SUPREME COURT OF FLORIDA

MICHAEL G. LOVETTE,

Appellant,

v.

STATE OF FLORIDA

Appellee.

CASE NO. 78,202

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA (Criminal Division)

Clifford H. Barnes, Esquire
Florida Bar No. 0329681
The Historic Sunrise Theater
117 South Second Street
Suite 202
Fort Pierce, Florida 34950
(407) 466-8400
(407) 466-6321 (FAX)
Counsel for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

FLORIDA RULES OF CRIMINAL PROCEDURE

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court. He will be referred to as Appellant or by name in this Brief.

The Record on Appeal is consecutively numbered beginning on Page 1 with the opening of the Trial. The sentencing proceedings by the trial judge are prepared separately, however, and are included in the second of two volumes entitled "Pretrial Conference, Motions to Suppress and Sentencing " and "Motion to Suppress, Motion in Limine and Sentencing" respectively. All references to the trial judge's sentencing hearing will be by the symbol (S) followed by the appropriate page number in parentheses. The rest of the record will be referred to by the symbol (R). Although the record was supplemented with an additional Motion to Suppress, it will not be referred to.

STATEMENT OF THE CASE AND FACTS

On May 10, 1989, Appellant and his co-defendant, Thomas Wyatt, were indicted by an Indian River County Grand Jury on fifteen (15) charges (R 1613 - 1619). Included were four (4) counts of First Degree Murder. The alleged victims were Frances Edwards, William Edwards, Matthew Bornoosh, and Cathy Nydegger (R 1613-1614). The remaining counts charged Sexual Battery of Ms. Edwards; kidnapping of William Edwards, Frances Edwards and Bornoosh; Robbery with a Firearm of money from Domino's Pizza and a Domino's Pizza shirt from Mr. Bornoosh; Grand Theft of the money, an automobile, and a firearm; Arson of the same automobile, and Possession of a Firearm by a Convicted Felon (R 1614 - 1618).

Count IV, the Nydegger murder, and Count XIV, the Possession of Firearm charge, were subsequently severed (R 1881, 1884). Also, Appellant and his co-defendant Wyatt were granted separate trials (R 1895). On Appellant's motion, the trial court granted a change of venue to Pinellas County (R 1934 - 1935).

At trial, the State introduced a model of the Domino's Pizza store in Vero Beach, Florida, depicting the store as it was in the early morning hours of May 18, 1988 (R 379, 382 - 384). Robert Clark, an ex-employee, testified that he was in the store at 10:50 p.m. on May 17 (R 395). Since the door was locked, a lady let him in (R 398). Clark identified pictures of the victims as the persons he saw working that night, and testified that when he left "shortly after eleven", nothing was suspicious (R 400 - 403).

Robin Christy, who owned a competing pizza store and was a former police officer, testified that she and a friend drove by about 11:45 p.m. and became suspicious because the lights were out before the usual closing time of 1:00 a.m. (407 - 411) She drove into the parking lot of the store and observed a "fancy" red and white car and two cars with Domino's signs (R 412 - 413). She was able to see a back light on, but could not see anyone inside, including in the front part of the store (R 414). Although she testified she could have seen anyone in the front area, she clarified on cross examination that she meant she could have seen them if they were standing (R 414, 423). Lisa Powell, who was with Christy, testified that she did not see anyone in the front of the store despite adequate lighting, but also admitted that beneath the 2 1/2 - 3 foot counter, one's view would be blocked (433 - 437).

Daniel Lawing, a customer of Domino's testified that he ordered a pizza about 11:00 p.m. (R 440). When the pizza didn't arrive within the thirty minute guarantee and he was unable to get an answer by phone, he drove to the store (R 441 - 442). He arrived at midnight (R 442). After finding the door unlocked and the store darkened except for a light in the back, he reported his findings to the police (442 - 446).

The first officer on the scene, Lt. D'Agosto, testified that when he arrived the front room was dark except for a hanging lighted sign four feet above the counter, and the back room was "dimly lit" by two light sources (R 451 - 454). Sgt. Pete Huber

arrived just after D'Agosto and took photos of the three victims as they were originally discovered (R 472 - 473). One, Exhibit 9, was taken with the existing light at the time (R 473). Photos taken later depicted the office area with a cash drawer on the desk, money pouches and wrappers on the floor, open desk drawers, and blood droplets in the drawers and on the floor (R 511 - 512). There was a bloody shoe print on the office floor which matched Mr. Edwards' shoe (R 513). Also admitted was a photo of Mr. Bornoosh's ring in the trash basket in the bathroom and Mrs. Edwards' clothes and shoes behind the bathroom door (R 514 - 515).

It was determined that Mr. Bornoosh's shirt was missing from the scene, but six hundred and thirty-five dollars in cash was found in an unlocked office drawer, and forty dollars in cash was found in a money bag on top of the office desk (R 536 - 543). Store manager Rick Lindsay testified that Mr. Edwards, the assistant manager, was trained to give up the money during a robbery, and had a key and combination to the fifteen minute time-delay safe under the front counter (R 595 - 605). He further stated that based on the receipts found in the store, Mr. Bornoosh would have been ready to deliver Lawing's pizza about 11:15, (R 632). Mr. Lindsay said that the appearance of the office indicated that Mr. Edwards was making up twenty dollar bags for the next day's drivers. Finally, Lindsay testified that one thousand one hundred and fifty-three dollars had been stolen from the safe (R 634).

The injuries to the victims were described by Dr. Hobin, the Medical Examiner, (R 639). Mr. Edwards had received a gunshot to the upper chest and a gunshot to the front of the head, both from close or contact range (R 646 - 649). Hobin agreed that a "reasonable possibility" was that Mr. Edwards was kneeling when he was shot (R 659 - 660). The head wound would have immediately rendered Mr. Edwards unconscious according to Hobin, but the chest wound would not necessarily have done so (R 705, 649).

Mrs. Edwards was shot once to the back of the head from unknown range which would have immediately rendered her unconscious (R 662 - 664). Hobin again agreed that it was a "reasonable possibility" that she was kneeling when she was shot (R 665). Hobin also identified bumping and scraping on Mrs. Edwards' knee and shin which was not more that two hours old before her death (R 666).

Mr. Bornoosh received a gunshot to his left ear from contact range and a "glancing kind of injury" to the top of his head from another shot (R 672 -676). Either injury would have immediately rendered Bornoosh totally disabled (R 707).

Dr. Hobin testified that the blood in the office, if Mr. Edwards' was not consistent with having been produced by the gunshot (R 682). He agreed that a prior head injury could have been concealed by the gunshot wound (R 682). Later, the blood in the office was eliminated as having come from Wyatt, Lovette, Mrs. Edwards, or Bornoosh. Mr. Edwards could not be eliminated as the donor (R 971 - 972).

Dr. Hobin was unable to determine as to the order of the injuries to the victims, or proximity in time to one another (R 706 - 708).

During the early morning of May 18th, authorities were alerted to a burned 1983 Cadillac Seville parked in a remote area of Highway 60 (R 714 - 731). Later the same morning Mr. Bornoosh's Domino's shirt was found on a stretch of road between Domino's and the burned car (R 753 - 755). Later it was determined that the shirt contained hair matching Appellant and Bornoosh (R 990 - 991). It was determined that the car was stolen on May 16 in Jacksonville, and that the owner had left a .38 handgun in the car (R 758 - 774).

At a motel forty miles west of Vero Beach, in Yeehaw Junction, it was discovered that occupants in a red and white Cadillac had checked in on May 16th or 17th (R 788 - 790). The registrant stated there were two in his party, and signed the name "Billy Mathis". He wrote the address of "1012 Boulevard, Martinville, Virginia." (R 803). Appellant's fingerprint was identified on the registration card (R 843 - 845). On a phone book removed from the motel room of "Billy Mathis," police identified the print of Tommy Wyatt (R 838 - 843).

Gerald Wilkes, an FBI firearms expert, testified that the bullets recovered from the Domino's store were all consistent with having been fired from the same .38 caliber firearm (R 861 - 872). Phone records received from Wyatt's and Appellant's relatives showed collect calls to them on May 17 from the Yeehaw Junction

motel and from a Vero Beach bar, all before 9 p.m. (R 879 - 885). A witness who was at the bar identified appellant as the older of the two men who had a conversation with him on the night of May 17th (R 887 - 890). The witness testified that Appellant told him they were on vacation from North Carolina and that he was "showing the kid the ropes" (R 891). Appellant told the witness he was driving a Seville (R 891). The witness also remembered that one of the men mentioned that his sister had given birth recently (R 893). It was proven that Appellant's sister had had a baby on May 13 (R 896).

A truck driver who traveled Highway 60 contacted authorities and picked Appellant and Wyatt out of a photo lineup (R 900 - 908).

Appellant's handwriting was identified on a May 18, Motel registration card in Brandon which contained the name "Billy Mathis" and address of "1012 Boulevard, Columbia, South Carolina" (R 902 - 956).

Dan Nippes, the chief criminalist at the Indian River Crime Lab, testified that he found seminal fluid in the sex crimes kit performed on Mrs. Edwards, which was later identified by a DNA expert as coming from Wyatt (R 980, 1046). Nippes states that there was no evidence of fluid from Appellant, and that he would have expected to find proof of same if Appellant had had sexual intercourse with her (R 999 - 1000). Nippes further testified that he found no blood, seminal fluid, or gunpowder residue on Bornoosh's shirt (R 1000 - 1001). He predicted that if Appellant had fired a gun into the bathroom while wearing that shirt, he

could have found gunpowder residue ricocheted from the tile walls (R 1002).

