the jury's recommendation of life imprisonment. Some of that mitigation was found in the prosecution's case at trial, which showed that Engle alone committed the actual homicide. It was that evidence which persuaded Justices McDonald and Overton on the original direct appeal that the jury's recommendation should not have been overridden. Significantly, the State presented no additional credible[27] aggravating evidence on the remand for resentencing. This eminently reasonable basis for sustaining the life recommendation therefore exists unchanged.

Stevens, on the other hand, presented a great deal of evidence at the resentencing from many sources about the following subjects (among others): his deprived childhood,

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[27]The only aggravating evidence which the State offered to supplement the testimony found in the trial transcript was rejected by Judge Weatherby as unworthy of belief (T 678).

the severe physical **and** psychological abuse he suffered at the hands of his parents (principally, but not exclusively, his father), his learning disabilities, his good work record, his honorable discharge from the Army, his excellent record as a parent and husband, his drinking problems and his intoxication at the time of the crime, his remorse concerning the crime, his good prison record, the fact that he was almost totally blinded in 1986 by another prisoner, and accounts of numerous acts of kindness and concern by Stevens for his fellow human beings (strangers, as well as family and friends).

There was little dispute about the extensive mitigating evidence presented. Judge Weatherby found that 16 non-statutory mitigating circumstances were established. The problem lay in how that mitigating evidence should be considered. Had Judge Weatherby applied the standard first enunciated in ***Tedder v. State,*** **322 So.** 2d 908 (Fla. 1975) --- which is applicable to cases with jury recommendations of life --- he would have imposed a life sentence. The analysis which Judge Weatherby should have applied was aptly stated by this Court in ***Cheshire v. State,*** 568 **So.** 2d 908, 911 (Fla. 1990) as: "whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment" (emphasis added). As we demonstrate in Point One, the relied-upon mitigating circumstances provided overwhelming support for the jury's recommendation. We therefore submit that the override of the life recommendation violated the *Tedder* rule.[28]

This brief is structured and argued upon the assumption that subseuuent points presented need not be reached. or even considered. for the Court to grant the relief

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[28]Point Two establishes that Stevens' death sentence is disproportional to numerous cases in which this Court reversed overrides of jury recommendations of life despite the presence of four or five aggravating circumstances. Point Three discusses the various ways in which the **four** aggravating circumstances found by Judge Weatherby were not proven beyond a reasonable doubt, were improperly considered after having been waived by the prosecution, or are constitutionally invalid. Point Four demonstrates that significant portions of the prosecution's proof were unconstitutionally admitted into evidence and thus should have been suppressed. Point Five discusses the prosecutorial misconduct which deprived Stevens of a fair resentencing proceeding.

sought in the preceding point(s). We submit that Point One should resolve this case. We argue that point upon the premise that Stevens is entitled to a life sentence under *Tedder*, notwithstanding the four aggravating circumstances which were improperly found by Judge Weatherby (see Point Three), notwithstanding the significant portions of the prosecution's case which rest on unconstitutional evidence (*see* Point Four), and notwithstanding the prosecutorial misconduct in the resentencing proceeding (see Point Five). Thus, only if the Court disagrees with us as to Point One, need it consider Point Two; and only if it disagrees with us as to Point Two, need it consider Point Three; and so on.[29]

V. ARGUMENT

POINT ONE

THE SEVENTEEN MITIGATING FACTORS PROVED BY STEVENS OVERWHELMINGLY REQUIRED A LIFE SENTENCE, HAD THE *TEDDER* STANDARD BEEN APPLIED AND DUE DEFERENCE BEEN GIVEN TO THE JURY'S RECOMMENDATION OF LIFE

A. Introduction

The most fundamental (but hardly the sole) sentencing error Judge Weatherby made was to ignore totally the jury's recommendation of life and to impose sentence as if that recommendation had not been made. In doing so, the judge ignored the oft-

[29]If the Court is required to reach the claims in Points Three or Four, a favorable ruling as to one or more of those claims would require a re-analysis of the claims presented earlier in the brief, insofar as they may be affected by the ruling(s) on the later-presented claim(s). Most particularly, this Court would be required by the federal and state constitutional protections against double jeopardy to reconsider the Tedder claim in Point One and the proportionality claim in Point Two to determine whether either or both of those claims should be granted. For if it is determined that the trial court should have accepted the jury's recommendation of life pursuant to Tedder, or that Stevens' sentence is constitutionally disproportional, double jeopardy principles would require this Court to order the imposition of a life sentence. *See Wright* v. *State*, 586 So. 2d 1024, 1031-32 (Fla. 1991).

enunciated ***Tedder*** standard[30] and, rather than determining whether there was a reasonable basis in the record to support the jury's recommendation, erroneously denigrated the significance of the proven mitigating circumstances. Had the court **below** given appropriate weight to the jury's recommendation, it would have determined that the record left it no alternative but to impose a life sentence, We now **ask** this Court to correct the unconstitutionally-erroneous sentence imposed on **Stevens.**[31]

We will: (1) discuss the ***Tedder*** standard; *(2)* analyze Judge Weatherby's sentencing order, showing how it ignored that standard; and **(3)** discuss the extensive evidence **of** mitigating circumstances which overwhelmingly provides **a** reasonable basis for the **jury's** recommendation of life imprisonment.

B. The *Tedder* Standard

In the seminal case of ***Tedder v. State, supra,*** 322 ***So.*** 2d at 910, this Court stated:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence **of** death should be so clear and convincing that virtually no reasonable person could differ.

In its decision remanding this matter for resentencing --- ***Stevens v. State, supra,*** 552 ***So.*** 2d at 1085 --- this Court explained the analysis to be applied **as** follows: "If there is a reasonable basis in the record to support the jury's recommendation, an override is **improper**" (emphasis added). In ***Cheshire*** *v. State*, ***supra,*** 568 ***So.*** 2d at 911, this Court further explained that:

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[30]Our references to "the ***Tedder*** standard" encompass the analysis to be applied after **a** jury recommends life and the weight to be given to such a recommendation, as enunciated in the entire body of relevant case **law.**

[31]**Judge** Weatherby's sentence in light of all the circumstances discussed in this point **was** arbitrary, discriminatory and capricious and thus unconstitutional. Amends. VIII, XIV, U.S. Const.; **Art. I,** §§9, 17, Fla. Const.; see ***Spaziano v. Florida,*** **468 U.S. 447, 465-67 (1984).**

> ... under *Tedder,* the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment. (Emphasis added.)

Concurring in **Cheshire,** Justice McDonald stated at 914 that under the "stern" *Tedder* standard:

> The test to be applied by the judge is whether the facts are such that the jury's recommendation is reasonable and not whether the judge would reach the same conclusion. The benefit of any doubt on the reasonableness of a recommendation must be given the defendant. (Emphasis added.)

Upon a resentencing, such as this, the evaluation of the reasonableness of the jury's recommendation must be based both upon what the jury heard and also upon the new mitigating evidence presented at the resentencing proceeding. *Buford v.* State, 570 So. 2d 923, 924 (Fla. 1990).

If there is mitigating evidence in the record which supports a life recommendation, an override will be reversed regardless of the number of valid aggravating circumstances found. **See,** *e.g.*, the following cases where a life override was reversed by this Court despite the existence of multiple aggravating factors: ***Hegwood v. State,*** 575 So. 2d 170 (Fla. 1991) (five valid aggravating circumstances); ***Ferry v.*** State, 507 So. 2d 1373 (Fla. 1987) (five); *Masterson* ***v.*** State, 516 So. 2d 256 (Fla. 1987) (four); see also, Johnson *v. Dugger,* 911 F.2d 440, 474 **n.78** (11th Cir. 1990) (categorizing reversals of life overrides by this Court by number of valid aggravating circumstances found).

C. Judge Weatherby's Sentencing Order

Judge Weatherby began his sentencing order (R 303-07) with a brief recitation of

the history of the case,[32] mention of the evidence he considered, and a fairly detailed discussion of the prosecution's evidence offered to support aggravation (R 303-04).[33] The court then set forth the four aggravating circumstances which it found proven beyond a reasonable doubt: *i.e.*, that the capital felony was (1) committed during the course of a robbery, sexual battery and kidnapping; (2) committed for the purpose of preventing the identification and arrest of Engle and Stevens; (3) committed for pecuniary gain; and (4) especially heinous, atrocious, or cruel (R 304-05). §921.141(5)(d), (e), (f), (h), Fla. Stat. (Supp. 1991).

None of the seven statutory mitigating circumstances was found to be established (R 305-06). Judge Weatherby, however, found 16[34] non-statutory mitigating circumstances (R 306-07).[35] Judge Weatherby found one of his six categories of mitigation to be particularly persuasive --- *i.e.*, "deprived childhood," which apparently includes the mitigating circumstances of "deprived childhood" and "physically/psycho-

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[32]This brief historical recitation makes passing reference to the jury recommendation of life (R 303). It is never mentioned again in five single-spaced pages.

[33]This stands in marked contrast to the failure of the order to provide any full recitation of the defense evidence offered to support mitigation (as opposed to a mere list of the mitigating factors proved).

[34]Actually, Stevens presented evidence of 17 non-statutory mitigating circumstances, the sixteenth of which involved his physical condition. The "physical condition" mitigating factor was amply established by the testimony of Dr. Halpern (T 302-16) and various documents (DRE1, DRE2, DRE13, DRE14; R 677,680-81, 688, 689), and was argued by defense counsel (T 650-51). Since the evidence supporting that mitigating circumstance was uncontroverted, the sentencing court was required to consider it as part of its *Tedder* analysis. See, *e.g.*, ***Cheshire v. State, supra***, *568* **So.** 2d at 911-12; ***Nibert v. State***, **574 So.** 2d 1059, **1062** (Fla. 1990) ("[W]hen a reasonable quantum of competent, <u>uncontroverted</u> evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved" [emphasis added]).

[35]Judge Weatherby suggested that the 16 mitigating circumstances could be divided into "four or five categories" (R 307). He actually listed six categories: (1) "deprived childhood," (2) "mental stability," (3) "life after reaching majority," (4) "substance abuse," *(5)* "quality of the State's case" and *(6)* "prison record." We submit that two of the 16 listed mitigating circumstances --- "remorse" and "charitable/humanitarian deeds" --- do not fit into the six categories. Nor does the ignored mitigating factor of "physical condition."

logically abused as a child." Had he applied the *Tedder* standard, he would necessarily have found that Stevens' deprived childhood, in and of itself, provided a reasonable basis for the jury's recommendation and thus, in and of itself --- given the weight he ascribed to that category --- mandated a sentence of life imprisonment. Lamentably, Judge Weatherby was not applying the correct standard.

That he was not applying the *Tedder* standard is indisputably shown by his conclusions concerning both the category of mitigation to which he gave significant weight and also the categories to which he gave short shrift (R 307):

> However, the significance of the defendant's childhood is insufficient to explain or excuse the crime for which he stands convicted,
>
> Of the remainder of the reduced [in number] categories, none are so out of the ordinary as to [be] consider[ed] by this Court as sufficient to mitigate against a sentence of death.

Having found (as the facts mandated) that the proffered mitigating circumstances were established by the evidence, Judge Weatherby was required to consider whether those circumstances could have provided a basis for the jury's life recommendation.[36] *See Cheshire v. State, supra,* 568 *So.* 2d at 911-12. Contrary to established law, however, he applied his own *ad hoc* analysis. Nothing in the *Tedder* standard justifies dismissing mitigation which the sentencing court found compelling --- *i.e.*, Stevens' deprived childhood --- as "insufficient to explain or excuse the crime." Nor does any view of the *Tedder* standard permit dismissing 15 established mitigating circumstances, without any further consideration or discussion, as being not "so out of the ordinary."[37]

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[36]"[A] mitigating factor once found cannot be dismissed as having no weight." *Campbell v. State,* 571 So. 2d 415, 420 (Fla. 1990).

[37]Judge Weatherby's conclusions on the weight to be given to the mitigating circumstances and his ultimate conclusions are not entitled to a presumption of correctness. *Ferry v. State, supra,* 507 So. 2d at 1376-77. If this Court determines that "reasonable people could differ on what penalty should be imposed in this case" (emphasis in original), the override was improper.

The sentencing court's failure to apply the *Tedder* standard continued in the paragraph setting forth its ultimate conclusions. The order stated (R 307):

> ... this Court concludes that there are four aggravating circumstances present which dictate the imposition of a sentence of death. (Emphasis added.)

After reiterating that he found no statutory mitigating circumstances, Judge Weatherby stated (R 307):

> The Court further finds that those [16 or 17] non-statutory mitigating circumstances presented by the defense are insufficient to outweigh the aggravating circumstances established and that no reasonable person could conclude otherwise.[38]

Not even once in the entire order did Judge Weatherby advert to the most essential element of the *Tedder* standard: *i.e.*, whether the mitigating evidence provided a reasonable basis for the jury's recommendation of life. Rather, he found that the presence of four aggravating circumstances, standing alone, dictated a sentence of death. Having totally ignored both the *Tedder* standard and the jury's life recommendation, Judge Weatherby's analysis and conclusions are fatally flawed and should be reversed by this Court.

D. The Overwhelming Support for the Jury's Recommendation of Life

When Stevens' case was before this Court on the original direct appeal, the principal mitigation in the record --- because ineffective trial counsel had done nothing to investigate and present such evidence --- was the proof that Engle alone committed the

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Id. at 1377.

[38]The last clause in the quoted sentence may have been an attempt to apply the *Tedder* standard. If so, Judge Weatherby was erroneously focusing on a weighing of mitigating versus aggravating circumstances (appropriate if there had been a death recommendation), rather than on whether there was a reasonable basis in the record to support the life recommendation.

homicide. *See Stevens v. State, supra,* 552 *So.* 2d at 1085-88. On direct appeal Justice McDonald, joined by Justice Overton, dissented (*Stevens v. State, supra,* 419 *So.* 2d at 1065) with respect to sentence, stating:

> The jury could have concluded that Stevens participated in the robbery and rape, but that Engle was the sole perpetrator of the homicide. There was, therefore, a rational basis for the jury's recommendation and it should have been followed by the trial judge. (Emphasis added.)

On collateral appeal the full Court concluded that the jury's life recommendation was for exactly the reason stated in Justice McDonald's partial dissenting opinion. *Stevens v. State, supra,* 552 *So.* 2d at 1086. Now, after the remand, Stevens still presents the same mitigating evidence which Justice McDonald and the jury identified, and much, much more,

It **is** important to note that the basis upon which Justices McDonald and Overton found that there was a rational basis for the jury's recommendation exists unchanged. Not one scintilla of additional credible aggravating evidence was presented by the prosecution. In fact, the new evidence presented by the State at the resentencing was rejected by Judge Weatherby as being unworthy of belief (T **678).** Thus, the basis **upon** which Justices McDonald and Overton found the life recommendation supported on the original appeal is equally compelling on the present record.[39]

Before discussing the extensive mitigating evidence in the record, we draw this Court's attention to the fact that virtually all the mitigating evidence which Stevens said **during** the post-conviction proceeding he could prove --- much of which is discussed in *Stevens v. State, supra, 552 So.* 2d at 1085-86, nn.8-10 --- has indeed been proven (and

[39]Because we discuss the 17 mitigating factors in the numerical order both we and Judge Weatherby **employed** in the trial court, Stevens' lack of participation in the actual killing is the tenth listed mitigating circumstance. Neither as to **this** or any other factor **should** its significance be **linked** to its numerical place in the list **of** 17 mitigating circumstances.

so has much more). It is axiomatic that this Court would not have reversed Stevens' sentence on the ground of ineffective assistance of counsel in investigating and presenting mitigating evidence unless the evidence proffered during the 3.850 proceeding were reasonably probable to obtain Stevens a life sentence. This Court had to be persuaded of the likely significance of that evidence at a resentencing to determine that the prejudice prong of the ineffectiveness test was satisfied. See *Strickland v. Washington,* 466 U.S. 668, 692-94 (1984). In a certain sense, therefore, the issue on the remand for resentencing was whether Stevens would prove the mitigation he had said he could. As we demonstrate below, Stevens did deliver what he promised --- plus much more.[40]

1. <u>Deprived Childhood.</u> From the time of his birth Stevens lived in abject poverty. A brother died of malnutrition. Stevens and his siblings were constantly humiliated at school by being singled out to take showers and to receive haircuts and hand-me-down clothes, not to mention his being treated as a pariah because he smelled so badly and was so filthy. Moreover, even by the standards of Appalachian hill folk, his family lived in terrible squalor. That Stevens had a deprived childhood cannot be controverted. Such circumstances constitute mitigation. *See, e.g., Hegwood v. State, supra,* 575 *So.* 2d at 173; *Buford v. State, supra, 570 So.* 2d at 925.

2. <u>Physically/psychologically abused as a child.</u> There is no doubt that Newt Stevens was a cruel and vicious father. He brutalized Rufus both physically and psychologically from the time Rufus was a small child until he was fullgrown (when Newt insisted on unreasonable control over an adult son's life). Not satisfied with frequent and severe beatings, Newt shot Rufus twice, once nearly killing him. He deprived Rufus and others of his children of medical care for no reason other than meanness. The Stevens family lived in an armed camp where little was thought about

[40] Since the Statement of Facts contains a fairly detailed summary of the mitigating evidence, we will comment on that evidence, but will not reiterate all of it. The specific record references are set forth in the Statement of Facts.

shooting at another. Almost beyond belief (but the incident was testified to by three witnesses), Rufus was also shot at and nearly wounded by his mother. Such horrifying parental abuse surely has a deleterious effect upon a child. Being abused as a child has often been held to be a mitigating circumstance, *See, e.g., Nibert v. State, supra,* 574 So. 2d at 1062; *Campbell v. State, supra,* 571 So. 2d at 419.

3. Learning disabled/lack of education. Stevens, who struggled throughout his schooling, ostensibly went as far as the eighth grade --- at the age of 18 --- but his performance level was not nearly that advanced. His ability to read was so limited that he was turned down for a number of jobs as an adult. Such disabilities constitute mitigating circumstances. See *Campbell v. State, supra,* 571 So. 2d 415,419; *Brown v. State,* 526 So. 2d 903, 908 (Fla. 1988).

4. Good worker/held jobs. Stevens worked consistently and supported his family. Four employers or supervisors vouched for his dependability and industriousness. This is mitigating evidence. See, *e.g., Dolinsky v. State,* 576 So. 2d 271, 275 (Fla. 1991); *Smalley v. State,* 546 So. 2d 720, 723 (Fla. 1989).