On July 13, 1988, Boyd Lovette rented a motel room in Statesville, North Carolina. Recognizing the name, the clerk called police (R 1081 - 1082). Appellant surrendered to authorities after Boyd Lovette called his room and urged him to do so (R 1081 - 1089).

A North Carolina officer, Mr. Foster, testified that after an FBI agent read Appellant his Miranda warnings, Appellant agreed to an interview (R 1092 - 1000). After recounting his and Wyatt's trip to Florida and theft of the car in Jacksonville, Appellant advised that the two rented a motel room near Vero Beach (R 1103 - 1104). They drank at a bar in Vero Beach and then headed back to the motel (R 1104). Appellant advised that on the way back, the two decided to stop at the Domino's "to rob the place, we needed money" (R 1104 - 1105), According to Appellant the store was almost closed: "... we started to return to the car and the man opened the door and told us to come on in ... We both pulled our guns and told them we wanted money..." (R 1105). Appellant claimed that after being advised of the safe's time delay, he kept the white male near the safe and Wyatt took the white female and "Puerto Rican" male into the back room out of his sight (R 1105). He and the white male remained near the safe until it opened (R 1105). Prior to this, Appellant could not see or hear anything in the back expect for some moaning sounds (R 1106). After obtaining the money he called to Wyatt, who came to the front and took the

white male to the back in order to "lock all of them in the closet" (R 1105 - 1106). Appellant said that he tried to see from the front where Wyatt was putting the people but that they were out of his line of sight (R 1106).

As soon as Wyatt got to the back of the store with the white male and disappeared, Appellant heard 3 - 4 quick pistol shots (R 1107). Wyatt came running out and the two men fled in the Cadillac (R 1107). Appellant asked Wyatt if he had shot anyone and Wyatt responded "yes." At that point in the interview, Appellant stated "I never had no idea he was going to shoot nobody." (R 1107). According to Appellant, he and Wyatt were drunk during the incident (R 1108 - 1109).

At Wyatt's request, Appellant threw the murder weapon out of the car window (R 1111). On their way to Tampa, the car overheated and they burned it. They then were picked up by a trucker and were able to make their way to another motel (R 1112 -1113).

Captain Blanton then testified that he and Captain Dubose arrived in Statesville while Appellant was being interviewed by Foster and the FBI agent (R 1119 -1120). Blanton advised him of his Miranda rights and Appellant recounted essentially the same facts he had told Foster, but added that Wyatt had thrown him a Domino's shirt to wear while he waited by the safe (R 1121 - 1131).

Captain Blanton recalled asking Appellant how Mr. Edwards' blood ended up on the office floor, (R 1131). Appellant claimed that Wyatt had hit the manager with a gun (R 1131). Blanton seemed to recall that Appellant stated that this incident happened in the

office while Appellant, Wyatt, and the manager were there together (R 1131 - 1132). Blanton then testified that he showed Appellant photos of the store and that from where Appellant said he was standing at some point in time, he could have seen the bathroom door and inside the bathroom, (a distance of 27 feet), and could have heard sounds in the back (R 1134 - 1136, 1140). Blanton also stated that Appellant later admitted seeing Wyatt put the victims "in the closet" (R 1138). Blanton admitted on cross examination that there were "plenty" of areas in the back that would be out of Appellant's sight from the spot Blanton indicated that Appellant was at the point where he could see the bathroom (R 1139). He also agreed that from the area where the safe was, one could not see into the back of the store (R 1141). Appellant advised Blanton he never saw Mrs. Edwards naked or being raped (R 1139).

Captain Dubose recalled an important part of Appellant's statement quite differently than Blanton. Regarding Wyatt striking Mr. Edwards, Dubose remembered Appellant stating that it occurred "right after the robbery started" (R 1162 - 1163). Appellant never said that Wyatt was in the office (R 1163 - 1164). Appellant did admit going in the office himself after learning of the safe's time delay, and prior to being given a Domino's shirt (R 1159). Dubose also testified that Appellant claimed he asked Wyatt what had happened, and when told, he asked why. Wyatt responded "we were there too long they could identify us" (R 1154). A four page statement written by Dubose and adopted by Appellant was admitted into evidence (R 1158 - 1162).

After a hearing and over Appellant's objection, the trial court allowed the state to present testimony of Dr. Robert Berland, Appellant's court-appointed confidential expert (R 1165 - 1230). Dr. Berland testified that Appellant admitted to him "that he heard the Wife pleading with the codefendant ... he looked back and called the codefendant out to see what was happening ... and saw the manager's wife on the floor without her pants ..." (R 1231). According to Dr. Berland, Appellant at some point "saw the codefendant with the gun aimed and the codefendant fired four shots..." (R 1231 -1232).

Captain Blanton was recalled by the State. He testified that the office was the only area in the store where blood was found other than where the victims were discovered (R 1263). He also recalled that during the end of Appellant's interview, Appellant said he realized he would be charged with robbery and first degree murder (R 1265).

The defense did not present any witnesses in the guilt phase of the trial.

During deliberations, the jury requested a "transcript of the forensic psychologist" (R 1431). The jury was returned to the courtroom whereupon the court reporter reread Dr. Berland's testimony to them (R 1432 - 1433). The jury then expressed a desire to have the testimony "in writing," but settled on hearing it read again (R 1434). No further requests were made by the jury, and they returned verdicts of guilty as charged on each count (R 1434 - 1438).

The penalty phase began with Appellant waiving all statutory mitigating factors other than the "catch-all" provision (R 1450 - 1451).

Early in the penalty phase Captain Blanton testified over defense objection that during the early stages of the investigation "we all agreed... obviously these were not amateurs" (R 1465 - 1466). The State proved that Appellant and Wyatt had escaped from a prison road detail in North Carolina, where Appellant had been incarcerated for burglary and larceny (R 1473, 1487 - 1488).

Over Appellant's objection the State proved that after leaving the road detail, Appellant broke into a house and stole a car and firearm (R 1477 - 1486).

The State also established that after the escape Appellant and Wyatt traveled to Greenville, South Carolina, where on May 14th they robbed a man at gunpoint of his wallet and car and locked him in the trunk (R 1433, 1489 - 1491). The victim was able to free himself when the two abandoned the car 2 - 3 minutes later (R 1491). Appellant received a life sentence for those crimes (R 1494 - 1495).

Finally, the State presented evidence that on May 16th Appellant and Wyatt committed an armed robbery of a Taco Bell in Holly Hill, just outside of Daytona (R 14740. Appellant received a life sentence for this crime as well (R 1496 - 1497).

Appellant called six witnesses in the penalty phase. His Mother, Mrs. Cheek, testified that Appellant was born in Wilkes County, North Carolina, at the foot of the Blue Ridge Mountains (R

1502). He was raised in a house without indoor plumbing (R 1503). His father was abusive to the family, and was an alcoholic (R 1504). One afternoon, when Appellant was six or seven, his father used a shotgun to herd the family into the outhouse (R 1504). He forced them to remain in the outhouse until about three in the morning (R 1504). Mrs. Cheek testified that to Appellant's father the bottle came first ... "He never cared for his family" (R 1504). Appellant's Mother and Father were divorced when he was young, and he lived with his Mother until about the age of 13 or 14 (R 1505). Appellant introduced pictures of himself during these time periods (R 1507 - 1508). Mrs. Cheek stated that she and Appellant had remained close over the years (R 1508). She expressed her love for her son and asked the jury to spare his life (R 1509).

Appellant's younger sister, Donna Blevins, confirmed the abuse and told of other examples of the Father's drinking and violence (R 1512). She also stated that she and Appellant were close and expressed her love for him (R 1513). Blevins stated that, as a child, Appellant made A's and B's in school (R 1513).

Ms. Jane Lovette testified that she was married to Appellant's Uncle, Boyd, and had known Appellant almost all her life (R 1515). She stated that he was "very close" to her children and herself and that "he's like a brother, good friend" (R 1516). She stated that Appellant's execution would be very hard for her family to take, and expressed a plea for his life (R 1517).

Ms. Lovette's 16 year old daughter, April, testified that she and Appellant exchanged letters and that he was "like a brother" to her also (R 1520).

Mr. Willie Evans then testified that he had employed Appellant as a concrete finisher (R 1523). Appellant was "a hard worker" who progressed through his business (R 1523 - 1524). Mr. Evans requested that Appellant be given a life sentence, and expressed his love for him (R 1524).

Finally, Ms. Jane Lovette's mother, Ruth Turner, testified that she first met Appellant when she found him sleeping in a hallway (R 1527). She took him home and he became "part of the family" (R 1527). She stated that she "loved him like one of our own younguns" and asked that his life be spared (R 1527).

Over Appellant's objections, the Court allowed the State to admit his jail photo I.D. card, his photo at the time of his arrest, and a photo found in his cell in North Carolina (R 1548 - 1549).