5. Military service. Stevens received an honorable discharge from the Army. This has been held to be mitigating. See, *e.g., Bedford v. State,* ___ So. 2d ___ (Fla., No. 73,703, Oct. 10, 1991, p. 19); *Masterson v. State, supra,* 516 So. 2d at 258.

6. Good parent/family member. Stevens was and is a good husband and father. In light of his being so brutalized by his father as a child, it is noteworthy that (unlike so many other victims of child abuse) he did not replicate his father's abusiveness. He stressed to his son Leonard at an early age the importance of not hitting women. Most significantly, Stevens absolutely shunned violence, and even the use of corporal punishment, in his own family. His continued sound advice to Leonard --- *e.g.,* to respect his stepfather and to stay in school --- from death row is exemplary. Such positive family relations are mitigating. *See, e.g., Bedford v. State, supra* at 19; *Holton*

v. State, 573 So. 2d 284, 293 n.6 (**Fla.** 1991).

7. **Mental/psychological problems.** Stevens is seriously delusional. Even in the very structured world of prison he **is** unable to function in a quasi-normal fashion. He hears voices and **talks** to imaginary people. He involuntarily believes all kinds of things which are not true, but has no insight into his fundamental psychiatric problems. Although not a danger to others, he has twice attempted suicide while in prison.

Stevens' delusional state **is** in itself a form of punishment and thus mitigating. See *Ford v. Wainwright,* 477 **U.S.** 399, 407-08 (1986) (discussing the ancient common law doctrine of *furiosus sole furore punitur* --- *i.e.,* madness is its own punishment). Mental problems, including attempting suicide while incarcerated, have been held to be mitigating circumstances. *Campbell v. State, supru,* 571 *So.* 2d at 419; *Curter v. State, 560 So.* 2d 1166, 1168-69 (Fla. 1990).

8. **Drinking or intoxicated at the time of the crime.** The prosecution's evidence proved that Stevens had been drinking heavily for about eight hours and was intoxicated at the time of the homicide. This constitutes mitigation. *Downs v. State,* 574 *So.* **2d** 1095, 1099 (Fla. 1991); *Cheshire v. State, supra, 568 So.* 2d at 911 ("evidence that Cheshire had been **drinking** at the time of the murder ... is valid mitigation" despite the fact that the trial "judge concluded that Cheshire was not sufficiently intoxicated"). Such evidence has also been held to establish the statutory mitigating circumstances that "the defendant was under the influence of **extreme**[41] mental or emotional disturbance" and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

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[41] **If** the mental or emotional disturbance is established **but is** not shown to be "extreme," such evidence constitutes a **non-statutory** mitigating circumstance. **See** *Cheshire v. State, supra,* 568 *So.* 2d at 912,

§921.141(6)(b), *(f),* Fla. **Stat. (1985).**[42] ***Nibert*** v. ***State, supra,*** 574 ***So.*** 2d at 1062-63; ***Ross v. State,*** 474 ***So.*** 2d 1170, 1174 (Fla. 1985).

9. **History of alcohol problems.** Stevens had a severe alcohol problem. On most days during his year in Florida, he drank one and one-half or more cases of beer and often some whiskey. Key prosecution witness Hamilton, among others, recognized that Stevens was an alcoholic and Detective Parmenter's investigation showed that Stevens was a heavy drinker. **A** history **of** alcohol abuse **is** a mitigating circumstance. ***Downs v. State, supra,*** **574** ***So.*** 2d at 1099; ***Nibert v. State, supra,*** **574** ***So.*** 2d at 1062-63.

10. **Question of which participant committed the homicide.** **As** pointed out above, Justices McDonald and Overton **found** on direct appeal that this factor alone provided a reasonable basis for the jury's recommendation, Moreover, the prosecution presented no new evidence (except for some **brief** testimony by Hamilton which Judge Weatherby rejected as unworthy of belief). **As** was true on the original direct appeal, the record clearly shows that Engle, acting alone and out of the presence of Stevens, killed Tolin. The facts that, whenever anyone **saw** him, Engle **was** constantly in possession of the murder weapon, but that he had his landlord hide it when he suspected the police might be coming to his house, corroborate Stevens' statements that Engle was the killer. Moreover, Engle was known to be **an armed robber,**[43] while Stevens was known to **be** easily influenced.

This Court recently held that: "Conflicting evidence on the identity of the actual

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[42] **Judge** Weatherby's sentencing order erroneously stated (R 305) that Stevens presented "no evidence" concerning the circumstance **set** forth in **§921.141(6)(b).** Not only **did** Stevens present such evidence, but his counsel **alerted** the court to the fact that he was relying on that statutory mitigating factor in connection with the evidence of his heavy drinking at the time of the crime **(T 559-60, 635-36).**

[43] Engle received the lion's share of the proceeds of the **robbery.**

killer can form the basis for a recommendation of life imprisonment" (emphasis **added).** ***Cooper v. State,*** 581 ***So.*** 2d 49, 51 (Fla. **1991);**[44] see also, ***Pentecost v. State,*** **545** ***So.*** 2d 861, **863** (Fla. 1989). Indeed, this Court stated in ***Cooper*** that, if it were clear that Cooper were the actual killer, the totality of the circumstances might justify a life ovemde. Thus, even conflicting evidence concerning this mitigating circumstance alone can sustain **a** life recommendation,

In ***Dolinsky v. State, supra, 576 So.*** 2d **at 272-274,** Dolinsky willingly participated in a drug rip-off in which three persons were shot dead. He shot one of the three victims, either killing or seriously wounding him. Nevertheless, the fact that another perpetrator "played the primary role" **was** found to be a mitigating circumstance supporting the jury's life recommendation.

Unlike in ***Cooper,*** the record in the instant case is unambiguous that Stevens did not personally commit the homicide. Moreover, Stevens' involvement in the homicide was **far** less than Dolinsky's. Consideration solely of ***Cooper*** and *Dolinsky* shows how convincingly this mitigating circumstance was **established.**[45]

11. Premeditated murder not proven (although defendant convicted of felony murder). The evidence **does** not support a verdict of premeditated murder. When Tolin unexpectedly ran after she had been raped, Engle spontaneously followed and **killed** her. The failure of the prosecution to sustain a theory of premeditated murder --- even though it sustained a felony-murder theory --- has been found to support a life

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[44]The trial judge found that Cooper had been the actual killer. Cooper, on the other hand, testified that the codefendant was the actual killer. The circumstantial evidence as to who did the shooting **was** conflicting.

[45]**Stevens'** death sentence is constitutionally disproportional to sustain Stevens' death sentence since his involvement in the homicide **was** not sufficiently major and since he had neither a conscious intent to cause death nor a reckless disregard of the **risk** that death might occur in the circumstances. In short, he did not have sufficient mental culpability to permit him to be sentenced to death. See *Tison v. Arizona*, **481 U.S. 137 (1987);** ***Jackson*** *v. State*, **575** So. 2d 181, 190-93 (Fla. 1991).

recommendation. *Freeman v. State,* 547 So. 2d 125, 129 (Fla. 1989).

12. **Reasonable doubt concerning the State's case.** As is clear from our discussion of the two preceding mitigating circumstances, there is far more than a reasonable doubt about Stevens' participation in the actual homicide. Since a reasonable doubt concerning an aspect of the State's case has been held to support a jury's recommendation of life, the total absence of proof of Stevens' involvement in the homicide *a fortiori* supports the jury's recommendation in this matter. *See Douglas v. State, 575 So.* 2d 165, 167 (Fla. 1991).

13. **Remorse.** From the moment he saw Engle return dragging Tolin's lifeless body, Stevens felt significant remorse at having participated in the events which led to the homicide by Engle. Both before and immediately following his arrest, Stevens expressed sorrow and horror concerning what had happened. Moreover, Dr. Levin stated that Stevens' pain over his role in the events contributed to his delusional state. Remorse is a recognized mitigating circumstance. *Nibert v. State, supra, 574 So,* 2d at 1062; *Smalley v. State, supra,* 546 *So.* 2d at 723.

14. **Good prison record.** Stevens' prison record is an extremely good, if not perfect, one. Not only was the number of his disciplinary reports unusually low --- five in eleven and one-half years --- but four of them are clearly of a *de minimis* nature. Only one incident involved aggression against another, that being the sole incident which arguably created any reasonable degree of management problem for the prison authorities. As the prison records demonstrate, and as Dr. Levin testified, that infraction was a direct result of Stevens' psychiatric disorder.[46] It is fair to conclude that (except arguably for the one incident which was caused by his mental illness, which we submit

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[46]His insistence that he had had a sexual relationship with a prison psychologist --- which precipitated the disciplinary problem --- was specifically identified by Dr. Levin as a delusion Stevens suffered as a result of his psychiatric disorder (T 420-21, 425-26).

cannot justifiably be held against him) Stevens has an excellent prison record. Such a record is a mitigating circumstance. *Skipper v. North Carolina,* 476 U.S. 1, 4-5 (1986); *Douglas v. State, supra,* 575 *So.* 2d at 167.

15. **Positive potential for rehabilitation.** Based upon the available facts, most particularly his lack of violence in more than eleven years in prison, Dr. Levin found that Stevens had a positive potential for rehabilitation. This is a mitigating factor. *Nibert v. State, supra,* 574 *So.* 2d at 1062; *Carter v. State, supra,* 560 *So.* 2d at 1169.

16. **Physical condition.** As a result of the actions of another prisoner, Stevens has been almost totally blinded. Although that terrible injury was not the intention of anyone in authority, it was a direct consequence of Stevens' imprisonment. The burning away of his corneal tissue not only caused a permanent loss of most of his vision but also caused months of severe pain. Beyond that, he has visibly deteriorated in physical appearance since he was imprisoned and also suffers from chronic obstructive pulmonary disease. Just as mental debilitation can be a mitigating circumstance, so can the devastating physical debilitation Stevens has suffered. *See McClesky v. Kemp,* 481 U.S. 279, 304 (1987) (mitigating circumstances can be founded on any basis for not imposing a death sentence); *Cooper v. State, supra,* 581 *So.* 2d at 52 (Barkett, J., concurring specially) (debilitated physical condition found to be evidence that defendant will not pose a future danger to the community).

17. **Charitable/humanitarian deeds.** The evidence presented by Stevens demonstrates that throughout his life he has been an unusually generous person who has gone out of his way to help not only those he knows but also total strangers. Stevens was a man who visited the elderly, the sick and the dying and helped their families in times of distress. Contrary to what one knowing of his upbringing might expect, he was a man who brought both racial harmony and physical peace to the block where he lived. Definitely contrary to the behavior exhibited by so many victims of child abuse, he did

not replicate the sins of his father in dealing with his wife and children. Indeed, he went out of his way to stop violence against women --- both by using his physical strength to non-violently keep the peace and also by teaching his son what was right and wrong on this topic. Almost ironically, Stevens was a man who helped protect the woman who ran the grocery store next to his trailer park in Jacksonville and helped her feel secure at nights. And much, much more. Indeed, we are unfamiliar with any reported case which includes such extensive evidence of charitable/humanitarian deeds --- not to mention, by one so horribly mistreated as a child. Such behavior constitutes a mitigating circumstance. *Bedford v. State, supra* at 19; *Songer v. State,* 544 So. 2d 1010, 1011, 1012 (Fla. 1989); *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988).

E. Conclusion

We submit that it is virtually incontrovertible that there are numerous reasonable bases in the record to support the jury's recommendation of life imprisonment. Indeed, assuming *arguendo* that the jury had recommended death, we submit that we could show that the mitigating circumstances significantly outweigh the aggravating circumstances.[47]

Justices McDonald and Overton were correct on direct appeal in finding the existence of a rational basis to support the jury's recommendation. With the opportunity Stevens was given by this Court to develop properly the mitigation evidence about himself as a person, we submit that no reasonable view of the evidence allows for any conclusion other than that the life recommendation is fully supported by the extensive mitigating evidence. This Court therefore should vacate the sentence of death and remand this matter with directions to impose a sentence of life imprisonment without eligibility for parole for 25 years.

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[47] We hasten to add that, despite our confidence in our proof, we do not take on any burden heavier than that minimal burden imposed by the *Tedder* standard.

POINT TWO

THE SENTENCE OF DEATH WAS DISPROPORTIONAL TO REVERSALS OF LIFE OVERRIDES BY THIS COURT IN LIGHT OF THE FACTS THAT STEVENS WAS NOT THE ACTUAL KILLER, WAS INTOXICATED AND HAD A HISTORY OF ALCOHOL ABUSE, AND WAS THE VICTIM OF A SEVERELY DEPRIVED CHILDHOOD

Stevens' sentence of death is disproportional to other cases having four or five aggravating circumstances[48] in which this Court has reversed the sentencing judge's override of the jury's recommendation of life and in which one or more of the following mitigating factors were present: (1) the defendant was not the actual perpetrator of the homicide; (2) the defendant was intoxicated at the time of the crime and/or had a history of substance abuse; and (3) the defendant was the victim of a severely deprived childhood. All three of these mitigating circumstances --- plus, as discussed above, many others --- play a significant role in this case, while in none of the cases to which we compare this one were all three factors present. A proportionality analysis of all the circumstances of Stevens' case as compared to the circumstances in the below-discussed reversals of life ovemdes leads to the conclusion that Stevens' death sentence violates Article I, §§9 and 17 of the Florida Constitution. See *Tillman v. State*, ___ *So.* 2d ___ (Fla., No. 74,756, Oct. 17, 1991, pp. 4-7).

In analyzing the disproportionality of Stevens' sentence, it is critical to consider the tremendous weight which should be accorded a jury recommendation of life imprisonment and "the wholly different legal principle" which this Court is required to apply to such cases. *See Watts v. State*, ___ *So.* 2d ___ (Fla., No. 74,776, Jan. 2,

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[48]We recognize that this Court has held that the number of aggravating and mitigating circumstances is not controlling with respect to proportionality issues. *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 111 S.Ct. 1024 (1991). We nonetheless restrict our proportionality discussion to cases where at least four aggravating circumstances were found so as to forestall the State from arguing that Stevens' case is a more egregious or aggravated case than the ones on which we rely.

1992, p. 14). Because the analysis applied by this Court to life override cases is so differentthan that applied to cases in which the jury recommended death, only the former are relevant to this discussion.

As we have discussed above, it was critical to Justices McDonald and Overton on the original direct appeal --- and it remains of key importance on this appeal --- that Stevens was not involved in the actual killing of Tolin. In *Cooper v. State, supra,* 581 *So.* 2d at 51, n.*, this Court made it clear that the conflicting evidence as to which defendant shot the police officer was the crucial factor in finding the jury's life recommendation to be reasonable, despite the presence of four valid aggravating circumstances. Likewise, in *Carter v. State, supra,* 560 *So.* 2d at 1167, there was directly conflicting testimony as to Carter's involvement in the actual homicide. And in *Hawkins v. State,* 436 *So.* 2d 44, 45-47 (Fla. 1983), despite evidence that earlier in the evening of the two murders[49] Hawkins was overheard "talking about guns and about wanting to 'blow away' two people in Golden Gate [the subdivision where the crimes took place]" and despite the finding of four aggravating circumstances,[50] this Court found mitigation based upon Hawkins' statements to the police which attributed both homicides to his companion. In the case at bar, unlike in *Cooper, Curter* and *Hawkins,* the evidence is <u>not</u> conflicting, but rather is <u>unambiguous</u> that Engle alone committed the homicide outside Stevens' presence and without Stevens' knowing that Engle was going to kill Tolin.

As to the second prong of our proportionality analysis, Stevens was severely

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[49] This Court reversed the life overrides as to both of the murders of which Hawkins was convicted.

[50] Three of the four aggravating factors in *Hawkins* were also found by Judge Weatherby: avoiding arrest; heinous, atrocious, or cruel; and pecuniary gain/during participation in a robbery and burglary (considered as one factor). 436 So. 2d at 47-48 (Boyd, J., concurring and dissenting).

intoxicated on the night of the crime and had a significant history of serious alcohol abuse. These circumstances constituted significant --- and undisputed --- evidence of mitigation. In *Cooper v. State, supra,* 581 *So.* 2d at 51, 52 (Barkett, J., concurring specially), it was noted that Cooper had drunk a large amount of alcohol on the day of the crime and had a chronic alcohol problem. In *Masterson v. State, supra,* 516 *So.* 2d at 257-58, the defendant's consumption of substantial amounts of alcohol and drugs and his history of substance abuse were mitigating circumstances relied upon in reversing the life override despite the presence of four aggravating circumstances. And in *Amazon v. State,* 487 *So.* 2d 8, 12-13 (Fla. 1986), inconclusive evidence of substance abuse on the night of the two murders[51] and "stronger evidence" of a history of substance abuse were factors in supporting the jury's life recommendation despite the presence of the identical four aggravating circumstances as are present in this matter.[52]

As to the third part of our analysis, the child abuse suffered by Stevens was so severe that, along with other aspects of Stevens' deprived childhood, it constituted the only mitigating circumstance to which Judge Weatherby gave significant weight. In *Hegwood v. State, supra,* 575 *So.* 2d at 173, the defendant's unfortunate childhood caused by his abusive mother was a key mitigating circumstance found to support the jury's life recommendation in the face of five aggravating circumstances[53] which applied to three separate murders (as to all three of which this Court reversed overrides).

When one considers the totality of the circumstances relating to Stevens' case ---

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[51]The life overrides as to each of Amazon's two murder convictions were reversed.

[52]The aggravating factors were even identical to the extent that the felony-murder aggravating circumstance in *Amazon* involved the same underlying felonies as Judge Weatherby found: robbery, kidnapping and rape.

[53]Three of the five aggravating factors in *Hegwood* were also found by Judge Weatherby: avoiding arrest; heinous, atrocious, or cruel; and pecuniary gain/during commission of a robbery (considered as one factor). See 575 So. 2d at 171 n.8 (Ehrlich, J., concurring and dissenting).

the mitigating factors discussed in this point, the additional mitigating evidence not discussed in this point but discussed in Point One, ***supra,*** and the weak aggravating evidence --- one is compelled **to** conclude that his sentence **is** disproportionate to the above-cited life override cases (all of which involve four **or** five aggravating circumstances and some of which involve multiple homicides). Article I, §§9 and 17 require therefore that the sentence be vacated and the case remanded with directions to impose a sentence of life imprisonment. ***See Tillman v. State, supra.***

POINT THREE

EACH OF THE FOUR AGGRAVATING CIRCUMSTANCES RELIED UPON WAS INSUFFICIENTLY PROVEN AND/OR WAS CONSTITUTIONALLY DEFECTIVE

A. Introduction

Judge Weatherby relied upon four aggravating circumstances. §921.141(5)(d), (e), *(f),* (h), Fla. Stat. (Supp. 1991). That reliance **was** constitutionally erroneous. Three of the circumstances --- avoiding arrest, pecuniary **gain,** and heinous, atrocious, or cruel --- were not proven beyond a reasonable doubt and the former two were unconstitutionally proffered by the State after it had expressly waived reliance on them before the trial jury. Moreover, the heinous, atrocious, or cruel and the felony-murder aggravating circumstances are constitutionally defective.