After argument of counsel, the Court instructed the jury on seven aggravating factors:

1. Crime committed while under sentence of imprisonment;
2. Prior violent felony;
3. Crime committed while engaged in commission of or flight from a robbery, sexual battery, and/or kidnapping;
4. Crime committed to avoid arrest;
5. Crime committed for financial gain;

6. Crime was especially wicked, evil, atrocious or cruel;

7. Crime was cold, calculated, and premeditated (R 1595 - 1597).

The jury voted 7 to 5 for a recommended sentence of death for each of the three murders (R 1603). On June 7, 1991, the trial Court held its sentencing hearing (S 259). Appellant conceded two aggravating factors - prior violent felonies and committed under sentence of imprisonment, but challenged the others. Defense counsel asked the Court to find at least seventeen nonstatutory mitigating factors relating to the facts of the crime and Appellant's life history (S 267 - 272). In his sentencing order for all three murders, the trial Court found only four nonstatutory mitigators opposed to all seven aggravating factors argued by the State (S 279 - 307). The Court made a finding of fact that Appellant neither shot the victims, nor raped Mrs. Edwards (S 285, 287, 294, 296, 297, 303, 305, 306). Appellant was sentenced to death on each of the murder convictions and filed a timely appeal (S 307, R 2364 - 2365).

SUMMARY OF ARGUMENT

Appellant was convicted of three counts of First Degree Murder and several lesser charges arising out of he and a codefendant's robbery of a Domino's Pizza Store. There was no evidence produced to suggest that Appellant killed either of the victims, intended for them to die, or was warned more than a split second ahead of time of the codefendant's intent to kill. Although the trial judge found that the codefendant rather than Appellant actually killed the victims, he followed the jury's 7-5 recommendation and imposed the death penalty for each murder.

In the guilt phase, it was Appellant's defense that the shootings of the three victims were independent acts of the codefendant, and thus were not the consequence of his own felonies. Appellant's defense was severely undermined by three erroneous rulings by the trial court. First, the trial court allowed the prosecutor to improperly seek a tacit commitment from the venire to convict on a hypothetical containing facts from this case. Secondly, the trial court admitted the testimony of Appellant's confidential mental health expert in the State's case in chief, who recited statements made to him by Appellant during his examination. These statements contradicted and were more inculpatory than those given to authorities in the case. (Which had been admitted into evidence earlier.) Finally, the court denied Appellant's requested independent acts instruction for the three murders, despite evidence to support it.

The trial court's admission of Dr. Berland's testimony also severely prejudiced Appellant's defense in the sentencing phase. Not only did it undermine his credibility and character, it provided the only evidence to suggest that his participation in the crimes was greater than he had admitted to authorities. Dr. Berland's testimony was followed by prejudicial evidence in the sentencing phase which neither rebutted Appellant's mitigation evidence, or proved statutory aggravating factors. This evidence was in the form of collateral crimes, disparaging remarks by detectives, and particularly unflattering photos of Appellant. The trial court also erred in instructing on and finding Appellant vicariously liable for several aggravating factors that were based purely on the codefendant's motives, in not merging the "pecuniary gain" factor with the robbery "felony murder" factor, and in failing to consider or find several nonstatutory mitigating factors from Appellant's life history and the crimes themselves.

Appellant's sentences of death are not proportionally warranted. His level of culpability in the crimes did not reach the threshold set forth by the United States Supreme Court to make him eligible for the death penalty as a nontriggerman felony murderer. Even if he were eligible, the closeness of the jury's vote, combined with a weighing of the three aggravating factors properly found against many more mitigating factors which were found or should have been found, renders the death sentences disproportionate under these facts. Finally, it is argued that Florida's death penalty laws are unconstitutional.

I

THE COURT ERRED IN ALLOWING THE STATE TO GIVE FACTS OF THE CASE IN VOIR DIRE AND TACITLY SEEK A COMMITMENT FROM THE JURY TO CONVICT, AND THEN DENYING APPELLANT THE OPPORTUNITY TO DISCUSS THE LAW FROM APPELLANT'S STANDPOINT

Early into the State's first round of voir dire, in response to a juror's question about a factual scenario similar to this case, the prosecutor began to tell the jury specific facts and to mesh them with the law:

> The other issue that you brought up regards a situation that the law refers to as principals, that is, where more than one person commits a crime. And the example you gave is if two people commit a robbery is one responsible for the acts of the other. The answer under the law of principals is yes. Do you all understand that one or more people can be guilty of a crime even if the other person not on trial committed certain parts of that crime?
>
> For example, in this case, to get specific, what the State is going to show you is there were two people that committed these crimes, obviously only one person is on trial here. There was another person besides the Defendant Lovette and his name was Tommy Wyatt. He, the State intends to prove -- (R 92)

Appellant objected to the State giving "facts of the case" and arguing "they equal felony or premeditated murder" and "asking for a commitment ... at this stage" (R 93). The Court overruled the objection, stating that this type of voir dire was proper when predicated with "if" (R 93). The State then continued along the same line (R 93 - 95). At one point the prosecutor explained felony murder thusly:

> ...if two people decided to go and commit a robbery and didn't even talk at all about killing anyone and went to the store and committed the robbery and during the course of the robbery one of the people shot and killed the victim of the robbery, now under felony murder that would be first degree murder on the part of both of them, the person who actually did the shooting and the person who was committing the robbery with him, because under the law the murder occurred or the death occurred during the course of or as a result of the robbery.

The prosecutor repeated this theme in response to another juror's question (R 97). Finally, the prosecutor explained the legislature's reasons for passing the felony murder law (R 97 - 98). Throughout his discussion the prosecutor did not mention that the felony murder law required that the death be a "consequence" of the commission of the felony of felonies (R 72 - 129).

During Appellant's voir dire, the first time counsel attempted to explain the felony murder law and the reason for the word "consequence" in its definition, the Court sustained the State's objection that "that's not a correct statement" (R 171). The Court informed Appellant's counsel "You're talking about argument. I'll be instructing them on that. You can ask them if they'll follow the Court's instructions. We've beat this horse."

The State's explanation and argument of the law, meshed with specific references to the facts of this case and hypothetical identical to this case, was improper. See Renney v. State, 543 So.2d 420 (Fla. 5th DCA 1989); Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981); and Smith v. State, 253 So.2d 465 (Fla. 1st DCA 1971). Although the prosecutor here did not explicitly ask for

a conviction, a tacit commitment was certainly pursued and probably obtained from the jury. This is just as much error as an explicit request, Saulsberry, 398 So.2d at 1018. The error was compounded by the Court's refusal to allow Appellant to explore the law from his theory of the case.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on these errors would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

II
THE COURT ERRED IN ADMITTING APPELLANT'S STATEMENTS TO A MENTAL HEALTH EXPERT IN STATE'S CASE IN CHIEF

On June 22, 1989, pursuant to Appellant's motion, the court appointed Dr. Berland to "confidentially examine" Appellant as to sanity, competence, and possible psychological mitigation; and to "report solely to defense counsel his findings" (R 1658 - 1660). The motion had been made pursuant to F.R.Cr.P. 3.216 (R 1661).

In the guilt phase, the State called Dr. Berland to the stand in its case in chief (R 1165). As demonstrated in the Statement of Case and Facts, his testimony went well beyond the rest of the evidence with regard to Appellant's knowledge of the rape and murders. In his statements to authorities, for example, although Appellant had admitted hearing "moaning" from the back room, he had

not identified who the sounds were from. He had steadfastly denied knowing anything about the rape of Mrs. Edwards, and had consistently claimed that he had not seen the shots fired, only heard them. Finally, he maintained that he spent almost all of the time up front, and had never entered the back room. During Dr. Berland's testimony, the jury learned that Appellant had heard Mrs. Edwards pleading with Wyatt, that he had gone and seen her lying on the floor without pants, and that later he had seen Wyatt shoot the victims. Dr. Berland's testimony, coming as it did at the end of the trial, was extremely harmful. Not only did it provide evidence of greater knowledge on Appellant's part of Wyatt's actions, it also surely opened the door to speculation as to what else Appellant wasn't truthful about.

As previously discussed, the only testimony the jury requested to hear again from the entire trial was Dr. Berland's. This very brief testimony was reread not once but twice at their request.

Prior to Dr. Berland's testimony, the State had carefully laid the groundwork for it to have maximum effect. With Captain Dubose, the last witness to testify before Dr. Berland, the State asked:

> "Did you specifically ask Mr. Lovette if he ever saw Frances Edwards naked ...?" (R 1156)
>
> "Did you specifically ask if he saw the people being killed?" (R 1157)

In its closing argument the State emphasized Appellant's version as told to Dr. Berland, and the discrepancies between that and the version given to law enforcement (R 1305, 1318 -1319).

Before Dr. Berland's testimony, a hearing was held to determine its admissibility (R 1165 - 1230). Appellant objected to Dr. Berland's testimony on the grounds that it constituted violations of the Rules of Discovery, the attorney/client privilege, the Fifth Amendment and the Eighth Amendment (R 1166, 1167, 1169, and 1199).

FIFTH AMENDMENT VIOLATION

Dr. Berland testified at the hearing that it was his understanding and advice to Appellant that he was to be a confidential expert reporting solely to defense counsel:

> A. I just tell them, as I told him the first time I saw him, which was in October of '89, that I am a confidential expert, that everything that he and I talked about and all of my findings would only be reported to his attorney. If he and his attorney decided that my findings helped his case and they called me as a witness, once I was called as a witness the Judge or prosecutor could ask me anything I did in the evaluation, I would have to tell them. If I was not called as a witness no one else could call me and I would not reveal my findings to anyone else but his attorney...
>
> A. I give that warning every time I meet with anyone, unless I meet with them two days in a row. So, I told him in October of '89 and when I saw him again in April of 1990 (R 1208).