Even if this Court disagrees with our conclusions **as** to one or more of the aggravating circumstances and finds that it or they **have** been sufficiently and validly proven, **we** submit that the jury may well have decided that said factor(s) "were entitled to little weight." ***See Hallman v. State,*** 560 **So.** 2d **223, 227** (Fla. 1990). This Court should consider that likely possibility in determining whether Stevens should have been sentenced to **life** imprisonment.

B. THE AVOIDING ARREST AGGRAVATING FACTOR WAS NOT SUFFICIENTLY PROVEN BECAUSE THE EVIDENCE DID NOT SHOW THAT THE DOMINANT OR ONLY MOTIVE FOR THE MURDER WAS THE ELIMINATION OF A WITNESS

In pertinent part §921.141(5)(e), Fla. Stat. (Supp. 1991), provides that an aggravating circumstance exists when "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest ...." In *Menendez v. State,* 368 *So.* 2d 1278, 1282 (Fla. 1979), this Court held that:

> ... an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses. (Emphasis added.)

And in ***Riley v. State,*** 366 So. 2d 19, 22 (Fla. 1978), this Court emphasized that, where a law enforcement officer is not the victim, "[p]roof of the requisite intent to avoid arrest and detection must be very strong." Indeed, that intent must be proven beyond a reasonable doubt for the avoiding arrest aggravating factor to be established. *See State v. Dixon,* 283 *So.* 2d 1, 9 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974).

The proof here was a far cry from establishing such an intent beyond a reasonable doubt. The prosecution's trial evidence shows that Tolin spontaneously ran away after she got dressed outside the car and that Engle, reacting to her flight, chased her. The record does not reflect what happened during the 15 minutes before Engle returned with Tolin's body. Whatever inferences one might draw about what happened during those 15 minutes, certainly it is not proven beyond a reasonable doubt that Engle's (much less Stevens') "dominant or only motive for the murder was the elimination" of Tolin as a witness. Engle may have panicked, or he may have been in a rage that Tolin ran away, or he may have reacted spontaneously to Tolin's trying to defend herself, or he may have been so drunk that he did not know what he was doing. Any number of other possibilities exists.

The only arguably credible evidence[54] which might tend to **support** the intent necessary to establish the avoiding arrest aggravating factor was Hamilton's testimony (TT 577-78):[55]

> I [Hamilton] asked him [Engle] why they did it and he said that they took her out of the store to get her away from a phone, they took her out into the country and Rufus went crazy and started saying she's going to identify us and I asked him, I **said,** man, was it worth killing a little gal over a lousy $50 robbery and he said no, it wasn't,

Assuming that one can draw the inference from this ambiguous testimony that Stevens was worried about being identified, how can one know why <u>Engle</u> killed Tolin? Was it to satisfy Stevens' alleged **worry** or was it for one of the several reasons set forth in the preceding paragraph? Suffice it to say, that since <u>Engle's</u> motive for the murder cannot be derived from the silent record, the record does not prove beyond a reasonable doubt that <u>Stevens'</u> dominant or only motive to kill Tolin was to eliminate her as a witness.

Based upon the fact that <u>Engle was the sole homicidal actor</u> (who killed Tolin when she ran away and was out of Stevens' presence), it was improper to hold Stevens vicariously liable for Engle's intent, <u>even</u> if Engle's dominant or only motive was the elimination of a witness. Cf. *Omelus v. State*, **584 So. 2d** 563, **566-67** (Fla. 1991)(improper to hold man who <u>hired</u> actual killer responsible for the heinous, atrocious, or cruel methods employed by killer). In the event that this Court disagrees with us that Engle's intent should not be vicariously imputed to Stevens, we demonstrate below how there was insufficient proof that Engle (and vicariously Stevens) had the dominant or only motive of eliminating Tolin <u>as a witness</u>.

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[54]**Judge** Weatherby quite properly rejected Hamilton's resentencing hearing testimony 12 years after the fact as incredible (T 678).

[55]At Point **Four** D., **pp.** 89-91) *infra,* we set **forth** why the admission of this evidence violated the **Federal and** State Constitutions.

A review of some of the cases handed down by this Court which follow the *Menendez* rule shows that the prosecution in this case did not sufficiently prove the avoiding arrest aggravating circumstance. In ***Cook v. State,*** 542 ***So.*** 2d **964** (Fla. 1989), killing a store employee during a robbery "'to **keep** her quiet because she was yelling and screaming' was insufficient to support" this aggravating factor (even with the only other store employee also being killed during the robbery), In ***Garron v. State, 528 So.*** 2d **353, 358 (Fla. 1988),** the avoiding arrest circumstance was not sufficiently proven despite the fact that the victim was telephoning the police when shot.

Even though the victim knew **and** could have identified the defendant/killer, evidence that defendant may have "panicked" or "blacked out" created doubt as to whether the elimination of the victim/witness was the dominant or only motive for the murder in ***Perry v. State, supra,*** 522 ***So.*** 2d at ***820.*** In ***Rogers v. State,*** 511 ***So.* 2d** 526, 529, 533 (Fla. 1987), ***cert. denied,*** **484 U.S.** 1020 **(1988),** defendant said that he shot the victim because he "'was playing hero'" by slipping **out** of the back of a store which Rogers was robbing. Despite Rogers' statement, this Court found that the evidence to support the avoiding arrest aggravating factor "falls short of the 'clear proof' required by ***Menendez*** and ***Riley.***"

Bates v. State, **465 *So.*** 2d **490** (Fla. 1983), **is** quite similar to this case. Defendant abducted the victim from an office, attempted to rape her, robbed and killed her. This Court held at **492** that the avoiding arrest aggravating factor was improperly found. **The** possibility that the victim would identify the perpetrator **does** not suffice to prove this factor. ***See*** also, ***Dufour v. State,*** **495 *So.*** 2d **154,** 156, 163 (Fla. 1986), ***cert. denied,*** **479 U.S.** 1101 **(1987)** (avoiding arrest aggravating circumstance not proven when victim taken to orange grove, robbed and then shot at close range).

If nothing else, the above-discussed case law demonstrates how strict this Court has been in requiring that the only or dominant motive for the murder be the elimination

of witnesses. In this matter the prosecution evidence (giving the State the benefit of the doubt) is simply too ambiguous to prove beyond a reasonable doubt that the dominant or only motive for Engle's killing of Tolin was to eliminate her as a witness. The avoiding arrest aggravating circumstance was therefore improperly relied upon by Judge Weatherby.

C. THE PECUNIARY GAIN AGGRAVATING FACTOR WAS NOT SUFFICIENTLY PROVEN, IN THAT THE HOMICIDE DID NOT FURTHER THE FINANCIAL GAIN

Although the capital felony in this matter followed a robbery (which, by definition, involves a pecuniary gain), the purpose of the murder itself was not to obtain financial gain nor was the killing in furtherance of such a gain. The pecuniary gain involved in the robbery had long since been completed at the time Engle murdered Tolin. ***So*** while the entire criminal chain of events involved pecuniary gain, the murder itself was not for pecuniary gain. Our position **is** based upon this Court's interpretation of **§921.141(5)(f),** Fla. **Stat.** (Supp. 1991), since 1987.

In ***Rogers v. State, supra,*** 511 ***So.*** 2d at 529, the victim was shot --- according to defendant for "'playing hero'" --- as he slipped out the back door of a store which Rogers and his companion had just unsuccessfully attempted to rob. This Court held at **533** that "the conclusion that the murder was for pecuniary gain is not supported by the record, since the killing occurred during flight and thus was not a step in furtherance of the sought-after gain" (emphasis added). If the shooting in ***Rogers,*** which occurred within seconds of the **efforts** to get the clerk to open the cash register **was** not in furtherance of pecuniary gain, the murder in this case --- which occurred one hour or more after the robbery had been completely consummated --- was certainly **not** in furtherance of pecuniary gain. Had Engle not followed Tolin when she ran away, the pecuniary gain from the earlier robbery would have been every bit as secure as it was

when he ran after her and killed her, The **killing** just simply had nothing to do with already-completed robbery.[56]

This Court has followed the rule enunciated in *Rogers*[57] in a number of recent cases. In ***Hill v. State,* 549 *So.*** 2d 179, 183 (Fla. 1989), this Court emphasized the necessity for causality between the murder and the pecuniary gain --- *i.e.*, that the murder was committed for pecuniary gain. In ***Scull v. State, 533 So.*** 2d 1137, 1142 (**Fla.** 1988), *cert. denied,* 490 **U.S.** 1037 (1989), the pecuniary gain aggravating circumstance was found not to have been established because "the primary motive for this killing" (emphasis added) was not pecuniary gain. Without a doubt, the primary motive for Engle's killing of Tolin was likewise not for pecuniary gain. In a similar vein, in ***Hardwick v. State,*** 521 ***So.*** 2d 1071 (Fla.), ***cert. denied,*** 488 **U.S.** 871 (1988), this Court stated at 1076:

> Although there was evidence that Hardwick killed Pullum for stealing Quaaludes, this fact alone does not establish that the killing itself was to obtain financial gain. ...[W]e have permitted this aggravating factor only where the murder is an integral step in obtaining some sought-after specific gain. (Emphasis added.)

In *Spivey v. State,* 529 *So.* 2d 1088 (Fla. 1988), the prosecution's theory was that defendant committed a contract murder, stealing some items from the victim's house to cover up the real motive of the crime. The defendant testified that his intent was to steal and that the homicide occurred during a robbery. The jury's verdict convicted defendant

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[56]Under Rogers and its progeny, there is a clear distinction between the felony-murder rule, which encompasses a homicide committed during flight after the commission of a robbery, and the pecuniary gain aggravating circumstance which does not apply when the homicide is committed after the robbery or attempted robbery has been completed.

[57]This Court's present interpretation of §921.141(5)(f) was advanced by Justice McDonald in his opinion concurring in part and dissenting in part in *Fitzpatrick v.* State, 437 So. 2d 1072, 1079 (Fla. 1983), *cert. denied,* **465 U.S.** 1051 **(1984).** Justice Overton joined Justice McDonald in that partial dissent, which foresaw the position this Court would take unanimously in Rogers.

only **of** felony murder, thereby rejecting the prosecution's theory of the case. This Court found that the pecuniary gain aggravating circumstance was <u>not</u> established because the motive for the theft was to-'disguise the nature of the crime. Although defendant concededly realized financial gain from this transaction by taking valuables from the house, **the** pecuniary **gain** aggravating factor was not established because that gain was not shown to be the <u>motive</u> for the murder.

Since the murder in the instant matter was not a step in the furtherance of the robbery and since by no view of the evidence was financial gain the primary motive for the killing, the pecuniary gain aggravating circumstance was not proven beyond **a** reasonable doubt and should not have been relied upon by Judge Weatherby.

D. THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR WAS NOT SUFFICIENTLY PROVEN, IN THAT STEVENS DID NOT KNOW EITHER THAT ENGLE WOULD MURDER TOLIN OR HOW HE WOULD DO IT

As we have discussed, Engle alone killed Tolin outside of Stevens' presence. Stevens had nothing to do with the killing. He did not intend it, he did not urge or importune Engle to commit the homicide, he did not know that Engle was going to kill Tolin and he likewise had not the slightest knowledge that Engle was going to stab Tolin three times and strangle her. In these circumstances Judge Weatherby had no basis for applying the aggravating circumstance --- that "[t]he capital felony was especially heinous, atrocious, or cruel," §921.141(5)(h), Fla. Stat. (**Supp.** 1991) --- against Stevens because of the "prolonged and agonizing" nature of Tolin's death. Judge Weatherby's analysis would have been applicable to Engle, who committed the homicidal acts upon which Judge Weatherby based his findings, but not to Stevens who was neither present nor aware of what Engle was doing.

Omelus v. State, supra, 584 *So.* 2d at 566-67, involved a situation where Omelus hired Jones to kill Mitchell. Notwithstanding the facts that Omelus initiated a contract

murder and that Mitchell was killed by 19 stab wounds, this Court held that it was error for the trial court to instruct the jury concerning the heinous, atrocious, or cruel aggravating circumstance because the record neither established that Omelus knew how Jones **was** going to kill Mitchell, nor that Omelus directed that the killing occur in a heinous, atrocious, or cruel manner. If Omelus, who arranged for Mitchell's murder, was not responsible for the heinous, atrocious, or cruel method of homicide used by the man he hired to do the deed, then this aggravating factor certainly cannot be applied against Stevens, who did not know that Engle was going to kill Tolin, much less the methods he would employ.

E. CONSIDERATION OF §921.141(5)(e) AND (f) WAS PRECLUDED BY THE LAW OF THE CASE DOCTRINE AND THIS STATE'S TRIPARTITE SENTENCING SCHEME

1. Introduction

During the penalty phase of the **trial,** State Attorney T. **Edward** Austin specifically told the jury that the State was not relying upon the aggravating circumstances set forth in §921.141(5)(e) and (f) (TT 1249-50). Thereafter, the prosecution changed its mind and argued those two aggravating factors to Judge Santora, who found that both factors were applicable. At the resentencing proceeding, the prosecution again relied upon the same two previously-waived aggravating circumstances and Judge Weatherby erroneously[58] considered both factors (and found both to have been established).

2. The Law of the Case

In his motion for post-conviction relief and his successful appeal to this Court

[58] The claims set **forth in** Parts E, F and G of **this** point **were** made to the court below (R 239-50, 254-58). Judge Weatherby summarily rejected them (R 297-98).

from the denial thereof, Stevens contended that his trial attorney **was** constitutionally ineffective for failing to object to the prosecution's reliance in its arguments **to** Judge Santora on §921.141(5)(e) and *(f),* when it had specifically disclaimed reliance upon those two factors in its argument to the jury. This Court found trial counsel to have been ineffective in his representation of Stevens during the sentencing proceedings for a number of reasons. ***Stevens v. State, supra,*** 552 ***So.*** 2d at 1085-88. In listing and discussing counsel's numerous deficiencies, this **Court** stated at 1087:

> Lastly, trial counsel failed to provide the trial court with an answer brief in response to the state's brief urging imposition of the death penalty. The prosecution's **brief** erroneously reported that Stevens had served one year in a Kentucky county jail for a felony conviction. It was further asserted that two aggravating factors applied which the state deliberately had chosen not to advance before the jury. The state went on to point out that trial counsel had made no attempt to offer evidence of a single mitigating factor. In his findings of fact, the trial judge relied on the two newly argued aggravating factors (that the murder **was** committed for the purpose of avoiding or preventing a lawful arrest and for pecuniary gain). In addition, he relied on the erroneous information concerning Stevens' prior criminal history. Trial counsel made no effort to correct the misstatements or errors made by the state. (Emphasis added.)

It is axiomatic that an attorney cannot be found to be constitutionally ineffective unless he failed to represent his client properly. See *Strickland v. Washington, **supra,*** **466 U.S.** at 687-88. Since this Court found that Stevens' trial attorney was ineffective for failing to object to the prosecution's assertion of (which led to Judge Santora's reliance on) "two aggravating factors **...** which the state deliberately had chosen not to advance before the jury," ***a fortiori*** this Court implicitly determined that Judge Santora's consideration of those two aggravating circumstances had been improper. If such consideration had not been improper, counsel would not have been ineffective for failing to object to the prosecution's belated argument that those two aggravating circumstances

applied (as there would have been no deficient performance).

This Court having implicitly determined that it was error for the prosecution to rely upon two aggravating **circumstances** upon which it had disclaimed reliance before the jury, the prosecution's assertion, and Judge Weatherby's finding, of those two factors at the resentencing proceeding **was precluded** by the doctrine of law of the **case.**[59] That doctrine has long been established law in this State. *See Wilson v. Fridenberg*, 21 **Fla.** *386* (1885).

In *State ex rel. Outrigger Club, Inc. v. Barkdall*, **277 So.** 2d 15, 16-17 (Fla. 1973), this Court, quoting from *United States Gypsum Co. v. Columbia Casualty Co.*, 124 **Fla.** 633, 169 So. 532, 535 (1936), defined the "law of the case" as meaning:

> "[W]hatever is once irrevocably established as the controlling legal rule **of** decision between the **same** parties in the same case continues to be the 'law of the **case,'** whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts of the **case** before the court."

There has been no change since Stevens' original sentencing proceeding in the relevant fact that the prosecution deliberately waived reliance upon §921.141(5)(e) and (f) before the only jury to consider sentencing in this matter.

At least since ***Sanders** v. State ex rel. D'Alemberte*, **82** Fla. **498,** 90 *So.* **455,** 457 (1921), it has been the law that when a particular conclusion was <u>necessarily reached</u> by an appellate court, even if that conclusion **is** not explicitly discussed in that court's opinion, <u>the necessarily-reached conclusion constitutes the law of the case</u>. In ***Rogers** v. State,* 156 Fla. 161, **23 So.** 154, 155 (1945), this Court, quoting from 5 **C.J.S., Appeal** and Error, §1832, stated:

[59]This conclusion **is** reinforced **by** the fact that this Court ordered only a resentencing proceeding before **a judge** and rejected conducting a new jury resentencing proceeding --- both in its original decision and **by** its denial of the State's petition for rehearing (in which **a new** jury resentencing proceeding **was** explicitly sought).

> "Questions necessarily involved in the decision on a former appeal will be regarded as the law of the case ..., although the questions are not expressly treated in the opinion of the court ...."

More recent decisions of this Court are to the same effect. **See,** ***e.g.***, ***Dade County*** *Classroom* ***Teachers' Association*** *v.* ***Rubin***, 238 ***So.*** 2d **284,** 289 (Fla. 1970), *cert.* ***denied,*** 400 **U.S.** 1009 (1971); ***Sax Enterprises v. David and*** *Dash,* 107 ***So.*** 2d 612,613 (Fla. 1958) ("if ... a particular holding is implicit in the decision rendered, then it is no longer open for discussion or consideration").