Appellant testified at the hearing that "I was under the impression by the psychologist that anything I said to him would be confidential and the only way that it wouldn't be was if my attorneys called him as a witness" (R 1204 - 1205). Appellant further testified that he wouldn't have given the statements that

he did to Dr. Berland if he had known they could be used against him even though Dr. Berland wasn't called as a witness (R 1220).

Dr. Berland's and Appellant's understanding of the law was correct. The introduction of Appellant's statements to Dr. Berland violated Appellant's Fifth Amendment rights. In Parkin v. State, 238 So.2d 817 (Fla. 1970) the Florida Supreme Court held that statements obtained during a defendant's psychiatric exam are to be used only for the purpose of determining mental condition, unless he opens the door in his questioning of the expert to collateral issues, admissions, or guilt. The United States Supreme Court held in Estelle v. Smith, 451 U.S. 454 (1981), that without Miranda warnings having been given, and the Fifth Amendment protections waived, a defendant's statements to a court appointed mental health expert are inadmissable for any purpose. A reading of Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990) is also helpful. In Erickson, as in this case, the defendant moved under F.R.Cr.P. 3.216 for the appointment of a mental health expert, but did not put his sanity or the voluntariness of his confession at issue during the trial. The State, as in this case, nevertheless presented the psychiatrist in its case in chief to testify to factual admissions made during the exam. Although the appeals court found the error harmless the court discussed the Fifth Amendment implications at length and reaffirmed the principles discussed above.

DISCOVERY VIOLATIONS

On March 25, 1991, Appellant listed Dr. Berland in a discovery response with the words "PENALTY PHASE ONLY" beside his name (R 1939).

On May 21, 1991, (on the day of this "Richardson" hearing) Appellant served notice of his intent not to use Dr. Berland in either phase of the trial (R 2231). The State conceded during the hearing that it had not listed Dr. Berland on any answer to discovery (R 1173).

It is also clear from the Discovery responses that Appellant was not given notice of the statements the State had acquired from Dr. Berland (R 1613 - 2426). Although the State alleged that the doctor had already given the notes containing the statements to the defense, Appellant's counsel made it clear that in fact he had not (R 1180 - 1181). The doctor confirmed under oath that he had not provided Appellant's counsel with the statements either verbally or through copies of his notes, until the night before the "Richardson" hearing (R 1208 - 1209). It is clear that the State has a duty in discovery to provide the defendant with a virtually verbatim recitation of his statements and the identity of the person to whom they were made. Martinez v. State, 528 So.2d 1334 (Fla. 1st DCA 1988), Blatch v. State, 495 So.2d 1203 (Fla. 4th DCA 1986), Griffis v. State, 472 So.2d 834 (Fla. 1st DCA 1985).

By Not listing Dr. Berland or supplying Appellant with the substance of Appellant's statements, the State violated the Discovery Rules. As Appellant's counsel indicated during the

"Richardson Hearing", he was thus unable to comport his opening statement and cross examination of the witnesses to the additional facts. This surely eroded his credibility with the jury.

ATTORNEY-CLIENT PRIVILEGE VIOLATION

Appellant submits that the statements elicited from Dr. Berland also violated Appellant's attorney-client privilege. Communications from court-appointed mental health experts assisting the defense fall within the attorney-client privilege. That privilege prevents the use of communications from a defendant to the expert unless a waiver can be found. See Tucker v. State. 484 So.2d 1299 (Fla. 4th DCA 1986), Ursry v. State, 428 So.2d 713 (Fla. 4th DCA 1983) and Pouncy v. State, 353 So.2d 640 (Fla. 3rd DCA 1977). All three were cases in which, unlike the case at bar, the defendants presented insanity defenses. The experts were then called by the State to present the defendant's statements on to rebut the insanity defense (through the use of the doctors' general opinions rather than specific statements from the defendant). The question was whether their counsel had by prior actions waived the attorney-client privilege. (By presenting an insanity defense, those defendants had evidently waived their Fifth Amendment rights discussed above.) The Tucker court found waiver from the fact that the defendant had listed the expert on discovery as a witness he intended to call, had allowed the state to depose the expert, and had not objected to the state's motion to compel. The Pouncy and Ursry courts found there had been no waiver where timely objections were made to the experts' being used or deposed by the state.

In the case at bar, since Dr. Berland was listed for the Penalty Phase only, the State was on notice that Appellant would offer no evidence from him in the guilt phase. The allegations of counsel for the State and Appellant conflicted as to whether the deposition and discovery of Dr. Berland's notes were ultimately over objection of Appellant's counsel or not, although both sides agreed there was an objection initially (R 1167 - 1189). Although Appellant feels that the Fifth Amendment violation lessens the relevance of this issue, it is urged that the Court take this opportunity to rule that the listing of a mental health expert for mitigation purposes does not waive the attorney-client privilege as to the guilt or innocence stage. A person in a capital trial should not have to choose between maintaining the privilege and thereby giving up the right to present mitigation, or incriminating himself so that he can present mitigation if convicted. This Court recently ruled that an accused does not forfeit his Fifth Amendment rights by testifying in a pretrial hearing, Hayes v. State, 581 So.2d 121 (Fla. 1991). Logically, the same rule is needed under these circumstances.

Not only did the introduction of Dr. Berland's testimony violate Appellant's rights against self incrimination, it served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I,

Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

III
THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION ON INDEPENDENT ACTS WITH REGARD TO THE THREE MURDERS

Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to that theory when he so requests. See Bryant v. State, 412 So.2d 347 (Fla. 1982).

In his opening and closing statements Appellant argued that the three murders were a result of Wyatt's actions, not his own (R 376- 368, 1286 - 1287, 1362 - 1372). He also requested an instruction on independent acts with regard to the three murders (R 2232 - 2233, 1239 -1242).

Appellant's arguments and requested instruction were certainly based on sufficient record evidence, as demonstrated by the Statement of Case and Facts. There was no physical evidence directly linking Appellant to the shootings, and his statements all indicated that the shootings were carried out by Wyatt without consultation with the Appellant. There was also no evidence that the two had used lethal force before, or that Appellant had reason to believe Wyatt would do so.

According to Dr. Berland, in the most incriminating of his statements, Appellant "turned around, he saw the codefendant with the gun aimed and the codefendant fired four shots" (R 1231 -1232).

This Court has twice addressed the independent acts issue in first degree murder cases. In Bryant v. State, 412 So.2d 347 (Fla. 1982), the defendant and codefendant burglarized an apartment where they encountered the victim. The defendant was active in tying up the victim and moving the victim to the bedroom, but then left the apartment. The victim was subsequently strangled in the bedroom by the codefendant. This Court ruled on appeal that upon the defendant's request the trial court should have given an independent acts instruction. While recognizing that "the felony murder rule and the law of principles combine to make a felon liable for the acts of his co-felons" this Court held that "this liability is circumscribed by the limitation that the lethal act must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish . . . these must be some causal correction between the homicide and the felony." 412 So.2d at 350. In Parker v. State. 458 So.2d 750 (Fla. 1984), this Court reviewed the facts to decide whether any supported an independent acts instruction. This Court approved the trial court's refusal to give such an instruction. The Parker court found that, although the codefendant actually killed the victim, the defendant had first threatened the codefendant's life if he did not reimburse him for drugs fronted to the victim and had remained while the victim was kidnapped and murdered for his failure to pay the drug debt owed the defendant. The Court reasoned that the motivations of the defendant in Bryant were only pecuniary, and unrelated to the rape and murder in that case; whereas in Parker

the codefendant's motivation for killing was a "natural and foreseeable culmination of the motivations for the original kidnapping" 458 So.2d at 753. The facts in the case at bar, taken in the light most favorable to the defense, are more comparable to the former case. Like that defendant, Appellant's motivations may be viewed as purely pecuniary. There was no evidence indicating any particular design or vendetta against any of the victims. And also as in the Bryant case, the codefendant here evidently committed the murders for reasons completely unrelated to Appellant's motivations, and outside of his immediate presence. The trial court erred in not giving the independent acts instruction.

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

IV
THE COURT ERRED IN GIVING THE FLIGHT INSTRUCTION REQUESTED BY THE STATE

At the State's request and over the objection of Appellant that it was an improper judicial comment on the evidence, the Court gave a flight instruction in this case (R 2215, 1237 - 1238). This Court has since ruled that this type of instruction is improper and in the future should not be used, Fenelon v. State, 17 F.L.W. 113

(Fla. Feb. 1992). Appellant submits that the instruction in a case such as that at bar, where the accused does not deny identity or criminal wrongdoing, is especially harmful. The instruction here could only have been interpreted by the jury as encouragement by the trial court to convict of the main charges rather than lesser included offenses. Although this court found the instruction harmless error in Fenelon, that defendant's theory was that he had killed by accident - thereby giving the flight instruction some relevance.