This **Court's** opinion on collateral appeal in this matter, as a matter of law, should have precluded the prosecution's reliance upon and Judge Weatherby's consideration of the aggravating circumstances set forth in §921.141(5)(e) **and (f).** This Court should now hold that reliance on those factors was barred by the law of the case doctrine.

3. This State's Tripartite Sentencing Scheme

Critical to the facial constitutionality of the Florida death penalty statute are the checks **and** balances built into the legislatively-constructed tripartite sentencing scheme. **See,** ***e.g.***, *Barclay v.* ***Florida,*** 463 U.S. 939 (1983); ***Proffitt v. Florida***, **428 U.S. 242** (1976). Each stage in the process --- the jury, the sentencing judge and this Court --- is essential to the fair and constitutional application of the statute. ***See State v. Dixon, supra, 283 So.*** **2d** at 8.

As State Attorney Austin noted (TT 1198) shortly before the penalty hearing in front **of** the jury began, $921,141 permits the prosecution broad discretion in what it presents to the jury at such a hearing. Notwithstanding its ability to present all the arguments it wished for all the aggravating circumstances in §921.141(5), the State Attorney unambiguously disclaimed reliance on §921.141(5)(e) and (f) (TT 1249-50).

Having foresworn reliance upon §921.141(5)(e) and (f) before the jury, the

prosecution improperly and unconstitutionally argued their applicability to Judge Santora and Judge Weatherby. The State's tactical course of action was **a** perversion of the tripartite sentencing process. The impropriety of failing to present all relevant evidence to the **jury in** penalty phase **was** commented upon in *Messer v. State,* **330 So.** 2d 137, 142 (Fla. **1976).** There, the trial judge had taken the position that it was sufficient for him, as the actual sentencer, to hear certain evidence **and** that there was no **need for** the jury to consider that **proof** because its verdict was only advisory. This Court held at 142:

> It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral **part,** The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation.

See also *Miller v. State,* **332** *So.* 2d 65, *67-68* (Fla. 1976).

In ***Richardson v. State,*** 437 ***So.*** 2d 1091, 1095 (Fla. 1983), the sentencing judge overrode a penalty-phase jury's life recommendation in part because that jury had not heard "all available facts and evidence" **as** a result of the trial jury's having been disqualified after its guilty verdict. Notwithstanding the unusual circumstances which required **a** second jury, this Court vacated the sentence, stating at 1095:

> **...** [N]either party was constrained in its presentation [of evidence]. **... We** cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating **and** mitigating factors after all parties have agreed on the appropriate evidence **to** be considered.

Obviously, the prosecution's deliberate withholding from the jury of its reliance upon one or another aggravating circumstance is not an acceptable manipulation of the capital sentencing process.

A sentencing judge should not have to speculate whether the jury which returned

a life recommendation would have recommended death had it but considered the **prosecution's** reliance on an aggravating factor upon which it had disclaimed reliance before the jury. The procedure used by the State in this case cannot help but to improperly undermine the significance to a sentencing judge of a life recommendation. For the judge will never know whether the jury would have recommended life if it had considered all the aggravating factors presented to the court.

That the prosecution's tactic in this case prejudicially perverted the statutory scheme is most clearly explained by Justice England's concurring opinion (in which two other members of the Court joined) in ***Chambers v. State*, 339 So.** 2d 204, 208 (Fla. 1976), where he stated:

> ... [T]he jury's advisory function may not be distorted by the omission of any aggravating or mitigating Circumstance (absent acquiescence by all parties) ... to insure that a jury and judge could never reach differing conclusions on a sentence as a result of misunderstanding the law or applying different standards to the peculiar facts before them. (Emphasis **added.**)

The legislature and the courts having given the jury such an indispensable role in the sentencing process, it was a violation of Stevens' constitutional rights to due process of law to sentence him upon the basis of prosecution arguments not presented to the jury during the penalty phase. *See* ***Presnell v. Georgia,*** **439 U.S. 14,** 16 (1978).[60]

Having expressly waived presentation to the jury of any arguments concerning the aggravating circumstances in §921.141(5)(e) and (f), the State should not have denigrated the jury's critical function and distorted the Florida sentencing process by relying upon those aggravating factors in its presentation in the second (or judicial) stage of that

[60] Stevens' rights under the Fifth (double jeopardy and collateral estoppel), Sixth (perversion of defendant's right to a persuasive jury recommendation), Eighth (right to a non-arbitrary sentencing process) and Fourteenth (due process and equal protection) Amendments to the United States Constitution **and** Article 1, **§§9, 16(a) and 17** of **the Florida Constitution were also violated.**

tripartite process. Just as defendants in capital cases are held to the waivers (even if inadvertent and unknowing) of rights by their counsel, so the prosecution has no basis for avoiding the consequences of its intentional, knowing and voluntary waiver of its right to rely upon the factors set forth in §921.141(5)(e) and (f). The prosecution's and Judge Weatherby's reliance on §921.141(5)(e) and (f) seriously distorted the statutory scheme and prejudicially violated Stevens' constitutional rights.

F. §921.141(5)(h) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, BOTH ON ITS FACE AND AS APPLIED

The heinous, atrocious, or cruel aggravating circumstance (§921.141[5][h]) is unconstitutionally vague and overbroad (see Amends. VIII, XIV, U.S. Const.; Art. I, §§9, 17, Fla. Const.), both on its face and as applied by this Court. Compare, *e.g.*, ***Pope v. State,*** 441 So. 2d 1073, 1077-78 (Fla. 1983) (§921.141[5][h] not concerned with the "mindset of the murderer"), with ***Porter*** v. ***State,*** 564 So. 2d 1060, 1063 (Fla. 1990) (§921.141[5][h] requires showing that defendant coldly meant crime "to be deliberately and extraordinarily painful" to victim). Virtually identical (Mississippi and Oklahoma) and similar (Georgia) statutes have been struck down as so vague as to be violative of the Eighth Amendment. *See* ***Shell*** v. ***Mississippi,*** 111 S. Ct. 313 (1990); ***Maynard v. Cartwright***, *486 U.S. 356* (1988); *Godfrey* v. ***Georgia,*** 446 U.S. 420 (1980).[61]

G. §921.141(5)(d) UNCONSTITUTIONALLY FAILS TO LIMIT THOSE ELIGIBLE FOR THE DEATH PENALTY

Section 921.141(5)(d), Fla. Stat. (Supp. 1991), insofar as is relevant to Stevens' case, tracks the felony murder statute (§782.04[1][a][2], Fla. Stat. [Supp. 1991]), making

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[61]We concede that this Court has often rejected similar challenges to this aggravating circumstance. See, e.g., *Bedford* v. *State, supra* at 18 n.4; *Smalley* v. *State, supra,* 546 So. 2d at 722. Nevertheless, we maintain that the "heinous, atrocious, or cruel" aggravating factor must be and in fact has been applied in an arbitrary and capricious manner.

the same **proof** constitute an aggravating circumstance, as well as first degree murder, when **a** homicide is committed in connection with an underlying felony such as robbery, sexual battery or kidnapping. Since the burden of proof **is** the same for both, it is clear that every conviction of felony murder will also create sufficient proof of the existence of the aggravating circumstance set forth in §921.141(5)(d). This aggravating factor therefore unconstitutionally (*see* Amends. VIII, XIV, **U.S.** Const.; Art. I, §§9, **17, Fla.** Const.) fails to provide a rational, non-arbitrary basis for distinguishing between the few cases in which a death sentence is imposed from the **many** in which it is not. *See Zant v.* Stephens, 462 U.S. 862, 877 (1983) (requiring that an aggravating factor "genuinely narrow" the death-eligible class of persons from among those convicted of murder); ***Gregg v. Georgia,*** **428 U.S.** 153, **188** (1976).[62]

H. Conclusion

If the Court agrees with us that Judge Weatherby relied upon one or more invalid aggravating circumstances (*see* Parts B through G of this point), the sentence of death should be vacated, this Court should determine that --- with the striking of one or more of the aggravating circumstances **found** by Judge Weatherby --- a sentence of life **is** mandated by the *Tedder* standard, and the case should be remanded with directions to impose **a** life sentence.

[62]*Lowenfield v. Phelps,* **484 U.S. 231** (1988), upheld Louisiana's statutory scheme in response to **a** challenge similar to the one we make here. *Lowenfield* is not controlling, however, because Louisiana --- unlike this State, which uses aggravating factors --- employs a different method for channeling the selection **process:** i.e., narrowing the definition of the substantive capital offense. See *id.* at 244-46. But see, ***Bertolotti v. State,*** **534 So. 2d 386, 387** n.3 (Fla. **1988**) (finding *Lowenfield v. Phelps* controlling).

POINT FOUR

MUCH OF THE PROSECUTION'S EVIDENCE SUPPORTING AGGRAVATION WAS CONSTITUTIONALLY INADMISSIBLE AND SHOULD HAVE BEEN SUPPRESSED

A. Introduction

Although §921.141(1), Fla. Stat. (1985), provides that the usual exclusionary rules of evidence do not apply to capital penalty proceedings, it also explicitly prohibits the receipt of evidence which would violate a defendant's rights under the United States or Florida Constitutions. Despite that prohibition, the prosecution heavily relied upon constitutionally-tainted evidence in its resentencing case. We discuss below why three portions of that case --- Stevens' post-arrest statements, the medical examiner's testimony, and a statement made by co-defendant Engle (testified to by Hamilton) --- should have been suppressed.

B. THE CONSIDERATION OF STEVENS' POST-ARREST STATEMENTS VIOLATED HIS RIGHTS UNDER THE SEARCH AND SEIZURE AND SELF-INCRIMINATION PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS

1. Introduction

During almost five hours of post-arrest interrogation by Parmenter, Stevens made a number of statements which admitted his participation in the robbery, kidnapping and rape of Tolin. Judge Weatherby relied heavily upon those statements in finding aggravating circumstances. Those statements should not have been relied upon at all, however, because Stevens' motion to suppress them on the following grounds should have been granted: (1) that the statements were the fruit of a warrantless arrest in Stevens' home, in the absence of either exigent circumstances or consent; (2) that the statements were the fruit of an arrest which was illegal for the failure to comply with the "knock and announce" statute; (3) that the statements were the fruit of an arrest without

probable cause; and (4) that Stevens did not knowingly and voluntarily waive his rights to remain silent and to counsel, as evidenced by a tampered-with *Miranda* waiver form.

We first set forth the relevant facts and then discuss each of the suppression claims.

2. The Relevant Facts

a. **The Information Received from Hamilton.** On the evening of March 19, 1979 --- virtually one week to the hour from the time Hamilton and Stevens went out drinking the evening before Tolin was killed --- Hamilton, a friend named Lanny Israel, and another man were out drinking. Israel was pulled over for driving under the influence. He told the police officer who had stopped him that Hamilton knew who had robbed the convenience store and killed Tolin. Hamilton and Israel were taken involuntarily to police headquarters and Parmenter, the chief investigator on the Tolin case, was notified (Parmenter: T 56, 59-61, 97, 111; Godbee: TT 655-64).

Although Parmenter knew that Hamilton had been brought to police headquarters involuntarily, he had a hazy recollection that Hamilton had not been arrested (T 111). Hamilton, however, testified that he had been arrested for possession of a concealed firearm (which had been in Israel's car) and possession of marijuana. Hamilton was released on his own recognizance that night and the next morning he was informed that all charges had been dropped (Hamilton T 484,486-87; DSHE1).

Hamilton, who had been drinking since midday and who had been smoking marijuana, was so intoxicated that, when he exited Israel's car after the police pulled it over, he "almost fell out of the car." He remained intoxicated throughout the night as he dealt with Parmenter (Hamilton deposition:[63] 36, 51, 53, 54, 60, 65, 69; DSHE8

[63]Portions of Hamilton's deposition were made part of the suppression hearing record (T 318-20).

457-58).[64]

Before questioning Hamilton, Parmenter advised him of his *Miranda* rights. When the questioning began, Hamilton repeatedly denied having any knowledge about the Tolin case.[65] After some time he suddenly asked whether he would get the $5,000 reward offered by the company which owned the convenience store where Tolin had worked. Parmenter replied that the police had nothing to do with who received the reward. After Hamilton told Parmenter that he was afraid that the suspects might harm him or his wife and baby, he provided limited information about the suspects, whom he referred to as "A" and "B," and what he believed to be their roles in the crime (Parmenter: T 63-64, 97, 103, 104-07, 109, 112).

During the questioning Hamilton told the police that he had been arrested in Jacksonville four months earlier for aggravated assault, and possession of concealed weapons and of marijuana. He did not tell them about his three out-of-state criminal convictions (Hamilton deposition: 45; DSHE7). Parmenter could not remember in 1991 whether Hamilton had told him anything about his criminal record before Stevens' arrest, but he (Parmenter) did not affirmatively check on Hamilton's record until later (Parmenter: T 86-93).

Because of Hamilton's professed fear for the safety of his family, Parmenter went with him to pick up his wife and child. His wife was not at their trailer so they waited for her. Shortly after she returned, three men --- one of whom Parmenter later learned was Stevens --- came into the trailer. Parmenter identified himself as a narcotics officer, saying that Hamilton had been arrested on a drug charge and that, because he was cooperating with the authorities, the police were allowing him to inform his wife before

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[64]In 1990 Parmenter remembered Hamilton as smelling of alcohol but not being "severely intoxicated" (T 113).

[65]Hamilton did not reveal any information to the police until after they had threatened to arrest him for withholding information about the homicide (Hamilton: T 484, 486-87).

he went to jail. The three men left the trailer and shortly thereafter Hamilton, his wife and their child departed with Parmenter for police headquarters (Parmenter: T 65-66).

On the way to headquarters, Hamilton told Parmenter that on March **12** he and Stevens had been together and that Stevens had first suggested robbing a Best Western Motel and then the Majik Market where Tolin worked. Hamilton also related the following: that Engle had joined them; that Stevens had proposed the robbery of the **Majik** Market to Engle; that after the crime Stevens had said that the killing had been done with Engle's knife and that Hamilton should try to **obtain** Engle's knife and get rid of it (which he unsuccessfully tried to do); and that Engle had said that it had not been worth killing Tolin for $50. Hamilton **and** his wife also told Parmenter that Stevens' wife had found a kotex in his car and brush hanging from it and, based upon that, had accused Stevens of robbing the store and killing the clerk (Parmenter: T 66-71).

Parmenter, who had no basis for arresting Stevens other than the information he received from Hamilton, had no idea whether that information "was correct, [but] it was something that had to be **checked** out" (Parmenter: T 117-18, 164-65 [adopting a portion of his 1979 deposition]). There was nothing in that information which contradicted the facts Parmenter knew about the crime. Parmenter conceded, however, that all of the facts Hamilton related which corroborated information Parmenter already possessed had been publicized by the media, except, he believed, for Hamilton's reference to the proceeds of the robbery being $50 (Parmenter: T 93-96, 161-62). In fact, Hamilton had no knowledge of the amount of money which had been stolen (the amount was $67.77 --- Blalock: TT 476-78), but knew that convenience stores generally deposited any cash which exceeded $50 in a safe (Hamilton: **DSHE8 464).**

Parmenter did not know whether Hamilton, who seemed afraid that he was going to be arrested, was fabricating what he told the police and had no idea whether he was a habitual liar (Parmenter: T 96, 103, 159).

b. **Stevens' Arrest.** Hamilton gave Parmenter Stevens' and Engle's names and the information he had concerning their involvement in the crime at about midnight on March 20. Parmenter, accompanied by seven to ten other officers, arrested Stevens without a warrant[66] in his bed at 3:40 a.m. (Parmenter: T 118, 123-24; TT 864-66).[67] At Stevens' trailer Parmenter, with his gun drawn, knocked on the door. When a friend of Stevens named Guy Custer opened the door,[68] Parmenter identified himself, walked into the trailer without asking for permission to enter, satisfied himself that Custer was not Stevens, and then asked where Stevens was. Custer indicated where Stevens' bedroom was. Parmenter went to the bedroom, awakened Stevens and informed him that he was under arrest (Parmenter: T 71-72, 129-36).

c. **Stevens' Interrogation.** After his arrest, Stevens was taken to police headquarters. At 4:40 a.m. Parmenter readvised[69] Stevens of his *Miranda* rights which Stevens said he understood, and had him sign a form entitled "Your Constitutional Rights" (Trial Exhibit 32[70]). Parmenter then interrogated Stevens for approximately four and three-quarter hours, eliciting (beginning at 6:45 a.m.) what we have referred to as Stevens' "post-arrest statements" (Parmenter: T 72-73; TT 866-77, 892, 898-902).

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[66] Parmenter had no information that spending the time necessary to obtain an arrest warrant would have endangered anybody (Parmenter: T 135). Assistant State Attorney Coxe was present at police headquarters before midnight in connection with this case (Parrnenter: T 123), and thus had more than sufficient time to prepare a warrant application.

[67] A few minutes before, Engle had been arrested at the nearby house where he lived (Parmenter: TT 863).

[68] Parmenter admitted that he was not familiar with the "knock and announce" statute, §901.19(1), Fla. Stat. (1985), or its requirement that the officer's authority and purpose be announced before gaining entry (Parmenter: T 132-33).

[69] Parmenter had given Stevens oral *Miranda* warnings immediately after he awakened and arrested him (Parmenter: T 72; TT 865).

[70] Judge Weatherby indicated that, with respect to Trial Exhibit 32 ("Exhibit 32") and Engle Trial Exhibit 16 ("Exhibit 16"), he wished to continue to use their original numerical designations.

Exhibit **32,** the "Your Constitutional Rights" form signed by Stevens, **was** the **upper** portion of a Jacksonville Sheriff's Office form known as the "Standard Rights Form" (Parmenter: T **137-38, 142;** Zipperer: DSHE8 550).[71] Exhibit 16, which Engle signed **at** 6:35 a.m. on March 20 in the presence **of** Detective J. **A.** Zipperer, includes the entire rights form (on **a** standard 8-1/2-by-11-inch sheet of paper). The lower portion of the Standard Rights Form includes **a** "Waiver of Rights" statement **and** signature lines both for the person waiving those rights and for witnesses. On Exhibit **32,** on the other hand, there were no signature lines and there was very little space for Parmenter and Zipperer to squeeze their signatures on the bottom left (the longer side) of the form.