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

V

THE COURT ERRED BY NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER

As demonstrated in the Statement of Case and Facts, the evidence adduced at trial was insufficient to establish him guilty of premeditated murder of any victim. Appellant denied that he did the shootings, the evidence was consistent with those claims, and the court made this a finding of fact. A conviction can not rest on the theory of his being principal since there was no evidence that he intended to help the shootings occur. Any circumstantial theory of guilt is defeated by his statements, which support the

reasonable hypothesis that Wyatt shot the victims with no prior agreement, consultation, or help with or from Appellant. The Court should have granted Appellant's motion for acquittal as to this prosecution theory Jackson v. State, 575 So.2d 181 (Fla. 1991). Van Polyck v. State, 564 So.2d 1066 (Fla. 1990).

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

VI

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE SEXUAL BATTERY CHARGE

As demonstrated in the Statement of Case and Facts, the evidence adduced at trial was insufficient to establish that Appellant committed the rape of Mrs. Edwards himself, and the court made this factual finding. Therefore, the only way he could be convicted is through the principal theory. There was no direct evidence whatsoever to establish that Appellant knew Mrs. Edwards would be raped, that he intended it to happen, or that he shared in any expected benefit. His statements to Dr. Berland offer evidence that he heard her pleading and saw her lying on the floor at some point without her pants, but no more. Assuming arguendo that these facts are proof that he knew what had happened or was happening, prior knowledge and intent are still not proven as required under

Section 777.011, Florida Statutes (1988). See Howard v. State, 473 So.2d 841 (Fla. 1st DCA 1985). In Howard, the court found intent from that defendant's undressing the victim, his own attempt to rape the victim, and his rape of another victim while his codefendant was raping the first victim. The Court also found evidence that that defendant had prevented the first victim's rescue by the second victim. Despite the State's argument to the contrary, there was no evidence in the case at bar that Appellant's kidnapping of Mr. Edwards was intended to facilitate Mr. Wyatt's rape of Mrs. Edwards. Nor was there evidence that Appellant or Mr. Edwards knew of the rape until after it had occurred. Any circumstantial theory of guilt is defeated by his reasonable hypothesis that this crime was committed solely by Wyatt without Appellant's prior knowledge or intent.

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

VII
THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT X, ROBBERY OF THE SHIRT

Count X alleged the robbery of Mr. Bornoosh's shirt. However, there was no evidence presented at trial to establish that Appellant either removed the shirt himself or knew that it had been

removed at gunpoint. The only evidence relating to the taking was Appellant's statement that his codefendant had thrown it to him and told him to wear it (R 1121 -1131). It is clear that for multiple robbery convictions there must be "...successive and distinct forceful takings with a separate and independent intent for each transaction," Brown v. State, 430 So.2d 446, 447 (Fla. 1983). In Brown it was proven that the defendant had taken two sums of money from two cashiers, so this Court affirmed two separate convictions. In Hopp v. State, 594 So.2d 848 (Fla. 2d DCA 1992), the court ruled that only one robbery conviction was permissible for the taking of a wife's purse which contained her husband's property, even though they were both threatened at gunpoint.

Because there was no proof that Appellant committed any act to constitute a forced taking of the shirt independent of his initial armed entry and armed taking of the money, the trial court should have granted Appellant's Motion for Judgment of Acquittal as to this count.

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

VIII

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WITH REGARD TO THE KIDNAPPING OF MRS. EDWARDS AND MATTHEW BORNOOSH

As demonstrated in the Statement of the Case and Facts, the evidence adduced at trial was insufficient to prove that Appellant himself kidnapped Mrs. Edwards or Matthew Bornoosh. Appellant's statements, the only direct evidence of what occurred with regard to these two victims, indicate that Wyatt moved them to the rear of the store by himself. Appellant's actions with regard to those two victims were not shown to be anything more than inconsequential or inherent in the nature of the robbery. See Farison v. State, 426 So.2d 963 (Fla. 1983). For purposes of the principal theory of prosecution, there is no evidence that Appellant knew ahead of time or intended that Wyatt would transport the two victims in the back room, or that he did any act by which he intended to help Wyatt commit these particular crimes. These two elements are essential under Section 777.011, Florida Statute (1988).

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

SENTENCING ERRORS

IX

THE ERRORS IN ADMITTING DR. BERLAND'S TESTIMONY AND IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE COUNTS DISCUSSED IN ISSUES V, VI, VII, AND VIII, DEPRIVED APPELLANT OF A FAIR SENTENCING HEARING

In his Statement of Case and Facts, and in the discussion in issue II, Appellant has demonstrated the substance of Dr. Berland's testimony, the damage that it did to Appellant's defense, the emphasis placed upon it by the State, and the special attention paid to it by the jury. Appellant also demonstrated that the admission of this testimony was clearly erroneous. It was also demonstrated in Issues V, VI, VII, and VIII that the trial court erred in not granting Appellant's Motion for Judgment of Acquittal as to premeditated murder, sexual battery, a robbery count, and two kidnapping counts.

Whether or not an error was harmful in the guilt phase has no bearing on the sentencing phase. This Court has recognized that an error which is harmless in the former may nevertheless be harmful in the latter. Castro v. State, 547 So.2d 111 (Fla. 1989).

In his closing argument in the penalty phase, Appellant again emphasized his limited role in the sexual battery and murder, and requested that the jury find that as mitigation (R 1587 -1595). The erroneous admission of Dr. Berland's testimony severely undermined Appellant's case for mitigation for the same evidentiary reasons it harmed his guilt phase argument. The legal significance, however, is quite different. Whereas the State could argue that the evidence of guilt was overwhelming in this case even when Dr. Berland's testimony is excluded, the vote recommending

death could not have been closer (7-5). The admission of this testimony can not therefore be deemed harmless error. In addition, the jury instructions and the convictions on several serious felonies, including perhaps premeditated murder, was extremely prejudicial. Had Appellant been properly acquitted, it would have strengthened his theory of mitigation.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

X
THE COURT ERRED IN PERMITTING THE INTRODUCTION OF IMPROPER EVIDENCE DURING THE SENTENCING PHASE

In the State's case in chief at sentencing, it presented evidence that did not relate to any statutory aggravation. It also could not be offered to anticipatorily rebut any statutory mitigators since Appellant had waived them. As demonstrated in the Statement of Case and Facts, this consisted of a detective's comments that "... we all agreed ... obviously these were not amateurs," and evidence of a burglary in which Appellant stole a car and firearm. The detective's statement improperly implied that Appellant had killed before (he had not) or at the very least suggested he was a criminal mastermind. The thefts and burglaries

were collateral to this case. After Appellant's case, the State was allowed to introduce three particularly unflattering pictures of him, ostensibly to rebut the childhood photographs he had admitted (R 1546 - 1548). These photographs did not rebut anything presented by Appellant or establish any proper aggravating factor. They served simply to portray Appellant as a mean, evil person.

The admission of the items was clearly error. See Colina v. State, 570 So.2d 929 (Fla. 1990) (error to allow evidence of defendant's "sweet death" T-shirt with skull, and his lack of remorse), Castro v. State, 547 So.2d 111, 114 (Fla. 1989) (error to introduce evidence of knife found in the defendant's residence where the knife was not connected to the crime charged). Mendyk v. State, 545 So.2d 846, 849 (Fla. 1989), (error to allow jury to hear list of titles of pornographic books seized from defendant). The introduction of such evidence is presumed harmful. See Peek v. State, 488 So.2d 52, 56 (Fla. 1986). Considering the closeness of the defendant's jury's vote, it cannot be said beyond a reasonable doubt that the error was harmless.

XI

THE COURT ERRED IN FAILING TO GIVE A CURATIVE INSTRUCTION OR GRANT A MISTRIAL AFTER IMPROPER STATE ARGUMENT IN THE SENTENCING PHASE

Towards the end of his closing argument in the sentencing phase, the prosecutor told the jury:

> Even under that -- even as wide open as that definition is and even as unfortunate as that might be, that has nothing to do with the law or facts in this case. As I said, it's these three people whose pictures are in front of you, it's them we're here about. They're not here to tell you about the fear and terror

> they lived through. They're not here to tell you about what went through their minds as their lives sat -- their fate was in the hands of Michael Lovette and his partner.
>
> And that's what we're here about, about what he did and about what he is and about what he has done, to decide what is a fitting punishment for the person who qualifies under all seven of these aggravating circumstances. He's had the opportunity to present mitigating circumstances. Frances and Bill Edwards and Matthew Bornoosh weren't given an opportunity to present mitigating circumstances. He's here represented by two attorneys. Those three victims had no attorneys (R 1580 -1581).

Appellant objected to this argument on the grounds that it was "diminishing and denigrating his right to a jury" and moved for a mistrial and curative instruction (R 1581 - 1582). The court sustained the objection but denied Appellant's request for a curative instruction and mistrial (R 1582).

Soon after the above comments, the prosecutor told the jury:

> Don't let Mr. Barnes sit down after talking to you, don't let him make you feel guilty about your role. Don't let him make you feel as though you are bad people if you recommend death (R 1583).

Appellant moved for a mistrial on the grounds that the prosecutor was "not arguing the law or facts, he's attacking opposing counsel" (R 1583 - 1584). The trial court denied Appellant's motion for mistrial and a curative instruction, and ruled these comments were proper argument (R 1584).

The first comments were very similar to those addressed in Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985):

> Carol Jeannine Galloway did not have a battery of lawyers around her, she didn't have a judge sitting there ruling on the evidence, she didn't get twenty

> strikes when the jury was selected, she didn't have any courtroom with cameras so that the whole record could see that she got a fair trial.