Parmenter denied cutting off the bottom of Exhibit **32** either before or after Stevens signed it, but **also** denied **any** recollection **of** ever seeing a rights form of the truncated size of Exhibit **32** (Parmenter: T 142-44). He could not explain "**why** or how it [Exhibit 32] got to be this size," but he said that he "was shocked **as** anyone could be a few days ago [*i.e.*, in November, 1990] when **I** was shown a copy of this and it appeared that it was this size" (Parmenter: T **145).** He could not recall whether Exhibit **32 was** its present **size** when Stevens signed it, but he reiterated that he personally had nothing to do with removing the waiver portion of the form (Parmenter: T **148).**

d. **Motion To Reopen Hearing.** **After** the close of the hearing, Stevens' counsel learned for the first time that in or about 1979 (the year Stevens was arrested) Parmenter had made a practice of removing or obliterating the waiver portion of the Jacksonville Sheriff's Office's Standard Rights Form (R 137-38). Counsel presented copies **of** two other "de-waivered" rights forms (each **of** which was only part of an 8-1/2-

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[71]In addition to Parmenter's concession that the lower portion of the page of Exhibit **32 had** been cut off, measurement of that document **showed** that the left side **was** one-eighth of **an** inch longer than the right **side** (see T **350),** thereby making it beyond question that the paper had been cut (unevenly).

by-11-inch piece of paper) which Parmenter and his partner had obtained from two different suspects in November of 1979 (R 141, 143). Only three days earlier, other detectives who interviewed the same two suspects had used unaltered Standard Rights Forms (R 142, 144).

It was pointed out that the newly-discovered evidence followed the same pattern as the Engle-Stevens case --- *i.e.*, Parmenter used a "de-waivered" rights form when he was doing the interrogating, while his colleagues, at or about the same time, used the unaltered Standard Rights Form. Parmenter's testimony about not having seen other truncated rights forms, not having had anything to do with the removal of the lower portion of the form, and having been "shocked" when shown Trial Exhibit 32 was all apparently false. Stevens therefore sought to reopen the hearing on the motion to suppress to determine what actually occurred concerning the rights form (R 136-39).[72]

e. **Judge Weatherby's Rulings.** With respect to the unreasonable seizure claims, Judge Weatherby found that there was probable cause to arrest Stevens, and that Parmenter had acted in good faith reliance on the Florida statute which in 1979 allowed warrantless arrests in a person's home (R 225). He also found that *New York v. Harris*, 110 S.Ct. 1640 (1990) (warrantless arrest in suspect's home requires suppression only if arrest was without probable cause), governed the *Payton* claim.

With respect to the *Miranda* form, Judge Weatherby opined that the form signed by Stevens "was sufficient to inform ... [him] of his constitutional rights" and that Stevens knowingly and voluntarily waived his *Miranda* rights. The motions to reopen

[72]Stevens further moved for the issuance of a subpoena *duces tecum* directed to the Sheriff, seeking a list of Parmenter's cases over an 18-month period. The purpose of that information was to obtain evidence of other "de-waivered" *Miranda* forms used by Parmenter (Supplemental Record), The only practical way to locate those forms in the court files was to obtain from the Sheriffs office a list of cases in which Parmenter was one of the lead investigators. Stevens' motion for the issuance of the subpoena was based in part upon his constitutional rights to compulsory process. Amend. VI, U.S. Const.; Art I, §16(a), Fla. Const.

the suppression hearing and for issuance of a subpoena were denied without a statement of reasons (T 584, 585).

3. STEVENS' POST-ARREST STATEMENTS SHOULD NOT HAVE BEEN CONSIDERED BECAUSE THEY WERE THE FRUIT OF AN UNCONSTITUTIONAL WARRANTLESS ARREST IN THE HOME

a. Introduction

In *Payton v. New York*, 445 U.S. 573, 576, 589-90 (1980), the United States Supreme Court made explicit that the Fourth Amendment requires a warrant to arrest a suspect in his home, absent consent or exigent circumstances. ***United States v. Johnson,*** 457 **U.S.** 537, 562 (1982), held that *Payton* applied retroactively to all cases, such as Stevens',[73] where the conviction was not yet final on the date ***Puyton*** **was** decided. In ***State v. Rickard,*** **420** ***So.*** 2d 303, 306-07 (Fla. 1982), this Court followed *Johnson* and applied *Puyton* retroactively.

Judge Weatherby's failure to suppress Stevens' post-arrest statements violated Article I, §12 of the Florida Constitution (1968). We recognize that Article I, §12 has been amended, effective January 4, 1983, to require that this State's constitutional right to be secure in one's home against unreasonable searches and seizures "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court," **Art.** I, §12, Fla. Const. (1991). This Court has held, however, that that amendment to Article I, §12 **is** prospective only and that the pre-**1983** version applies to persons, such as Stevens, who were arrested before the effective date of the amendment. ***State v. Jones,*** **483 So. 2d** 433, **435** n.1 (**Fla.** 1986); ***State v. Lavazzoli***, 434 ***So.*** 2d 321 (**Fla.** 1983). We specifically rely upon the **pre-amended** state constitutional right.

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[73]**Stevens' direct appeal** to this Court **was** not **decided** until **September 14,** 1982, nearly **two and** one-half **years after** ***Payton*** **was decided.**

b. The Absence of Exigent Circumstances

It is undisputed that Stevens' arrest was without a warrant and without consent.[74] The issue of exigent circumstances,[75] however, is raised by this Court's decision in *Engle v. Dugger, supra,* **576** *So.* **2d at 699,** where in an alternate holding denying Engle's claim that his counsel had been ineffective for failing to move to suppress Engle's statements on *Payton* grounds,[76] this Court stated that "there were significant exigent circumstances for the police to arrest Engle in his house without a warrant." *Ibid.* The exigent circumstance identified by this Court in *Engle* was the risk of escape.[77] We respectfully submit that this Court erred in reaching that conclusion which strongly conflicts with this Court's decision in *Hornblower* v. *State, supra,* 351 *So.* 2d **716.** Moreover, when this Court decided *Engle,* it did not have the advantage of considering either the factual record made at the hearing on the motion to suppress or the arguments made here (Engle having treated this issue as a relatively minor, and thus not fully developed, claim).

In *Hornblower,* defendant's brother Dale sold drugs to an undercover officer and was arrested. The circumstances established probable cause to believe that drugs were present in defendant's trailer. The warrantless search executed in that trailer was

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[74]Parmenter testified that he entered Stevens' trailer with his gun drawn without asking for permission to enter (T 131-32).

[75]The prosecution has the burden of raising and proving the existence of exigent circumstances when it seeks on that ground to **avoid** the general requirement for a warrant. *See Vale* v. *Louisiana,* **399 U.S.** *30,* 34 (1970); *Hornblower* v. *State,* 351 So. **2d** 716, 717 (Fla. 1977), quoting *McDonald* v. *United States, 335* **U.S. 451, 456 (1948).**

[76]The Court's principal holding on Engle's claim (not relevant here) was that counsel was not ineffective for failure to foresee *Payton*. *Ibid.*

[77]Other exigent circumstances identified by the courts include the imminent **peril** of bodily harm to another, danger to law enforcement agents and a reasonable fear that evidence will be destroyed. See, *e.g.*, *Benefield* v. *State,* 160 *So.* 2d 706, 710 (Fla. 1964); *Alvarado* v. *State,* 466 **So.** 2d 335, **337** (Fla. 2d DCA 1985). None of those exigent circumstances is applicable to the circumstances in which Stevens was arrested.

unconstitutional, however, because exigent circumstances were not established. Specifically, the officers who arrested Dale spent at least **45** minutes in the police station while Dale **was** being booked. "Certainly a search warrant could have been obtained during that **[45-minute]** period or at the **very** least an attempt could have been made to obtain one." *Id.* at 719. This Court held at 718:

> ... [I]f time to get a warrant exists, the enforcement agency must use that time to obtain the warrant. (Emphasis added.)

In this connection it should be noted that it has been found that two hours was sufficient time to obtain an arrest warrant in Duval County in 1979. *See State v. Santamaria*, 385 *So.* 2d 1130, 1131 n.1 (Fla. 1st **DCA** 1980).

Numerous cases follow the central principle **of** *Hornblower* that, if time permits, a warrant must be obtained before an arrest or **a** search in a home occurs. For example, in ***Alvarado v. State, supra,*** 466 **So,** 2d at **336-337,** the circumstances were held not to be exigent when the police failed to obtain, or even to attempt to obtain, a warrant in the three-and-one-half-hour interval between the identification to the police of the defendant as the perpetrator of a burglary, assault **and** sexual battery on an 82-year-old woman **and** his arrest, despite the following: the defendant had told the victim that he was planning to leave town, the defendant was known to be armed with a knife and evidence of the crime would easily be destroyed if defendant washed his bloody clothes. The court, at **337,** held:

> ... [S]ufficient **time** elapsed between the officers' conversation with the victim [at 11:30 p.m.] and the arrest of Alvarado [at 3:00 a.m.] for the police to have made at least a minimal attempt to obtain a **warrant.** The officers did not know when the appellant was **supposed** to leave town; they had four men covering three **exits** to the apartment; and the appellant could easily have eradicated bloodstain evidence between the time of the afternoon assault **and** the arrest early the next morning. The

> conditions were. indeed. less than exigent. Furthermore, law enforcement officers cannot be permitted to convert self-imposed delay into a circumstance of exigency when the elapsed time is sufficient to seek a warrant. (Emphasis added.)

See also, *Graham v. State,* 406 So, 2d 503 (Fla. 3d DCA 1981) (no exigency for warrantless arrest of an armed robbery suspect in a motel when police took the time to drive from Miami to Deerfield Beach [a distance of approximately 40 miles --- presumably less than a one-hour drive for police officers]); *Wilson v. State,* 363 So. 2d 1146 (Fla. 2d DCA 1978) (no exigent circumstances where search conducted within minutes of a drug sale when, for at least six hours, officers had had probable cause from earlier sale at the same location); cf. *United States v. Houle*, 603 F.2d 1297, 1299-1300 (8th Cir. 1979) (failure to obtain arrest warrant for more than four early-morning hours vitiated prosecution claim of exigent circumstances, despite defendant being armed, having fired shots, and having threatened to shoot police).

In this case the police had at least three and one-half hours (the identical time period as in *Alvarado*) to obtain an arrest warrant from the time they learned of Stevens' identity and whereabouts until they arrested him in his bed. This was more than ample time to obtain a warrant (if a judge were persuaded that probable cause existed). The failure even to attempt to obtain a warrant is particularly unjustifiable in the circumstances of this case because an experienced prosecutor was present in police headquarters in connection with this matter at the very time the police were allowing hours to go by without seeking a warrant. Whatever exigencies might arguably have existed if the police had sought to arrest Stevens within less than 45 minutes[78] after he happened upon Hamilton and the police at Hamilton's trailer a little before midnight, they

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[78] We chose 45 minutes because that is the lapse of time found to be an unreasonable delay in *Hornblower*.

did not exist at 3:40 a.m. when the police arrested Stevens.

The police, of course, had no way of knowing whether Stevens would believe **their** cover story (that Hamilton was cooperating in a drug investigation) or whether he would suspect that Hamilton had provided information about the Tolin homicide. If, however, the police suspected the latter, they would have acted much more swiftly than waiting three and one-half hours to arrest Stevens.[79] To put it another way, if Stevens was going to seek to flee, he would, in all likelihood, have left hours before 3:40 a.m. Thus, the exigency which arguably may have existed at 12:15, 12:30 and even 12:45 a.m. no longer existed at 3:40 a.m.

Further militating against a finding of exigent circumstances is the fact that one **week** had already elapsed since the crime, **and** the police knew (based upon the information from Hamilton) that Stevens had not gone into hiding or left the jurisdiction. Furthermore, seven to ten policemen participated in the arrest of Stevens, and other officers had participated in apprehending Engle a few minutes earlier. With that type of mobilization of force, even if there had been a significant delay in obtaining the warrant (*e.g.*, four hours instead of the two found sufficient in *Santamaria*), sufficient officers were available to have been deployed around Engle's and Stevens' residences to prevent any escape during the brief extra time needed to obtain arrest warrants.

If one compares this case to *Hornblower* (where a delay of **45** minutes was held to vitiate any exigency), to *Alvarado* (where the same three **and** one-half hours were held too long for the circumstances to be exigent, despite the police having been told the

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[79]We respectfully submit that this Court was in error in ***Engle,*** 576 So. 2d at **700,** in stating: "In fact, the record reflects that Stevens **did** tell Engle that Hamilton was implicating Engle in the murder." **As** with all search **and** seizure questions, the issue is what the police knew **at** the time they engaged in the police activity, not what they later learned. See, *e.g.*, ***D'Agostino v. State,*** **310** ***So.*** **2d 12, 15** (Fla. **1975)** (fruits of an illegal arrest cannot negate that illegality). If, however, this Court disagrees with us on this point, **it** then **should** consider that Stevens in fact did not flee **and was** sound asleep in his **bed** three and one-half hours after he saw Hamilton with the police,

suspect he was planning to leave town), and to *Graham* (where a delay of approximately an hour in arresting a suspect in a motel room [a transient situation] was held to belie any exigency), one must conclude that no exigency existed. The police perceived no exigency at the time and none should be read into the record 13 years later.

c. This State's Mandatory Exclusionarv Rule

Until the 1983 amendment which required conformity of interpretation with the United States Supreme Court's decisions construing the Fourth Amendment, Article I, §12 of the Florida Constitution provided "more protection from governmental intrusion than that afforded by the United States Constitution." *State v. Sarmiento,* 397 *So.* 2d 643, 645 (Fla. 1981). The principal difference between Article I, §12 and the Fourth Amendment which led this Court, in *Gmbbs* v. *State,* 373 *So.* 2d 905, 909 (Fla. 1979), to characterize this State's provision as "more restrictive than its federal counterpart," was the last sentence of the pre-1983 version of Section 12, which stated: "Articles or information obtained in violation of this right shall not be admissible in evidence" (emphasis added). This Court pointed out that that provision was "an express constitutional exclusionary rule as distinguished from the federal rule which exists by case decision." *Grubbs v. State, supra,* 373 So. 2d at 909.

In *State v. Dodd*, 419 *So.* 2d 333, 335 (Fla. 1982), this Court stated:

> The exclusion from evidence of articles and informatian obtained in violation of article I, section 12 is constitutionally mandated rather than being a result of judicial policy. (Emphasis added.)

This Court went on to hold that that constitutionally-mandated exclusionary rule applied "regardless of the type or the nature of the proceeding in which the evidence is offered." *Ibid.* Article I, §12's exclusionary rule also applied "regardless of the scope of the Fourth Amendment exclusionary rule." *Odom v. State,* 403 *So.* 2d 936, 940 (Fla. 1981),

cert. denied, 456 **U.S. 925** (1982). Thus, Article I, §12 mandated that all illegally-obtained evidence be excluded from evidence --- a more definite and broader protection than that afforded by the Fourth Amendment.

Although the 1983 amendment to Article I, $12 negated the greater protection that provision had afforded, this Court has declined to deprive anyone of that protection retroactively. ***State v. Lavazzoli, supra,*** 434 ***So.*** 2d at **324.** As a result, this Court has continued to apply the protections of the constitutionally-mandated exclusionary rule of Article I, §12 to searches and seizures which occurred before January 4, 1983. *See State v. Jones, supra,* 483 ***So.* 2d** at 435 n.1; ***State v. Lavazzoli, supra,*** 434 ***So.* 2d** at **324.**

Applying pre-1983 Article I, $12 to the facts **of** this case, Stevens' warrantless arrest in 1979 in his home in the absence of exigent circumstances and consent was unreasonable and unconstitutional. ***Payton v. New York, supra,*** 445 **U.S.** at 576, 589-90; ***State v. Rickard, supra,*** **420 *So.*** 2d at **306-07.** Stevens' post-arrest statements were "information obtained in violation of' Article I, §12 **and** thus must **be** excluded from evidence in proceedings in this State, despite the fact that the result might well be different under the Fourth Amendment.

In ***New York v. Harris,*** 110 S.Ct. 1640, 1643-45 (1990), the Supreme Court held that the federal exclusionary rule would not apply to the indirect fruits, such as post-arrest station-house statements, of an illegal warrantless arrest in the suspect's home unless that arrest was made without probable cause.[80] Of significance, however, is the fact that the New York Court **of** Appeals determined upon remand to it of *Harris* that, notwithstanding the Supreme Court's determination that the federal exclusionary rule would not apply to *Payton* violations, Article 1, §12 of the New York Constitution

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[80]**We contend at pp. 74-78, *infra*, that Stevens' arrest was without probable** cause. **If this Court agrees with us on that point, the *Payton* violation requires suppression pursuant to the Fourth Amendment, as well as Article I, §12.**

required suppression of statements which resulted from a *Payton* violation. ***People v. Harris,*** **77** N.Y.2d 434,570 N.E.2d 1051, 1055(1991)(decision based upon the interplay **of** the New **York** Constitution's search and seizure provision with the state's expansive right to counsel). Both the result in ***People v. Harris*** and the result we seek in this matter are governed by specific provisions in the respective states' constitutions.

With respect to the instant case, we submit that, for the reasons discussed above, this State's pre-1983 search and seizure constitutional provision, by its very language, mandates the suppression we **seek. See** ***State v. Dodd, supra,*** 419 ***So.*** **2d** at 335; *Grubbs* ***v. State, supra,*** 373 ***So.*** 2d at 909.

d. <u>Conclusion</u>

In light of this State's constitutionally-mandated exclusionary rule, we submit that all fruits of illegal searches and seizures must be suppressed and that the attenuation-of-the-taint analysis required by the <u>federal</u> exclusionary rule should not be employed. **See** *Taylor* ***v. State,*** 355 ***So.*** 2d 180, 184 (Fla. 3d **DCA** 1978) ("an illegal arrest ... <u>presumptively taints</u> **and** renders involuntary any subsequent confession or admission obtained from the victim **of** the arrest" [emphasis **added]).** In the event that this Court were to disagree with **us** that Article I, §12 creates **a** ***per se*** rule **of** exclusion, we demonstrate below that the taint was not attenuated.

The Supreme Court stated in ***Taylor v. Alabama,*** 457 **U.S.** ***687,*** 690 (1982):

> ... a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession ....

To determine whether the link between the illegal arrest and the subsequent statement **is** close enough, the Court in ***Brown v. Illinois***, 422 **U.S.** 590, **603-04** (1975), set forth the following factors:

> [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, ... and, particularly, the purpose and flagrancy of the official misconduct.

In *Taylor,* at 691, sufficient temporal proximity (requiring suppression) **was** found where the confession was made six hours after the illegal arrest. In this case Stevens' statements began within three hours and were concluded within **less** than six hours of his arrest. Similarly, there was no intervening event which broke the connection in this case. Stevens was subjected to continuous interrogation from the time he arrived at police headquarters until the time he finished his statements. The administering of *Miranda* warnings, even if done three times, does not break the connection. *Id.* at 691. Moreover, the warrantless arrest was constitutionally unreasonable. *See Coolidge* **v.** ***New Hampshire,*** 403 **U.S. 443, 474-75** (1971) (**warrantless** seizures inside a person's home --- in the absence of exigent circumstances --- are *"per se* unreasonable").

Whether or not the attenuation-of-the-taint analysis required by the federal exclusionary rule is employed, Stevens' post-arrest statements should have been suppressed pursuant to Article I, §12 because they were the product of an unconstitutional arrest.

4. PARMENTER'S VIOLATION OF THE "KNOCK AND ANNOUNCE" STATUTE ALSO REQUIRED THAT STEVENS' POST-ARREST STATEMENTS BE SUPPRESSED

Stevens' arrest was **also** violative of Article I, §12 of the Florida Constitution[81] because Parmenter and his numerous backup officers **failed** to announce their authority **and** purpose before entering Stevens' trailer at gunpoint. The forcible entry without a **prior** announcement of authority **and** without anv announcement of purpose violated

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[81] We incorporate by reference the **discussion** in Point Four B.3.C., **pp. 67-69,** ***supra,*** of the **mandatory** exclusionary rule of **Article I, §12.**

§901.19(1), Fla. Stat. (1985).[82] Stevens' arrest thus being illegal, his post-arrest statements must be suppressed as fruits of that illegal arrest.

Section 901.19(1) provides:

> If a peace officer fails to gain admittance after he has announced his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, he may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

In the seminal case of *Benefield v. State, supra,* 160 *So.* 2d at 709, this Court acknowledged that §901.19(1) was "ambiguous and poorly drawn" and then set forth the following "reasonable interpretation" of it:

> When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building, He should then knock on the door and announce his name and authority, sheriff, deputy sheriff, policeman or other legal authority and what his purpose is in being there. ... He is not authorized to be there to make an arrest unless he has a warrant or is authorized to arrest for a felony without a warrant. If he is refused admission and ... has authority to arrest for a felony without a warrant, he may then break open a door or window to gain admission to the building and make the arrest. If the building happens to be one's home, these requirements should be strictly observed. (Emphasis added.)

This Court went on to hold that §901.19 is violated by "an unannounced intrusion" in the absence of exigent circumstances, "even if probable cause exists for the arrest of a person" (emphasis added). *Id.* at 710. In such circumstances any fruits realized through a violation of §901.19 are required to be suppressed. *Id.* at 711.

The record in this matter shows that Parmenter did not announce his authority

[82] Section 901.19(1) has not been amended since 1970 and thus existed in its present form at the time of Stevens' arrest.

until he had gained entry into Stevens' trailer at gunpoint. Moreover, Parmenter did not announce his purpose, to arrest Stevens, until long after he had entered the trailer --- *i.e.*, until after he had satisfied himself at gunpoint that Custer was not Stevens, had learned from Custer where Stevens' bedroom was and had awakened Stevens (Parmenter: T 72, 131-32, 136). As quoted above, this Court in *Benefield* held that strict compliance with the provisions of §901.19(1) was required when a home was involved. Since then, such strict observance has in fact been demanded. *See, e.g.*, *Hurt v. State,* 388 So. 2d 281, 283-84 (Fla. 1st DCA 1980) (finding a statutory violation where the police knocked and announced their authority, but not their purpose); *Moreno v. State,* 277 So. 2d 81 (Fla. 3d DCA 1973) (failure of the police to announce their purpose, despite their waiting ten minutes after futilely knocking and announcing their authority, violated statute).[83]

This Court in *Benefield, supra,* 160 So. 2d at 710, set forth the following four exigent circumstances which can justify a police decision not to strictly observe the requirements of §901.19(1):

> ... (1) where the person within already knows of the officer's authority and purpose; (2) where the officers are justified in the belief that the persons within are in imminent peril of bodily harm; (3) if the officer's peril would have been increased had he demanded entrance and stated the purpose, or (4) where those within made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted. (Emphasis added.)

In *Earman v. State,* 265 So. 2d 695, 696-97 (Fla. 1972), this Court made clear

[83] *Miller v. United States*, 357 U.S. 301 (1958), involved a set of circumstances similar to the case at bar, Suppression of the evidence seized in Miller's apartment was granted because the police forcibly entered, after knocking and identifying themselves, but without stating their purpose (which was to arrest Miller). Interpreting a similar federal "knock and announce" statute, the Supreme Court held that the arrest was unlawful and the evidence had to be suppressed because the police failed to give notice of their purpose before entering. *Id.* at 309-14.

that, if the prosecution wishes to rely upon exigent circumstances to justify non-compliance with the requirements of the "knock and announce" statute, it must present competent proof in the trial court that such non-compliance was based upon those exigencies. In *Earman,* the police had probable cause to arrest the defendant on drug charges. His arrest was illegal, however, because the officers entered his house without knocking or announcing their authority or purpose. On appeal, the State argued that inferences could be drawn which supported the existence of exigent circumstances. Noting that the burden of **proof was** on the prosecution to prove such circumstances at the trial level, this Court held that it was improper for an appellate court to draw the inferences which the State contended were in the record, in the absence of competent proof to support those contentions.

The prosecution did not attempt to present any evidence of the existence of exigent circumstances to justify Parmenter's delayed announcement of authority and his failure to announce his purpose. It is clear that no such circumstances existed. Although this Court (incorrectly, as we have argued above) found in *Engle v. Dugger*, ***supra,*** 576 ***So.*** 2d at 699, that the risk of escape justified the failure to obtain a warrant for Engle's arrest, that exigent circumstance is not conceivably applicable here. The prosecution not only did not present any evidence to support such a theory, it could not have done ***so.*** There were **a** minimum of seven, **and** possibly ten or eleven, officers who went to arrest Stevens. Other than people sleeping, nothing was going on in Stevens' trailer. Even if someone had been stimng, escape was not a possibility since the number of officers on the scene **was** more than enough to surround the trailer and make that theoretical possibility a total impossibility.

There being no exigent circumstances, the police entry into Stevens' trailer with **a** delayed announcement of authority and no announcement of purpose violated §901.19(1) and required suppression pursuant to the mandatory exclusionary rule of

Article I, §12. *See Benefield v. State, supra.*

5. STEVENS' POST-ARREST STATEMENTS SHOULD HAVE BEEN SUPPRESSED BECAUSE HE WAS ARRESTED WITHOUT PROBABLE CAUSE

a. Introduction

Just as is true with respect to the *Payton* violation,[84] we primarily rely upon Article I, §12 of the Florida Constitution and the protections that provision's exclusionary rule provides to persons arrested before January 4, 1983, in contending that no probable cause existed for Stevens' arrest. Under Article I, $12 we rely upon the two-part *Aguilar-Spinelli*[85] test, arguing that the "veracity" prong of that test was woefully unsatisfied. Alternatively, we rely upon the Fourth Amendment to the United States Constitution, under which the "totality of the circumstances" test of *Illinois v. Gates,* 462 U.S. 213 (1983), is applicable. Whichever test is applied, the information available to Parmenter was not sufficient to establish probable cause for Stevens' arrest, thus requiring suppression of his post-arrest statements.

b. The Law

In *Antone v. State, 382 So.* 2d 1205, 1211-12 (Fla.), *cert. denied,* 449 U.S. 913 (1980), this Court set forth the controlling test:

> The *Aguilar-Spinelli* test requires that a warrant which is based on an informant's tip must: (1) establish that the information provided by the informant, if true, is sufficient to support a finding of probable cause, and (2) the affidavit must establish that the informant is credible or his

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[84]We incorporate by reference our discussion in Point Four B.3., pp. 62, 67-70, *supra,* of the applicability of pre-1983 law, the mandatory nature of this State's constitutional exclusionary rule and the lack of attenuation (if, contrary to our contention, this Court believes it necessary to address that latter issue).

[85]*Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

information is reliable. (Emphasis added.)

Accord, *State v. Wolff*, 310 So. 2d 729, 732 (Fla. 1975). The probable cause requirements for a warrantless arrest are the same as those for the issuance of an arrest warrant. *D'Agostino v. State, supra*, 310 So. 2d at 15.

A "citizen-informant" is generally deemed to be reliable without any further showing. Hamilton, however, was not a "citizen-informant" for at least three reasons: (1) he had a prior relationship with, and therefore possible biases against, the men he was accusing; (2) he admitted involvement in planning discussions concerning the crime; and (3) he was brought to police headquarters involuntarily and was totally unforthcoming until he sought the $5,000 reward. See *State v. Novak*, 502 So. 2d 990, 992-93 (Fla. 3d DCA 1987).

c. Analysis of the Facts

Based upon the information which Parmenter had at the time he arrested Stevens, the second or "veracity" prong of the *Aguilar-Spinelli* test was not satisfied for at least the following reasons.

First, Parmenter did not have any prior knowledge of Hamilton or his credibility. Indeed, the detective admitted: "I had no idea at the time I received it [the information from Hamilton] that it was correct; it was something that had to be checked out" (T 165).

Second, when Parmenter had begun his interrogation, Hamilton had repeatedly lied to Parmenter in falsely denying any knowledge concerning the Tolin homicide.

Third, Hamilton started to make his allegations only after he inquired whether giving information would allow him to receive a posted $5,000 reward,

Fourth, Hamilton was under arrest on weapons and drug charges and had a motive to give information to benefit both himself (which, in fact, occurred when his

arrest was voided the next morning) and his friend, Lanny Israel, who was also under arrest and who also **was** not formally charged because of the information received from Hamilton,

Fifth, Parmenter perceived Hamilton **as** a possible suspect in the events as to which he was exculpating himself. The detective correctly recognized that Hamilton was **worried** about being arrested **as** an accomplice in the homicide.

Sixth, Hamilton **was** intoxicated from both alcohol **and** marijuana.

Seventh, Hamilton revealed that he had recently been arrested in Jacksonville for aggravated assault, possession of two concealed weapons **and** possession of marijuana.

Eighth, Parmenter claims that he did not inquire, before Stevens was arrested, about Hamilton's record of arrests and convictions. If he did not (as he claims), he was improperly burying his head in the sand trying to avoid the negative information he knew or suspected he would find. Police failure to ascertain whether **an** informant **has a** criminal record has been considered a negative factor in determining whether the informant's veracity was established. ***St. Angelo v. State, 532 So.* 2d** 1346, **1347** (Fla. 1st DCA 1988). **If,** on the other hand, Parmenter did check on Hamilton's record, he had discovered at least three out-of-state convictions in addition to the Jacksonville arrest disclosed by Hamilton.

Ninth, before he arrested Stevens, Parmenter made no effort to corroborate **any** of Hamilton's allegations. The importance of such corroboration has been repeatedly stressed **as** a critical factor. *See, e.g.,* ***Illinois v. Gates, supra,*** **462 U.S.** at **241-46;** ***Blue v. State,*** **441** ***So.*** 2d 165, 168 (Fla. 3d **DCA** 1983).

Tenth, to the extent that Hamilton's allegations were consistent with the facts known to Parmenter, none of those allegations related facts which had not been revealed

in the media coverage of the homicide.[86]

We submit that all the information Parmenter had about Hamilton's credibility was negative, some of it seriously so. Likewise, there was nothing to show that his allegations were reliable. In all the circumstances, Parmenter had *so* little information which **supported** the "veracity" prong of the ***Aguilar-Spinelli*** test that neither that test nor the "totality of the circumstances" test was satisfied. *See **Illinois v. Gates, supra***, **462** U.S. at **230, 233, 241.** Thus, probable cause for Stevens' arrest was not established **and** the fruits of that unconstitutional arrest should have been suppressed.[87]

d. Conclusion

This Court's conclusion in ***Engle v. Dugger, supra,*** 576 ***So.*** **2d** at 699, that probable cause existed for Engle's (and therefore Stevens') arrest, unfortunately was made without most of the pertinent facts. Engle had had no hearing on a motion to suppress on these grounds so his record on appeal lacked the information essential to determining that Hamilton's veracity was not only unproven but in fact was rebutted **by** the available facts. Moreover, and not insignificantly, none of the legal arguments

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[86]In 1990 Parmenter believed that Hamilton knew one non-public fact --- the approximate amount of the proceeds of the robbery (Parmenter: T **95**). But, as Hamilton testified in 1979, he did not know the amount stolen. He knew only that it was the policy of convenience stores to keep only about $50 in the cash register (Hamilton: **DSHES** 464).

[87]**If** this Court does not agree that the police lacked probable cause, the sentence should be **vacated and** the case remanded for **a** reopened hearing on the motion to suppress to permit **cross-**examination of Parmenter about the facts that Hamilton was initially arrested and **booked** for possession of a concealed weapon and drugs on March 19 **and** that that arrest was subsequently **voided.** Hamilton first revealed these facts, which the prosecution had suppressed for **12** years, during the resentencing hearing. The suppression hearing had then been concluded for months and Judge Weatherby had just denied a motion on other grounds to reopen that hearing. Stevens thus **has** never had an opportunity to cross-examine Parmenter about these facts --- facts which **he** played a crucial role in suppressing. To deprive Stevens of such a reopened hearing (if this Court deems his claim of lack of probable cause not to have been established) would be to deny him his constitutional rights to due process and to a reliable sentencing proceeding. Amends. **VIII, XIV, U.S.** Const.; **Art. I,** §§9, **17,** Fla. Const.

Stevens now makes was presented by Engle. He simply relied on the *ipse dixit* that there was no probable cause (see Initial Brief of Appellant, Case Nos. 74787, 74902, pp. 50-54). We suggest that, upon an analysis of both the facts we have elicited and the legal arguments we have presented, this Court will conclude that the police did not have probable cause to arrest Stevens and that his post-arrest statements should have been excluded.

6. JUDGE WEATHERBY'S FAILURE TO REOPEN THE SUPPRESSION HEARING REQUIRES A REMAND TO DETERMINE THE IMPLICATIONS OF PARMENTER'S APPARENT UNTRUTHS AND WHETHER STEVENS IN FACT VALIDLY WAIVED HIS *MIRANDA* RIGHTS

The prosecution must meet a "heavy burden" of demonstrating "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to ... counsel." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The fact that Stevens signed a Standard Rights Form, which had had the "Waiver of Rights" portion of it removed, raises a significant issue about whether the prosecution could meet that heavy burden. Among the possibilities raised by the "de-waivered" rights form is that Stevens refused or balked at signing a waiver, indicating reliance upon his right to remain silent. This is exactly what happened in *United States v. Christian*, 571 F.2d 64 (1st Cir. 1978), where the defendant signed a similar rights/waiver form under the upper (rights) portion of the form and not on the signature line under the lower (waiver) portion of the form. The First Circuit found that Christian had been advised of and understood his rights, but that he had not voluntarily and knowingly waived those rights, thus requiring suppression of his subsequent statements.

Unfortunately, the record in this case concerning this issue is not complete. At the hearing on the motion to suppress Parmenter expressed great surprise at the truncated size of Exhibit 32 and denied any recollection of ever seeing any other similarly-truncated Standard Rights Form. Shortly after the hearing counsel learned that

Parmenter had made a practice of excising the waiver portion of the rights form, even though other detectives were using the entire form. Counsel supported his motion to **reopen** the hearing for the purpose **of** permitting further cross-examination **of** Parmenter with documentary proof of Parmenter's practices. A comparison of those practices with Parmenter's testimony in this matter inevitably leads to the conclusion that Parmenter had lied at the suppression hearing.

Despite the compelling evidence that the record was neither complete nor accurate because of Parmenter's untruthfulness, Judge Weatherby denied Stevens' motion to reopen the hearing. Relying on the incomplete and inaccurate record, the court concluded with respect to the underlying waiver issue (R **225**):

> The Defendant's current suggestion that the rights form was in some way altered is without merit. Even if there had been an alteration, and the Court is not convinced that this is *so,* such alteration could only have occurred **after** the Defendant had been adequately advised of his rights and that his waiver of those rights was both voluntary and knowing. (Emphasis in original.)

How Judge Weatherby reached his conclusion as to the timing of the possible alteration was not explained, particularly since the prosecution **has** a "heavy burden" of showing a knowing and intelligent waiver of Stevens' constitutional rights. Moreover, the order also avoided the whole question of Parmenter's credibility. If Parmenter was lying about the de-waivering of the rights form **(as** it certainly **appears** he was), he might well have been lying about administering the *Miranda* warnings to Stevens or what happened when he did so (if he did).

A court is required to allow a party to reopen its case when the refusal to do *so* would, as here, defeat the ends of justice. *Steffanos v. State*, 80 Fla. 309, 86 *So.* 204, 205-06 (1920). Judge Weatherby's unjustified denial **of** the motion to reopen the suppression hearing denied Stevens his constitutional rights: not to incriminate himself

and to counsel during police interrogation, to confront witnesses against him, to a reliable sentencing proceeding, to a full and fair hearing of his claims, and to due process of law. Amends. **V,** VI, **VIII, XIV, U.S.** Const.; **Art. I,** **§§9,** 16(a), **17,** Fla. Const. The sentence should **be** vacated and the matter remanded for a reopened heating on Stevens' motion to **suppress** to determine whether there was **a** constitutionally valid waiver **of** his *Miranda* rights.

7. Conclusion

In resolving the propriety of Stevens' sentence, this Court should disregard his post-arrest statements which should have been suppressed and, based **upon** the overwhelming mitigating evidence and the none-too-persuasive unsuppressed aggravating evidence, determine that a life sentence is mandated by *Tedder* and its progeny.