762 F.2d at 1441. The Court in Brooks held that the statements quoted above "clearly urged the jury to punish Brooks for exercising his constitutional rights..." and were an "unmistakable implication that the system coddles criminals, at the expense of law abiding citizens, by giving them procedural protections." The Court then ruled that the comments "were an intentional effort to procure a decision that was not based on a rational assessment of the evidence..." and were thus improper. 762 F.2d at 1441.

The second comments were not only an appeal to concerns other than the evidence and law, they improperly impugned defense counsel's role in the system and the defense he presented. See Alvarez v. State, 574 S.2d 1119 (Fla. 3rd DCA 1991) (Improper for prosecutor to accuse defense of "nitpicking" and "insulting someone's intelligence"); Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986) (Improper for Prosecutor to characterize defense counsel's closing as misleading and a smoke screen); and Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977) (Improper for prosecutor to make comment regarding "one of the favorite tricks of a defense lawyer").

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution.

Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XII

THE COURT ERRED BY ALLOWING THE STATE TO ARGUE AND BY INSTRUCTING ON TWO AGGRAVATING FACTORS FOR WHICH APPELLANT CANNOT BE HELD VICARIOUSLY LIABLE

In the sentencing phase the court instructed the jury on seven aggravating factors. Two, "especially wicked, evil, atrocious or cruel" (HAC) and "cold, calculated and premeditated" (CCP) were objected to by Appellant on the grounds that they would improperly make him "vicariously liable" for Wyatt's actions (R 1535 - 1536).

Less than a month after Appellant's objection, this Court reversed a death sentence on the same rationale, Omelus v. State, 584 So.2d 563 (Fla. 1991). In Omelus, it was shown that the defendant had hired another to kill the victims, but did not specify how the killing was to occur and was not present to direct it. The trial court instructed, and the state emphasized in their argument, the HAC aggravating factor. The jury in that case returned an (8-4) recommendation of death. On appeal, this Court held that "where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously" 585 So.2d at 566. Three facts about that case caused this Court to rule the error was not harmless beyond a reasonable doubt. It first found that the improper factor had been emphasized to a great extent by the prosecutor. It also noted that the trial court had

found that a mitigating factor was proven. Finally, it noted the closeness of the vote (8-4).

Appellant submits that the vicarious liability exemption enunciated in Omelus should shield him from instructions on the HAC and CCP factors in the case at bar. Unlike in Omelus, this Appellant did not contemplate or solicit the victims' deaths. But, like that defendant, he was not able to direct the manner in which the killings occurred. The HAC factor generally requires the intentional torture of victims, beyond that necessary to kill. See Brown v. State, 526 So.2d 903 (Fla. 1988). The CCP factor generally requires heightened premeditation. See Farina v. State, 569 So.2d 425 (Fla. 1990). The defendant in Omelus was properly liable for the CCP factor even though he did not kill because he hired another to do it. Since absolutely no evidence at trial was adduced to show that Appellant had the requisite intent for these two factors (or even an intent to kill) the trial court erred in instructing and allowing the State to argue them.

The State emphasized these factors and its theory to support them in the most powerful part of its closing statement (R 1562 - 1570). The trial court found four (4) mitigating factors, and the vote was only 7-5. The error in instructing and allowing argument on these two (2) factors can not be deemed harmless beyond a reasonable doubt.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and

Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XIII

THE COURT ERRED IN FINDING APPELLANT VICARIOUSLY LIABLE FOR FOUR AGGRAVATING FACTORS

This Court ruled in Omelus v. State, 584 So.2d 563 (Fla. 1991), that a defendant shall not be "vicariously" liable for an aggravating factors that is based purely on another's intent or motives - in their cases HAC.

Several aggravating factors improperly found in this case may be described as having "specific intent" requirements, either by definition or caselaw interpretation:

Section 921.141(5)(e):

> "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest...."

This factor has been held to require that witness elimination be the "dominant motive" for the killing, Bruno v. State, 574 So.2d 76 (Fla. 1991).

Section 921.141(5)(f):

> "The capital felony was committed for pecuniary gain."

This factor requires that the "primary motive" be pecuniary gain. Scull v. State, 533 So.2d 1137 (Fla. 1988).

Section 921.141(5)(h):

> "The capital felony was especially heinous, atrocious, or cruel."

As discussed in issue #XI, this factor generally requires the intentional torture of the victims, beyond that necessary to kill, Brown v. State, 526, So.2d 903 SW (Fla. 1988).

Section 921.141(5)(i):

> "The capital felony was ... committed in a cold, calculated, and premeditated manner without any pretense of justification".

As discussed in issue #XII, this factor generally requires "heightened premeditation," Farina v. State, 569 So.2d 425 (Fla. 1990).

The Omelus decision precludes the four aggravating factors discussed herein. As demonstrated in the Statement of Case and Facts, there was absolutely no evidence to prove that Appellant intended these murders, or knew of the codefendant's intent until he saw him fire. Appellant did not learn until later of the codefendant's motives for the killings.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I,

Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XIV

THE COURT IMPROPERLY DOUBLED THE AGGRAVATING FACTORS THAT THE MURDERS WERE COMMITTED IN THE COMMISSION OF TWO ENUMERATED FELONIES AND THAT THEY WERE COMMITTED FOR PECUNIARY GAIN

The trial court here found that each of the murders were committed for pecuniary gain, thus establishing the aggravating factor in Section 921.141(5)(f) (R 2325 - 2326, 2334, 2342 - 2243). The Court also found that each was committed during the commission of a sexual battery and kidnapping (R 2323 -2324, 2332, 2340), thus establishing the aggravating factor in Section 921.141(5)(d). Apparently the Court left out the robbery in the latter findings in an attempt to avoid the merger of the two factors. Robbery is a specifically enumerated felony under that section, and was charged and proven at trial. During the jury instructions on the sentencing phase, it was also included as a felony the jury could use to consider this aggravator (R 1596).

Since the two aggravating factors arose out of the same episode, the trial court improperly doubled the two. See Green v. State, 583 So.2d 647 (Fla. 1991). In Green, this Court held that the pecuniary gain factor merged with the commission of a robbery or burglary. The authority cited in Green, Mills v. State, 476 So.2d 172 (Fla. 1985), held that where both factors are "based on the same aspect of the criminal episode" they should be counted as one, 476 So.2d at 178 (emphasis added). Because robbery was an underlying felony, pecuniary gain was a necessary part of that "aspect" of the criminal episode.

Regardless of the language used, it was demonstrated in the Statement of the Case and Facts that these murders occurred during a robbery. Appellant submits that the trial court may not avoid the merger doctrine simply by eliminating a charged and convicted underlying felony from his sentencing order. The Court erred in considering these aggravating factors as two instead of one.

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XV

THE COURT ERRED IN INSTRUCTING ON, AND FINDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATOR, WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT

Assuming arguendo that Appellant can be held vicariously liable for the "cold, calculated, and premeditated" (CCP) aggravator, the trial court's instructing on, and finding of it, was improper. This factor requires "heightened premeditation," defined as proof beyond a reasonable doubt "that the defendant planned or arranged to commit murder before the crime began," Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). Also see Capehart v. State, 583 So.2d 1009 (Fla. 1991), McKinney v. State, 579 So.2d 80 (Fla. 1991), and Holton v. State, 573 So.2d 284 (Fla. 1990). As demonstrated in the Statement of the Case and Facts, there was absolutely no proof in the case at bar that either

defendant had any idea of killing anyone when they walked into the Domino's. The evidence of their committing two prior robberies without harming anyone is circumstantial evidence that they had no prior intent. The only evidence of any prior reflection on behalf of the killer himself, Tommy Wyatt, was his statement afterward "... we were there too long, they could identify us" (R 1154). This does not translate into anything more than simple premeditation, and is further evidence of a lack of intent before the crime began.

This error served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XVI

THE COURT ERRED IN INSTRUCTING ON, AND FINDING THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR, WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT

Assuming arguendo that Appellant can be held vicariously liable for the "especially heinous, atrocious or cruel" (HAC) aggravator, Appellant submits it was not proven beyond a reasonable doubt, and this should not have been instructed on. The trial court used improper considerations and speculation in finding that it had been established.

With regard to HAC, this aggravator "is proper only in torturous murders - those that evince extreme and outrageous

depravity as exemplified by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). As demonstrated in the Statement of Case and Facts, there was no evidence that any of the victims in the case at bar were aware of their fate for any length of time, or were conscious after having been shot, or suffered physical pain. It was also demonstrated that there was no evidence to rebut Appellant's claim that the shots were fired in rapid succession. These type of shootings are normally not supportive of HAC, as a matter of law. See Shere v. State, 579 So.2d 86 (Fla. 1991), Cheshire v. State, 568 So.2d 908 (Fla. 1990), Cochran v. State, 547 So.2d 928 (Fla. 1989), Brown v. State, 526 So.2d 903 (Fla. 1988), Lloyd v. State, 524 So.2d 396 (Fla. 1988), Oats v. State, 446, So.2d 90 (Fla. 1984), and Lewis v. State, 398 So.2d 432 (Fla. 1981).

In his sentencing order, the trial judge based his findings of HAC in each of the murders on speculation that Mrs. Edwards was raped in front of the other two victims, that Mr. and Mrs. Edwards were shot in a manner "consistent with" a kneeling position, and that they heard one another pleading for their lives (R 2326, 2334, 2335, 2343 - 2344). As to Mr. Edwards specifically, the court held that it was "possible" that he was conscious after the first shot (R 2335). These conclusions were based on the court's speculation, not on facts proven beyond a reasonable doubt. This Court has held that "not even 'logical inferences' drawn by the trial court will suffice... when the State's burden has not been met," Clark v.