C. THE MEDICAL EXAMINER'S PATENTLY FALSE TESTIMONY VIOLATED STEVENS' CONSTITUTIONAL RIGHTS TO A FAIR AND RELIABLE SENTENCING PROCEEDING

1. Introduction

Stevens' motion to suppress, ***inter alia***, sought to exclude as false the segments of medical examiner Bonifacio **Floro's** trial testimony which asserted that the laceration of the deceased's vagina had to have preceded her death because of the amount of blood found in her vagina (R 105-06). **At** the hearing on the motion to suppress with respect to this issue, Stevens called Dr. Edward Willey and the State called Dr. Floro. Dr. **Floro's** autopsy report (DSHE3) and his testimony at Engle's trial (DSHE4) were also received in evidence,

Based upon **Dr.** Floro's testimony at the heating, Stevens further moved to suppress all of Dr. **Floro's** trial testimony on the ground that the witness had exhibited such a cavalier disregard for the truth that his testimony should be ruled too unreliable

to be considered in a **capital** sentencing proceeding (T **380-82).** Judge Weatherby denied the motions (R 226), finding Dr. Floro to be "credible" and rejecting the contention "that the State either intentionally or unintentionally presented **'false'** testimony of any **form."** **Judge** Weatherby also concluded: "While it **is** obvious that there is some confusion and conflict **with** regard to certain aspects of **his trial** testimony, it is equally obvious that **the** conflict [a]ffects, at most, the weight and not the admissibility of his testimony" (R **226).**

We will demonstrate below that Dr. Floro gave such blatantly false testimony as to be incredible as a matter of law and that receipt of his testimony violated Stevens' constitutional rights. **Amends. VIII,** XIV, **U.S.** Const.; **Art.** I, §§9, 17, Fla. Const.

2. The Relevant Facts

a. **Dr. Floro's Trial Testimonv,** Dr. Floro, an associate medical examiner for Duval County, testified at Stevens' trial that Tolin's vagina suffered a four-inch-long internal laceration, which was "very likely" caused by something other than a male organ during intercourse (TT 517-18, **531-32).** During the autopsy he recovered "about two tablespoons full of ... blood in the vagina" (emphasis added) (TT **533).** The prosecution elicited the following testimony from Dr. Floro (TT **537-38):**

> Q Doctor, were you able to form an opinion as to whether or not Kay Tolin was alive or dead when the damage to the vagina was inflicted?
>
> A She was alive, sir.
>
> Q How can you determine that?
>
> A ... I found blood in ... her vagina and there's no wav that the woman would bleed from the vagina when she's dead and I found about two tablespoons full of blood. (Emphasis added.)

On cross-examination the following testimony occurred (TT 551):

> Q And is that [in the vaginal canal] where you

found the blood on Mrs. Tolin?

A Yes, sir.

Q And what was that amount again?

A About two tablespoons full.

Q Two tablespoons full?

A Yes. sir.

Q I thought you said teaspoons full earlier?

A Two tablespoons full.

Q All right. How many cc's would that be?

A About 30 cc's.

Q About 30 cc's?

A Yes, sir. (Emphasis added.)

Dr. Floro also testified that while a person could passively bleed in small amounts after death, the amount of blood in the vagina was too great to be caused by such passive bleeding (TT 554-55).

b. Dr. Floro's Testimony at the Engle Trial. At Engle's separate trial conducted seven weeks earlier than Stevens' trial, Dr. Floro testified relatively consistently to his Stevens' trial testimony about the nature of the vaginal injury (DSHE4 359-60, 369-70), with the notable exception of stating that "forcible intercourse" could have caused the injury (DSHE4 360). His testimony about the amount of blood found, however, was very different than his Stevens trial testimony. In response to a question about how he had determined that Tolin was alive at the time of vaginal injury, he testified as follows on direct examination (DSHE4 370):

> Inside the vagina, I have recovered about five spoonfuls of blood and Mrs. Tolin at that time was not in

> her period, so it could not be from regular menstruation;[88] it came, the blood came from the laceration. Again, if she were dead, there should be no blood in that vaginal cavity. (Emphasis added.)

On cross-examination, Dr. Floro reiterated that he had found "about five tablespoons of blood in the vagina" (emphasis added) (DSHE4 375).

c. **Dr. Floro's Suppression Hearing Testimony.** On direct examination Dr. Floro testified that, as stated in his autopsy report (DSHE3 6), he had found about **four** cc's of blood in Tolin's vagina (T 230-31). He asserted that at both Stevens' and Engle's trials he had testified that he had found four cc's of blood in the vagina. He could not explain why the two trial transcripts stated "two tablespoons" and "five tablespoons," although he did note that he had a "Philippine accent" and that many court reporters find him hard to understand (T 233-34, 235). The autopsy showed that Tolin was not menstruating (T 232-33).

On cross-examination, Dr. Floro repeatedly maintained that, whenever the Stevens trial transcript had him stating "two tablespoons," he was <u>sure</u> that he had said "four cc's" and that the stenographer had mistranscribed "four cc's" as "two tablespoons" (T 257-61). He stated that he was as sure that Tolin was alive when the vaginal injury was inflicted as he was that he had actually said the words, "four cc's," which he claimed had been incorrectly transcribed as the words, "two tablespoons" (T 262). He also insisted that whenever the Engle transcript said "five tablespoons," he had actually said "four cc's" (T 262-63, 266-67).

When asked about the excerpt from TT 551 which is quoted at pp. 81-82, *supra*, Dr. Floro claimed that, when the transcript says "two tablespoons," he had actually testified "four cc's" (T 268, 270, 272). The very next question by Stevens' lawyer,

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[88] In the course of his investigation Parmenter was informed that a used kotex (suspected to have been Tolin's) had been found in Stevens' car shortly after the crime (Parmenter: T 124-26).

however, was: "Two tablespoons full?" (TT 551). At first, Dr. Floro maintained at the suppression hearing that defense counsel had said "four cc's" and that the stenographer had mistranscribed the question, but when pressed about trial counsel's lack of a Filipino or other accent, thought better of his claims and conceded that defense counsel was quoted correctly (T 269-70). Dr. Floro could not explain, however, why counsel followed up his (Dr. Floro's) purported answer of "About four cc's full," with the question, "Two tablespoons full?" He conceded that he had made a mistake in answering that question in the affirmative, but blamed defense counsel for not correcting his (Dr. Floro's) mistake (T 272-73). Dr. Floro was then completely unable to explain how he could have answered the followup question, "How many cc's would that be?" with "About 30 cc's,"[89] when (according to him) his prior answer had been "Four cc's" (T 273-74).

Dr. Floro conceded that if Tolin had been menstruating, that could have caused the four cc's of blood to collect in the vagina (T 282-83). He also reiterated that he believed that his autopsy report showed that Tolin had not been menstruating (T 287).[90]

d. Dr. Willey's Suppression Hearing Testimony. Dr. Willey, a former assistant medical examiner in Duval County and now a pathologist from St. Petersburg, pointed out the irreconcilable differences between each of Dr. Floro's three versions of the amount of blood found in Tolin's vagina (T 183-97). If the four cc's listed in the

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[89]There are 15 cc's in a tablespoon or 30 in two tablespoons (DSHE4 382).

[90]On cross-examination, Dr. Floro conceded that he had no independent recollection of the facts, but was testifying based on the contents of his autopsy report and one other document in the file (T 246). When asked how deep the vaginal laceration had been, he said that it had been half a centimeter (T *246).* Asked to explain the basis for his "half a centimeter" answer, Dr. Floro replied: "It's not in the report, but you asked me how big, so I have to give you some numbers" (emphasis added) (T 247). In a similar vein, Dr. Floro started to qualify an answer on redirect with the word "probably." When asked about that on recross, Dr. Floro said that it is his understanding that while testifying he should always give "firm answers" and not use the word "probably" (T 281-82).

autopsy was correct,[91] Tolin was likely dead when the injury was inflicted (T 197-98, 106-07, 208, 210-11). On the other hand, if the two tablespoons (30 cc's) or five tablespoons (75 cc's) were correct, Tolin was likely alive when she received the injury (T 211). Menstruation would explain the presence of blood in her vagina. Its amount and the fact that it was admixed with mucus are consistent with menstruation (T 205-06).

e. <u>Analysis of the Facts.</u> We submit that it was proven beyond a reasonable doubt (a burden we need not shoulder) that Dr. Floro was an unreliable, incredible and untrustworthy witness. He testified at the Stevens trial to finding 7.5 times as much blood in Tolin's vagina as was actually there and at the Engle trial he exaggerated the amount of blood found by a factor of 18.75. He then used that blatantly false testimony on this topic as the basis for concluding that Tolin was alive when the vaginal injury was inflicted.

Notwithstanding Dr. Floro's obvious willingness to testify to almost anything he thought would benefit the prosecution, Judge Weatherby found him to be "credible," though noting that there was "confusion and conflict" in his testimony (R 226). Judge Weatherby's finding that Floro was "credible" is entitled to no deference because it is wholly unsupported by the record. *See Catlett v. Chestnut,* 107 Fla. 498, 146 *So.* 241, 246 (1933) (inherent improbabilities create basis to disregard testimony, despite absence of conflicting evidence); *Brannen v. State,* 94 Fla. 656, 114 *So.* 429, 430 (1927); *White v. Acker,* 155 *So.* 2d 176, 177 (Fla. 1st DCA 1963) (proper to reject uncontradicted medical opinion evidence when based upon self-contradictory facts); see also, *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564,575 (1985) (appellate court may find clear error in credibility determination which is based upon internally inconsistent or facially implausible account).

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[91] Dr. Floro's subsequent testimony removed the uncertainty and validated Dr. Willey's belief that the autopsy figure was the correct one.

That lack of support in the record is shown most dramatically by Dr. Floro's preposterous insistence that the stenographer at the Stevens trial repeatedly transcribed "two tablespoons" when Dr. Floro had said "four cc's" and that at the Engle trial the same stenographer always heard "four cc's" as "five tablespoons." The dishonest attempt to manipulate the facts by pretending that his Filipino accent was the cause for these "transcription errors" is reprehensible. That gambit, of course, met its comeuppance when Dr. Floro was totally unable to explain how Stevens' non-Filipino-accented defense lawyer first echoed Dr. Floro's supposed "four cc's" with "Two tablespoons full?", and then purportedly inquired as to the number of cc's in "four cc's" --- to which Dr. Floro's nonsensical answer was "30." Dr. Floro's testimony about the "transcription error," which was the essence of his suppression hearing testimony, is totally unbelievable. **Because** that testimony obviously was not the result of **a** mistake, one is forced to conclude that it was deliberate perjury.

Having demonstrated conclusively, we submit, that Dr. Floro perjured himself at the suppression heating, his entire testimony should be disregarded in accordance with the maxim, *"falsus in uno, falsus in omnibus."* See *Gantling v. State,* 40 Fla. 237, 23 *So.* 2d 857, 860-61 (1898); *Anthony v. Douglas,* 201 *So.* 2d 917, 918 (Fla. 4th DCA 1967).[92] At the very least, his testimony concerning whether Tolin was alive at the time of the vaginal injury should be suppressed since it is riddled with erroneous facts

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[92]We note that Dr. Floro's untrustworthiness as a witness was not confined to the topic of the vaginal injury, but rather pervaded his entire approach toward testifying. When asked how deep the vaginal laceration was --- a fact not contained in the autopsy report --- Dr. Floro fabricated an answer. It is clear that it was fabricated because he (honestly for once) conceded that he had no independent recollection of the facts (T 246) and essentially conceded that he made up that prior answer. Asked to justify his manufactured testimony, Dr. Floro unashamedly told defense counsel: "[Y]ou asked me how big, so I have to give you some numbers" (T 247). We maintain that Dr. Floro's entire testimony should have been suppressed because he proved himself to be such an untrustworthy witness that his testimony was not sufficiently reliable to be considered in a capital sentencing proceeding. Amends. VIII, XIV, U.S. Const.; Art. I, §§9, 17, Fla. Const.; see *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976); *Horner v. State of Florida,* 312 F. Supp. 1292, 1295-96 (M.D Fla. 1967).

and conclusions.

Dr. Floro's own testimony instructs us to disregard his opinion that Tolin was alive when her vagina was injured. When asked if he were as certain that Tolin was alive at the time of the injury as he was that the stenographer had mistranscribed his testimony of "four cc's" as "two tablespoons," he said he was. Since the stenographer mistranscription theory is blatantly perjurious and incredible as a matter of law, Dr. Floro himself has told us to have no confidence in his opinion that Tolin was alive.

3. Argument

The State's use of testimony which it knew (as was clearly the fact here) was false denied Stevens due process of law. Amend. XIV, U.S. Const.; Art. I, §9, Fla. Const.; see *United States v. Agurs, 427 U.S.* 97, 103-04 (such "prosecutorial misconduct ... involve[s] a corruption of the truth-seeking function of the trial process"); *Giglio v. United States,* 405 U.S. 150, 153 (1972) ("deliberate deception of a court ... by presentation of known false evidence is incompatible with the rudimentary demands of justice").

Unlike situations where the denial of due process stems from the failure to reveal evidence favorable to the defense, a much stricter standard of review is applied in cases involving the use of perjured evidence. *See Antone v. State, supra,* 382 So. 2d at 1215 (if prosecution knew or should have known of the perjury and there is a reasonable likelihood that the false testimony could have altered the jury's judgment, then a new proceeding is mandated). Accord, *Arango v. State, 467 So.* 2d 692, 694 (Fla.), *vacated,* 474 U.S. 806 (1985), *adhered to,* 497 *So. 2d* 1161 (Fla. 1986). Included among the situations covered by this strict standard of review are those which involve the false or misleading interpretation and explanation of evidence. *Miller v. Pace,* 386 U.S. 1 (1967).

Although the above-stated rule applies when the prosecution should have known of the false evidence, Dr. Floro's testimony involves a case where the prosecution necessarily knew of its falsity. Assuming, *arguendo,* that it might not have known **of** its falsity before the motion to suppress, Dr. Willey's testimony, Stevens' contentions **and,** most importantly, Dr. Floro's obviously perjurious testimony put it on notice of the falsity of its evidence. Only conscious avoidance of the truth could have allowed the prosecution to be unaware of the falsity of Dr. Floro's testimony concerning whether Tolin was alive when the vaginal injury was inflicted.

There **is** no doubt that Dr. Floro's false testimony played a material role in the prosecution's arguments for, and Judge Weatherby's actual finding of, the heinous, atrocious, or cruel aggravating circumstance.[93] The prosecutor repeatedly relied upon this evidence in his closing argument (T 588,596,597-98, 600). Judge Weatherby spent one full paragraph (of six paragraphs summarizing the trial testimony) discussing this aspect of Dr. Floro's testimony (R 304). He also heavily relied upon the false evidence --- characterizing the injury **as** "torture" --- in his finding of the heinous, atrocious, or cruel aggravating circumstance (R 305).[94]

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[93]**If** Tolin had not been alive, or had been unconscious, the heinous, atrocious, or cruel aggravating circumstance would not be applicable. See *Cochran v. State,* 547 **So. 2d** 928, **931** (Fla. **1989);** ***Jackson v. State,*** **451 So. 2d 458, 463** (Fla. **1984).**

[94]We are aware that this Court considered and rejected this basic claim --- albeit on a fundamentally different record --- **in *Engfe v. Dugger, supra,*** 576 ***So.*** 2d at 699. This Court apparently rejected Engle's similar claim, either because there was not sufficient evidence that Dr. Floro's testimony concerning the vaginal injury was false, or because there was not sufficient evidence that the prosecution knew, or should have known, that it was false.

A review of the parties' briefs in ***Engle*** shows **that** this Court was presented with **a** far weaker claim than the one we make here. None of the evidence developed at the Stevens suppression hearing **was** known to this Court. Moreover, the record upon which ***Engle*** was decided has now been disavowed by the State **as** being inaccurate. In addition, the testimony presented at the suppression hearing in this matter significantly alters the facts and thus the claim. When this Court decided ***Engfe*** it did not have the conclusive evidence we have now presented that Dr. Floro has a total disregard for the truth. This Court had no way of knowing of Dr. Floro's totally incredible testimony about the "four cc's." Moreover, this Court did not have

4. Conclusion

For the foregoing reasons, this Court should find that the heinous, atrocious, or cruel aggravating circumstance was found by Judge Weatherby in significant reliance on Dr. Floro's false testimony. This Court therefore should find that that aggravating circumstance was not proven with constitutional evidence and should strike it. That aggravating circumstance having been stricken, this Court should conclude that a life sentence is mandated by the *Tedder* standard.

D. THE STATEMENTS MADE BY ENGLE, WHO COULD NOT BE CROSS-EXAMINED, VIOLATED THE *BRUTON* RULE AND SHOULD HAVE BEEN SUPPRESSED

Stevens sought the suppression of five segments of the trial testimony which consisted of four different witnesses recounting what Engle had told them, directly or indirectly implicating Stevens in the crime (R 96-97). The most damaging of Engle's statements was elicited by the prosecution in its final question to Hamilton on direct examination. Hamilton stated (TT 577-78):

> I [Hamilton] asked him [Engle] why they did it and he said that they took her out of the store to get her away from a phone, they took her out into the country and Rufus went crazy and started saying she's going to identify us and I asked him, I said, man, was it worth killing a little gal over a lousy $50 robbery and he said no, it wasn't.

The admission of Engle's statements was in violation of Stevens' rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§9

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any knowledge of the persuasive evidence presented by Dr. Willey. And, critically, the record in *Engle* did not establish --- even if Dr. Floro's testimony was false --- that the prosecution <u>knew</u> that it was false. The State's disavowal of the accuracy of the Stevens and Engle trial transcripts, the vastly-supplemented record developed at the suppression hearing and the certainty concerning the prosecution's knowledge make for a substantially different and infinitely more compelling claim than this Court considered in *Engle*. We submit, therefore, that *Engle* should present no impediment to the granting of relief on this point.

and 16(a) of the Florida Constitution. *See Bruton v. United States, supra,* **391** U.S. 123 (confrontation clause violated by admission into evidence of non-testifying co-defendant's statements implicating defendant in the commission of the crime charged); ***Nelson v. State***, 490 *So.* 2d 32, 34 (Fla. 1986); ***Hall*** v. ***State,*** 381 *So.* 2d **683,** 687-89 (Fla. 1979). This Court has specifically applied the ***Bruton*** rule to sentencing proceedings. *Engle v. State, supra,* 438 *So.* 2d at **813-14;** see also, ***Rhodes*** v. ***State,*** **547** *So.* 2d 1201, 1204-05 (Fla. 1989). The admission of Engle's statements also violated the specific language of §921.141(1), Fla. Stat. (1985), which forbids admission of hearsay statements which a defendant does not have a fair opportunity to rebut.

The prosecution did not dispute that the trial evidence concerning Engle's statements violated the ***Bruton*** rule. Rather, its sole argument was that Stevens' trial counsel --- whom this Court found to be ineffective for his failure to investigate and present mitigating evidence at the original sentencing proceeding and for his incredible failure to make any argument whatsoever to Judge Santora in favor of a life sentence[95] --- had made a tactical decision not to object to the constitutionally-inadmissibleevidence. The State contended that that tactical decision still bound Stevens (T **42-43,** 51-52). Judge Weatherby accepted the prosecution argument and refused to suppress the indisputably unconstitutional evidence (R 224-25).