State, 443 So.2d 973, 976 (Fla. 1983). When relying on circumstantial evidence to meet this burden of proof, there must be no reasonable hypothesis which negates the aggravation. In the case at bar, Appellant's claim that the murders were sudden and in rapid succession remains most reasonable.

The evidence of "pleading", contrary to the court's sentencing order, was that of Mrs. Edwards apparently at the time she was lying on the floor without pants. It was not related by the evidence to a pleading for the victims' lives, nor was it related to the time period they were shot. As in Clark, there is no evidence to prove that any of these victims "knew more than an instant before" they were shot of Wyatt's intent, 443 So.2d at 977.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XVII
THE COURT ERRED IN INSTRUCTING ON, AND FINDING THE AGGRAVATING FACTOR "FOR PECUNIARY GAIN" WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT

Assuming arguendo that Appellant could be held vicariously liable for his codefendant's motives, the Statement of Case and Facts demonstrate that the only motive adduced at trial for the killings was witness elimination, thus this factor was improperly

found. In Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), the Court rejected this factor's applicability and held that the killing of a store clerk after an attempted robbery "occurred during flight and thus was not a step in furtherance of the sought-after gain."

As in Rogers, the robbers in the case at bar were leaving the store when the murders occurred. The victims were neither resisting the theft or even in control of the items stolen when they were shot. The sought-after gain had already been achieved. Thus, this factor was erroneously found by the trial court.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XVIII

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND FIND PROPOSED NONSTATUTORY MITIGATING CIRCUMSTANCES SUPPORTED BY UNCONTRADICTED EVIDENCE

At the sentencing hearing, Appellant asked the Court to find approximately seventeen (17) different, identifiable non-statutory mitigating circumstances (S 267 - 271). It is well established that a court must "expressly evaluate in its written order each mitigating circumstance proposed to determine whether it is supported by the evidence and whether, in the case of nonstatutory

factors, it is truly of a mitigating nature," Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). "The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." 571 So.2d at 419. The circumstances that were proposed by Appellant as mitigation, but not recognized by the trial court, are:

1. "He also witnessed abuse of his siblings and mother by his father" (S 267).

2. "His father was an alcoholic who ... put the bottle first before his family" (S 267).

3. "He was approximately six years old when his parents divorced" (S 267).

4. "...Michael left home at an early age" (S 267).

5. "Michael Lovette ... was a hard productive worker..." (S 268).

6. "...he was and is close to several friends and relatives and expresses his love for them ... has maintained contact with them and positively impacts other people's lives" (S 268).

7. "Prior to the robberies ... no one was hurt (after his escape)" (S 268).

8. "On the night of this crime ... Lovette is intoxicated" (S 268).

9. "... no evidence ... to even infer that Michael planned to kill or rape..." (S 268).

10. "Compared to the culpability of ... Wyatt, Lovette's role in the deaths of the victims is minor" (S 269).

11. "Michael Lovette ... confessed to the crimes and his involvement" (S 269).

12. "He also identified the triggerman" (S 269).

13. "He is presently serving two life sentences. This Court could run three life sentences consecutive to those ... and to each other which would ensure that ... simply he would never be released from prison" (S 271).

The trial court did find four mitigating circumstances for each murder:

1. Defendant's abused or deprived childhood during his formative years;
2. Defendant's behavior at trial and attitude toward the Court was polite and acceptable;
3. The fact that the defendant was not the person who actually shot the victims;
4. The fact that the defendant was not the person who actually raped Frances Edwards.

(R 2329, 2338, 2346 - 2347)

By generalizing or combining several factors into one as to the first recognized factor, Appellant submits that the trial court did not properly consider the different life history factors established and proposed by Appellant as mitigation.

Several circumstances which were established in this case and ignored by the trial court have been specifically recognized by other trial courts, and this Court, as proper mitigation:

1. Status as hard worker. See Wright v. State, 586 So.2d 1024 (Fla. 1991), McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

2. Valuable, loving relationship with family. See McCray v. State, 582 So.2d 613 (Fla. 1991) where this Court found that the fact the defendant "has contributed to the lives of others" was a valid basis for jury's life recommendation, 582 So.2d at 616. Also, Caruthers v. State, 465 So.2d 496 (Fla. 1985) where the trial court found "natural love and affection of family and friends" as a mitigating circumstance.

3. Appellant's intoxication during offense. See Cheshire v. State, 568 So.2d 908 (Fla. 1990), Lamb v. State, 532 So.2d 1051 (Fla. 1988), and Fead v. State, 512 So.2d 176 (Fla. 1987), where this Court held that evidence of intoxication could have properly served as basis for jury recommendation of life.

4. The lengthy sentences Appellant was already serving and could receive. See Jones v. State, 569 So.2d 1234 (Fla. 1990).

5. Appellant's confession. See Caruthers v. State, 465 So.2d 496 (Fla. 1983).

Not only did the trial court not "expressly evaluate" most of the mitigating circumstances proposed in this case, much of the testimony was used by the trial court as nonstatutory aggravating circumstances, or at least to dispel the urged mitigation. The trial court found that the testimony of Appellant's witnesses

proved that he had an appropriate environment for "distinguishing right from wrong" and the "opportunity and means for a life of honesty and lawfulness," (R 2328 - 2329, 2337-2338, 2345-2346).

Appellant submits that the trial court should have expressly evaluated and found all of the nonstatutory mitigating circumstances proposed by Appellant.

The cumulative effect of these errors served to deprive Appellant of a fair trial, due process, and an impartial jury, contrary to Article I, Section 9 of the Florida Constitution and Amendments 5, 6, and 14 of the United States Constitution. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XIX
THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

This Court has found jury-recommended death sentences disproportionate in many cases despite evidence clearly establishing that a defendant personally killed someone after premeditation. See McKinney v. State, 597 So.2d 80 (Fla. 1991),

Nibert v. State, 574 So.2d 1059 (Fla. 1990), Farina v. State, 569 So.2d 425 (Fla. 19990), Thompson v. State, 565 So.2d 1311 (Fla. 1990), Blakely v. State, 561 So.2d 560 (Fla. 1990), Smalley v. State, 546 So.2d 720 (Fla. 1989), Songer v. State, 544 So.2d 1010 (Fla. 1989), Amoros v. State, 531 So.2d 1256 (Fla. 1988), Lloyd v. State, 524 So.2d 396 (Fla. 1988), Ross v. State, 474 So.2d 1170 (Fl.a 1985), Caruthers v. State, 465 So.2d 496 (Fla. 1985), Blair v. State, 406 So.2d 1103 (Fla. 1981), and Halliwell v. State, 323 So.2d 557 (Fla. 1975). Also see Rembert v. State, 445, So.2d 337 (Fla. 1984), where this Court vacated a jury-recommended death sentence in a felony murder/robbery case (with no mitigation) where that defendant personally beat the victim to death. The reduction to life in those cases usually resulted from a weighing of aggravating and mitigating circumstances. Also, too numerous to cite are those cases where this Court reversed "jury overrides" in situations where defendants personally killed after premeditation - another class of cases with which to compare this Appellant's death sentences.

Whereas a weighing of aggravating and mitigating circumstances is usually crucial in proportionality review, that weighing is necessary in nontriggerman felony murder cases such as the case at bar only if a threshold level of culpability is first established. If that threshold is not met, the death penalty is disproportionate irregardless. The United States Supreme Court has limited the possibility of imposing the death penalty in non-triggerman felony murders to those cases where the defendant participated to a major

extent in the felony and had "reckless indifference to human life" Tison v. Arizona, 107 S.Ct. 1676, 1688 (1987).

In Jackson v. State, 575 So.2d 181, (Fla. 1991) this Court reviewed the facts and ruling in Tison and two Florida Supreme Court cases, Duboise v. State, 520 So.2d 260 (Fla. 1988) and Diaz v. State, 513 So.2d 1045 (Fla. 1987), all of which upheld the death penalty in non-triggerman cases:

> In Tison, the defendants were Ricky Wayne Tison and Raymond Curtis Tison, two sons of Gary Tison. Gary was a convicted killer serving a life term for killing a prison guard during an attempted escape. Ricky and Raymond, with others, planned and executed a prison break in which they approached the Arizona State Prison with an ice chest filled with guns. They armed their father's cellmate, also a convicted killer, and broke out of jail. When their car broke down in the desert, they flagged down a passing car. Inside the car were John and Donelda Lyons, their two year old son and their fifteen year old niece. John Lyons begged the assailants for their lives. But, with Ricky and Raymond present at the scene, Gary and his cellmate walked over to the captives and fired repeated shotgun blasts into them, killing all four. Then the Tisons drove away in the stolen car, continuing their flight until police stopped them in a shoot-out at a roadblock several days later.
>
> The United States Supreme Court focused on the following facts to determine Ricky and Raymond's culpability:
>
> > Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of

> flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.
>
> Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnapping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims.

Tison, 481 U.S. at 151-52, 107 S.Ct. At 1684-85. On those facts, the Court determined that both Ricky and Raymond "subjectively appreciated that their acts were likely to result in the taking of innocent life," and that their respective states of mind amounted to "reckless indifference to the value of human life." Id., 481 U.S. at 152, 107 S.Ct. at 1685.