Despite the fact that Judge Weatherby was persuaded by the prosecution's argument, it **is** analytically absurd. This Court ordered **a** new sentencing proceeding before a new judge. ***552 So.*** 2d **at** 1088. Either party could present whatever relevant and constitutional evidence it desired to Judge Weatherby who had never heard any evidence concerning this matter. For reasons of convenience, the prosecution decided to submit the trial testimony, as set forth in the transcript, as almost its entire case. Stevens consented, subject to moving to suppress the portions of the trial testimony which

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[95] ***Stevens*** v. ***State, supra,*** 552 **So. 2d** at 1085-88.

were in violation of the Federal and State Constitutions. Stevens' position conformed with §921.141(1), which prohibits the introduction of constitutionally-violative evidence at capital sentencing proceedings. There is no exception in §921.141(1) for introduction of unconstitutional evidence merely because it had been introduced in a prior proceeding and there is no basis for reading such an exception into the constitutional safeguards of the statute.

The State's argument lacks not only logic but also fairness in the circumstances of this case. The record shows that Stevens' trial counsel did not make an affirmative tactical choice to introduce Engle's statements into evidence; rather, he simply failed to object to those statements which the State improperly offered in evidence. This was counsel's alleged tactical choice.[96] But, as is obvious, it was the State which was making the real tactical choice by introducing the unconstitutional and prejudicial evidence of Engle's statements. At most, Stevens' attorney acquiesced in the introduction of the unconstitutional evidence.[97]

Engle's statements indisputably violated the *Bruton* rule and were admitted into evidence in violation of Stevens' federal and state constitutional rights. Stevens' sentence therefore should be vacated and a life sentence imposed as required by the *Tedder* standard.

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[96]We say "alleged" because we argued vigorously in Stevens' post-conviction appeal that trial counsel had fabricated the tactical reasons for this and most of his other failures to competently represent Stevens. We were unable, however, to persuade this Court of our position on this point. See *Stevens v. State, supra, 552* So. 2d at 1084.

[97]The prosecution's argument was also unfair because it refused to be bound by & prior tactical choices concerning the presentation of evidence. The State recalled Hamilton to testify at the sentencing hearing before Judge Weatherby concerning evidence which the trial prosecutors allegedly made a tactical decision not to use (see T 471-72). Despite its insistence that Stevens should be bound by his counsel's failure at trial to object to unconstitutional evidence (an alleged tactical choice), the prosecution refused to be bound by its claimed tactical choice at trial not to elicit certain evidence from Hamilton.

E. A NEW RESENTENCING HEARING IS REQUIRED BECAUSE JUDGE WEATHERBY FAILED TO CONSIDER ALL OF THE EVIDENCE SUBMITTED IN CONNECTION WITH THE MOTIONS TO SUPPRESS

Judge Weatherby admitted to the prosecutor and to defense counsel that he had decided Stevens' motions to suppress without considering much **of** the transcript evidence submitted to him. Stevens' attorney filed an affidavit documenting Judge Weatherby's statements (R 316-17). Stevens moved to have Judge Weatherby specify exactly what portions of the trial **and** 3.850 transcripts he had read (and which of the eight defense exhibits at the hearing he had considered), to have a new resentencing hearing, to vacate the order denying the motions to suppress and to reconsider those motions after a review **of** all the evidence proffered in connection with those motions (R **3**11-17). Neither Judge Weatherby nor the prosecutor questioned the accuracy of defense counsel's affidavit. Judge Weatherby, however, did not provide the requested information. Rather, he simply summarily denied the motion (R 328).

Judge Weatherby's failure to consider all the evidence submitted to him in connection with the hearings denied Stevens his federal and state constitutional rights to a reliable sentencing proceeding, to a full and fair hearing of his claims and to due process of law. Amends. VIII, XIV, **U.S.** Const.; Article I, §§9, 17, Fla. Const. The sentence and Judge Weatherby's order denying Stevens' motions to suppress should be vacated, this matter should be remanded for *de novo* consideration of Stevens' motions to suppress and a new sentencing proceeding.

POINT FIVE

THE TRIAL PROSECUTOR'S MISCONDUCT --- INCLUDING KNOWINGLY PRESENTING FALSE TESTIMONY, SUPPRESSING FAVORABLE EVIDENCE, DELIBERATELY VIOLATING EVIDENTIARY RULES AND GIVING UNSWORN TESTIMONY --- DEPRIVED STEVENS OF A FAIR SENTENCING PROCEEDING

The prosecutor, Assistant State Attorney George Z. Bateh, engaged in numerous

instances of misconduct which singly and cumulatively rendered the resentencing process so unfair as to deny Stevens due process of law. Amend. XIV, **U.S.** Const.; Art. I, §9, Fla. Const. Unfortunately, despite his 18 years of experience in the State Attorney's office (see T 577), he showed himself to be singularly unaware of his due-process obligations **and** his duty to **seek a** just result. *See United States v. **Berger,*** 295 **U.S. 78, 88** (1935); ***Bertolotti** v. State,* **476 *So.*** 2d **130, 133** (Fla. 1985).

Among the serious instances of prosecutorial misconduct in this resentencing proceeding was the knowing presentation of false testimony by two witnesses, Dr. Floro and Detective Parmenter. **We** have already discussed the falsity and materiality of **Dr.** Floro's testimony at length and we here incorporate by reference that discussion at pp. 80-89, ***supra.*** Dr. Floro's testimony about the alleged mistranscriptions in the Stevens and Engle trial transcripts was patently incredible.[98] Bateh had to know that the mistranscription testimony --- and much more **of** Dr. Floro's testimony --- was objectively false. Even if by some farfetched theory, it is claimed that Bateh did not have actual knowledge of the falsity of the testimony, he should have known that it was false. Under the case law, that is all that need be shown. ***See, e.g., Antone v. State,*** *supra,* 382 So. 2d at 1215.

With respect to Parmenter, we do not assert that Bateh necessarily had actual knowledge of the falsity of the detective's testimony about Exhibit **32,**[99] the truncated *Miranda* rights/waiver form, but he certainly should have known that Parmenter was perjuring himself. The State Attorney's office had prosecuted other cases in which

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[98]Moreover, Dr. Floro essentially admitted during his cross-examination at the suppression hearing that he was fabricating testimony. *E.g.*, "It's not in the report, but you [defense counsel] **asked** me how big, **so** I have to give you some numbers" (T **247);** despite being **an expert** giving opinions, he stated that he tries always to give "firm answers" to all questions (T 281-82).

[99]We incorporate by reference our above discussions of Parmenter's testimony at pp. 59-61, **78-79, *supra.*** Its materiality **is** obvious because, without Stevens' statements, there likely **would** not have been a conviction, much **less** a death sentence.

Parmenter had used Standard Rights Forms with the waiver section removed (see **R** 137-**38)** *so* it had actual notice of Parmenter's practices. **A** prosecutor is **deemed** to have the knowledge possessed by another prosecutor in his own office. See *Giglio* **v.** ***United States, supra,*** 405 **U.S.** at 154.

Bateh's cavalier (or worse) attitude about false testimony is unambiguously shown by his refusal to correct objectively **false** testimony, even when called on to **do** so by **defense** counsel. **At** the suppression hearing, Dr. **Floro** stated, for the first time, that he had concluded that the vaginal injury was caused when Tolin was alive, not only because of the amount of blood he found, but also because of bruising on the labia. When asked whether he had relied at Stevens' and Engle's trials upon any factor other than the amount of blood found, Dr. Floro said that he had (T 276). In fact, he had <u>not</u> (see TT 537-38, DSHE4 370). When asked to stipulate that Dr. Floro had not given such testimony, Bateh refused despite the fact that he had to have known that Dr. Floro's suppression hearing testimony was false, Likewise, when Dr. Floro falsely testified that **he** had been deposed before the Stevens and Engle trials (T 241), Bateh not only refused defense counsel's requests that he fulfill his due-process obligation to correct that false testimony (T 298-300), but went so far as to himself state falsely (T 298):[100] "The record establishes that he [Dr. Floro] was [deposed]."[101]

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[100]Unfortunately, Bateh's false representation on this occasion was not an isolated incident. See, *e.g.*, T 361-75, when defense counsel having just pointed out in his closing argument that the State had failed to present evidence to meet its burden of proof on an issue being considered at the suppression hearing, Bateh interrupted and stated that there had been an "understanding" that additional transcripts of prior testimony (which would fill in the gap in the State's proof at the suppression hearing) were to be considered part of the record. There was no such understanding (T *362-63, 366-67, 368-69,* 373-75), but that little detail did nut stop Bateh from asserting what the exigencies of the moment demanded.

[101]In 1979 in Duval County depositions were filed with the court after they were transcribed. The various depositions taken in this case, which do not include one **of** Dr. Floro, are on file. **Needless** to say, Bateh never produced the deposition of Dr. **Floro** or any evidence that one was taken.

A prosecutor's knowing use of false testimony --- whether in his case in chief or in impeachment evidence brought out by the defendant on cross-examination --- and **refusal** to correct that testimony when **asked** to do so violates a defendant's due-process rights. ***See, e.g., Napue v. Illinois*, 360 U.S. 264** (1959); ***Alcorta* v.** *Texas,* **355 U.S. 28 (1957);** ***Porterfield v. State,* 442 *So.*** 2d 1062, 1063 (Fla. 1st **DCA** 1983). Indeed, a prosecutor has an affirmative duty to <u>voluntarily</u> correct false testimony.

Not only did Bateh present **false** evidence, but he **and** his office suppressed evidence which would have been quite helpful to Stevens at his recent motion to suppress. When Hamilton was called to testify at the resentencing hearing, he revealed for the first time that **he** had **been** arrested and charged with possession of a concealed firearm and possession of marijuana just before he implicated Stevens and Engle in Tolin's murder. The charges against Hamilton were dropped the **next** morning (T 484-87).

Had Stevens had the information about Hamilton's "deal" --- which resulted in the dropping of criminal charges --- he could have used it to show **a** further motive for Hamilton to provide false information to extricate himself from his legal problems. Moreover, the facts of Hamilton's arrest would have been used to severely impeach Parmenter, who has on a number of occasions testified completely inconsistently with these newly-revealed facts about the charges against Hamilton. Revelation of the "deal" Hamilton received would have made it reasonably probable that Stevens' statements would have **been** suppressed. Cf. *Porterfield v.* ***State,* 472 So. 2d** 882, 885 (Fla. 1st **DCA** 1985).

Bateh's failure to adhere to his obligations under *Brady* ***v.*** *Maryland*, **373 U.S. 83** (1963), and its progeny, **was** a matter of his routine. In **a** written *Brady* demand made one month before the suppression hearing, Stevens asked for information concerning how the truncated Standard Rights Form signed by Stevens had lost the

waiver portion **of** that document (R 12**1-22).** Bateh disingenuously responded: "The State Attorney has no additional information that has not previously been disclosed to the Defendant" (R 127). Defense counsel replied that he was unaware of any prior disclosures on that topic and that, if there were any, they should be brought to his attention (R 133). The record thereafter is silent. Then, after the suppression hearing, counsel learned that Parmenter had made it a practice to remove the waiver portion of the Standard Rights Form and had **lied** when he said he had no idea how Stevens' **rights** form had been truncated **(see pp.** 60-61, ***supra).*** Thus, despite an explicit demand for information which was in the possession of the State Attorney's office, Stevens' counsel had to fortuitously discover at the eleventh hour what the prosecution already knew but unconstitutionally refused to disclose.[102]

Bateh also deliberately violated the rules of evidence in cross-examining witnesses whose resentencing hearing testimony was taken in Lexington, Kentucky (so as to avoid the great expenditure of time **and** resources it would have required to have those nine witnesses travel to Jacksonville). Bateh **asked** questions of at least five of Stevens' witnesses (R 465-66, 503-04, 527, 619-21, 625, **638-39)** concerning whether they had **prior** criminal records, which questions he knew, from his 18 years as an assistant state attorney, were clearly in violation of §90.610(1), Fla. Stat. **(1979). As** defense counsel later explained, he was unaware at the time of the proceedings in Kentucky of the strict limits on impeachment imposed by §90.610(1) **and,** because of his ignorance, he did not then object. Nonetheless, counsel **stated** that it had been wrong for Bateh "as a

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[102]**Such a** denial of knowledge about *Brady* information **is** Bateh's consistent first response. In the same written ***Brady*** demand, Stevens **asked** for a specific police report believed to contain information favorable to **his** position on the motion to suppress (R **122).** Bateh responded: "The **State** is unaware of the existence of and has no knowledge of any police report concerning this matter" (R **127).** Stevens' counsel **was** forced to reply with numerous record references from the post-conviction proceeding <u>in which the police report was specifically referred to as being in the possession of the State Attorney's office</u> (R **133).**

prosecutor of 18 years' standing" to ask those questions when he knew they violated §90.610(1) (T **577). ** Bateh's response **speaks volumes** about his total lack of concern for fair and just proceedings (T 577):

> I would emphasize that questions can be **asked,** and they are proper unless they **are** objected to. It's not my responsibility to educate defense counsel as to **Florida** law. **He** is the one that assumed representation in this case. He is the one that's assumed to know what Florida law is .... (Emphasis added.)

Bateh's candid admission that he would do whatever he could get **away** with suggests a disturbing lack of sensitivity for the appropriate and proper use of his power as a prosecutor.[103]

Bateh also improperly gave unsworn (and inaccurate) testimony which he used to try to discredit Stevens' son Leonard (R 575-77). He then compounded his original improper behavior by gratuitously, during his cross-examination of another witness, trying to smear Leonard with his (Bateh's) prior inaccurate unsworn testimony (R 608). He further compounded his totally unjustified attempt to become an unsworn witness by twice interrupting defense counsel's closing argument in support **of a** life sentence to again give unsworn **(and** further inaccurate) testimony on this subject (T 650, 653-54). Such unsworn testimony and persistent efforts to gratuitously and falsely malign a witness is totally inconsistent with the constitutional restraints on prosecutorial behavior and violated Stevens' right to confront the witnesses against him. ***See*** *Nowitzke v. State,* **572**

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[103]**Bateh** further exhibited his disturbing insensitivity to the appropriate exercise of his prosecutorial powers by discriminating on the basis of race and socio-economic class in the manner in which he **asked** his improper questions about Stevens' witnesses' criminal records, Compare the apologetic questioning of Stevens' most economically successful witness at **R 625** with the inquiry **as** to date **of** birth for Stevens' only black witness at R 619. Such discriminatory treatment is a clear due-process violation. Cf. ***Batson v. Kentucky,*** **476 U.S.** 79 **(1986)** (finding racially-discriminatory peremptory jury challenges by prosecutors to he constitutionally impermissible); ***United States v. Socony-Vacuum Oil Co.,*** **310** U.S. 150, **237-40** (1940) (prosecutorial appeals to class prejudice condemned).

So. 2d **1346, 1352** (Fla. 1990); Amend. VI, XIV, **U.S.** Const.; **Art.** I, 559, 16(a), **Fla.** Const.

The prosecutor's misconduct, singly and cumulatively,[104] apparently so swayed Judge Weatherby that he ignored the jury's recommendation of life and imposed a sentence of death. Stevens' state **and federal** rights to due process require that his sentence be vacated and that this matter be remanded for a resentencing proceeding purged of prosecutorial improprieties,

VI. CONCLUSION

For the reasons set forth in Points One and Two, the sentence of death should be vacated and the case remanded to the Circuit Court with directions **to** impose a sentence of **life** imprisonment without eligibility for parole for **25** years.

For the reasons set forth in Point Three, all or some of the aggravating circumstances found by the Circuit Court should be stricken, the sentence of death should be vacated, this Court should determine that --- with the striking of one or more of the aggravating circumstances found by the Circuit Court --- a sentence of life is mandated by the *Tedder* standard, and the case should be remanded to the Circuit Court with directions to impose a life sentence.

For the reasons **set** forth in Point Four (except for **Parts** B.6. and E. of that point), the challenged evidence presented by the prosecution should be suppressed, the sentence **of** death should be vacated, this Court should determine that --- with the exclusion of the unconstitutionally-admitted evidence relied on **by** the Circuit Court --- a sentence of life is mandated by the *Tedder* standard, and the case should be remanded to the Circuit Court with directions to impose **a** life sentence.

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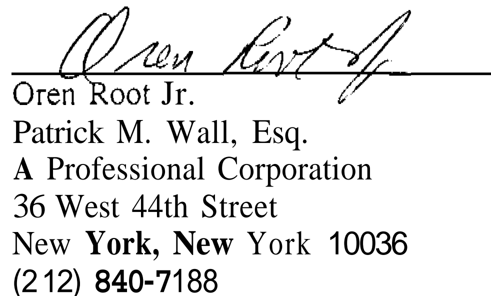
[104] See *Nowitzke v. State*, *supra*, **572 So. 2d at** 1350 (cumulative effect of various prosecutorial improprieties required **new** trial).

For the reasons set forth in Point Four B.6. **and** E., the sentence of death should be vacated and the **case** should be remanded to the Circuit Court for **a** new hearing on Stevens' motions to suppress and for a **new** resentencing proceeding.[105]

For the reasons set forth in Point Five, the sentence of death should be vacated **and** the case should be remanded to the Circuit Court for a new resentencing proceeding.

Respectfully submitted,



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[105]The relief sought with respect to Point Four **B.6.** and E. and Point Five should be **granted** only if this Court determines that upon the present state of the record Stevens is not entitled to **a** sentence of **life** imprisonment under the *Tedder* standard. To do otherwise would be to violate Stevens' constitutional right against double jeopardy. See ***Wright* v. *State,*** *supra,* 586 **So.** 2d **at** 1031-32.

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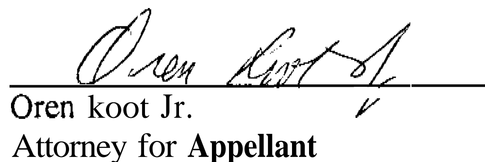
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing brief have been furnished by United States mail to Carolyn M. Snurkowski, **Esq.,** Office of the Attorney General, The **Capitol,** Tallahassee, FL 32399-1050, and to George Z. Bateh, **Esq.,** Office of the **State** Attorney, 600 Duval County Courthouse, Jacksonville, FL 32202, this 16th day of January, 1992.



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