In Diaz, we affirmed the death sentence of one of three men accused in the murder of a bar manager during a holdup. There was evidence from a witness that Diaz himself had been the triggerman. Moreover, the evidence showed that Diaz "and his fellow robbers each discharged a gun during the robbery. There is evidence that Diaz's gun had a silencer. Eight to twelve person occupied the bar at the time of the robbery." Diaz, 513 So.2d at 1048. We concluded that Tison and Enmund were satisfied because the evidence proved beyond all reasonable doubt that "Diaz was a major

> participant in the felonies and at the very least was recklessly indifferent to human life." Id.
>
> In Duboise, we concluded that Tison and Enmund had been satisfied with proof that DuBoise and his two companions decided to grab a woman's purse in order to get some money. As they passed the victim on the street, DuBoise left their car and attempted to snatch her purse. When she resisted, the other man came to assist DuBoise. The victim recognized one of Duboise's companions, and the three men put the victim in the car and drove to another area of town. There, while DuBoise raped her, the man whom the victim had recognized struck her with a piece of lumber. DuBoise's companions then raped the woman and both struck her with pieces of lumber.
>
> DuBoise was a major participant in the robbery and sexual battery. He made no effort to interfere with his companions' killing the victim. By his conduct during the entire episode, we find that he exhibited the reckless indifference to human life required by Tison.

Jackson involved a situation where the defendant and his brother entered a hardware store and killed the owner in a robbery. The evidence included a statement by the defendant afterwards that "we had to do it" because the victim resisted. 575 So.2d at 185. This Court also stated that a "reasonable inference could be drawn... that either of the two robbers fired the gun, contrary to the finding of the trial judge," 575 So.2d at 192. This Court nevertheless Mr. Jackson's vacated death sentence, ruling that "Although the evidence against Jackson shows that he was a major participant in the crimes, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other

armed robber whose murder conviction rests solely upon the theory of felony murder," 575 So.2d at 192.

One further case merits discussion. In Van Polyck v. State, 564 So.2d 1066 (Fla. 1990), the defendant and co-defendant attempted to break an inmate out of the custody of authorities during a visit to the doctor's office. The defendant himself planned the break, elicited the help of another, armed himself, kicked a guard, aimed a gun at another guard and pulled the trigger (it misfired), and fired numerous shots at police cars chasing him afterwards. Because the Court ruled "that Van Poyck played the major role in this felony murder and that he knew lethal force could be used," it upheld the death sentence. 564 So.2d 1070 - 1071.

Appellant submits that this case is far closer factually to Jackson than to the other cases cited, with less evidence of reckless indifference than in Jackson. Although Appellant concedes he was a major participant in the robbery and in the kidnapping of Mr. Edwards, he can not be said to have the "reckless indifference to human life" necessary for the death sentence. There was no evidence that he had any intent to kill, or knowledge of Wyatt's intent in time to stop the killings. There was no evidence that either man had harmed any person in the prior two robberies, or at any other time in their lives prior to that night. Unlike in several of the cases cited above, the trial court here found as a fact that Appellant did not shoot the victims. There was no evidence that Appellant's gun was even loaded. There was no

evidence that Appellant committed any physical violence to any of the victims. Finally, there was evidence that Appellant was intoxicated at the time. These facts indicate that unlike in Tison, the State failed to prove that this defendant had a subjective appreciation that his acts were likely to result in anyone's death. Appellant submits that under the facts in this record, the death penalty is disproportionate without regard to an examination of mitigation and aggravation. The threshold level of culpability has not been met.

Assuming arguendo that Appellant is a proper candidate for the death penalty under the Eighth Amendment, the mitigation in this case nevertheless far outweighs the aggravation. Three aggravators were properly found by the trial count - under sentence of imprisonment, prior violent felony, and felony murder (assuming this factor's constitutionality). Appellant urges that the first, under sentence of imprisonment, is diminished by the fact that Appellant did not break out of prison, but merely walked away from a road gang. See Songer v. State, 544 So.2d 1010 (Fla. 1989), where this Court found that the "gravity" of this factor in that case was "diminished" under almost identical facts. The second factor, prior violent felony, is diminished by the facts that the felonies were not capital, did not result in physical harm to anyone, and were not committed until Appellant's crime spree with Mr. Wyatt. The felony murder aggravator is diminished by the enormously important fact that Appellant did not commit the acts which directly caused the murders. Against those aggravators, a

host of nonstatutory mitigating circumstances, as discussed in Issue # XIX, are weighed. Based on the record and this Court's treatment of similar cases and those far more aggravated, death is a disproportionate penalty. Imposition of the death penalty based on this error would constitute cruel and unusual punishment contrary to Article I, Section 16 of the Florida Constitution and Amendment 8 of the United States Constitution.

XX
FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

A capital sentencing scheme is constitutional only to the extent that it is structured to avoid freakish or arbitrary application of the death penalty. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Since Proffitt v. Florida, 428 U.S. 242 96 S.Ct. 2960, 49 L.Ed.2d 912 (Fla. 1976), the operation of Section 921.141, Florida Statutes, has promoted freakish and arbitrary application of the death penalty. In Proffitt, the court held that the statute, as written, could be consistent with the Eighth Amendment. The Court did not contemplate the regression toward arbitrary application that has since occurred.

1. The jury

A. Standard jury instructions.

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

Pope v. State, 441 So.2d 1073 (Fla. 1983) bars jury instructions limiting an defining the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1953 (1988) and Shell v. Mississippi, 111 S.Ct. 313 (1990). Since, as shown below, this Court has been unable to apply this circumstance consistently, there is every likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

ii Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute. Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So. 2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to make errors. The standard instruction invites arbitrary and uneven application. It results in improper application of the circumstance. Since the statutory language is subject to a variety of constructions. the standard instruction ensures arbitrary application. Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These

clauses require accurate jury instructions during the sentencing phase of a capital case.

iii. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element in capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning the offense of felony murder without more into an aggravating circumstance. Further, the instruction turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death). Hence, the instruction violates the Cruel and Unusual

Punishment and Due Process clauses of the state and federal constitutions.

b. Majority verdicts

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

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, Appellant argues that the Florida right to a jury must be administered in a way that does not violate due process. Cf. Anders v. California, 386 U.S. 736 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (although there is no constitutional right to appeal, state law right to appeal must be administered in compliance with due process).

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 1523 (1972), and Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates due process. Similarly, in

deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. See, e.g., Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 1983), Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), and Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

c. Florida allows an element of the crime to be found by a majority of the jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So.2d at 9. The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 109 S.Ct. 2055 (1989).

d. Advisory role

The standard instructions do not inform the jury of the great importance of its penalty verdict. In violation of the teachings of Coldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the jury is told that its verdict is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no

say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish and uneven application of the death penalty.

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

3. The trial judge

a. The role of the judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

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

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), The plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravators mean pretty much what one wants them to mean, so that

the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts). For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523 (1984).

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

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict

construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison and parole. See Aldridge v. State, 351, So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

The original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts. See Bernard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989). However, it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428

U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance is sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Tedder

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

5. Other problems with the statute

a. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This

necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Contsitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument.)

b. No power to mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17, and 22 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution. It also violates equal protection of the laws as an irrational distinction trenching on the fundamental right to live. Cf. Myers, 897 F.2d 417.

c. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case). In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes a presumption of death which is to be overcome only my mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption. The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which requires the mitigating circumstances outweigh the aggravating. This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043). It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida unconstitutionally instructs juries not to consider sympathy.

The court instructed the jury not to consider feelings of sympathy using the standard guilt phase instruction:

> Feeling of prejudice, bias or sympathy are not legally reasonable doubts, and they should not be discussed by any of your in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

2R 1218. This instruction denied consideration of mitigating evidence. In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. In Saffle v. Parks, 110 S.Ct. 1257 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violates the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given above also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. 2R 1264. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Mr. Keen should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigation evidence.

E. Electrocution is cruel and unusual

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel

but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment. 39 OHIO STATE L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex re. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 564 So.2d 509 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Francis, 329 U.S. at 463-64; Coker v. Georgia, 422 U.S. 584, 592-96 (1977). A punishment which was constitutional permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 239, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., concurring). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has not become nothing more than the purposeless and needless imposition of pain and suffer. Coker, 433 U.S. at 592. The improvement in methods of execution over time have made the court's last consideration of this issue in Ferguson

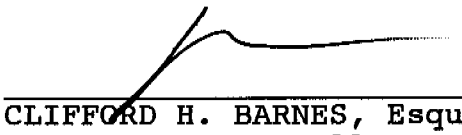
v. State, 105 So. 840 (Fla. 1925), appeal dismissed 273 U.S. 663 (1927) obsolete.

CONCLUSION

Based on the foregoing authority and argument, Mr. Lovette's convictions must be reversed, and his sentence of death vacated or reduced to life.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Celia Terenzio, Esquire, Assistant Attorney General, Office of the Attorney General, Elisha Newton Dimick Building, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, on this 7th day of October, 1992.

Respectfully submitted,



CLIFFORD H. BARNES, Esquire
Attorney for Appellant
117 South Second Street
Suite 202
Fort Pierce, Florida 34950
(407) 466-8400
(407) 466-6321 (Fax)
Florida Bar No.: 329681