IN THE SUPREME COURT OF FLORIDA

STEVEN STEIN,

Appellant,

v. CASE NO. 78,460

STATE OF FLORIDA,

Appellee.

_____/

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

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

A Duval County grand jury indicted Steven Edward Stein on February 7, 1991 for the first degree murder of Dennis Saunders, the first degree murder of Bobby Hood, and armed robbery. (R 11-12). Stein entered a written plea of not guilty on February 22, 1991. (R 19-20) On May 28, 1991, Stein proceeded to a jury trial. (TR 179) The jury found Stein guilty as charged on June 20, 1991. (R 317-321, TR 841-842) On the murder counts, the jury return specific verdict forms finding Stein guilty of both premeditated and felony murder. (R 317-320) After hearing additional evidence at the penalty phase of the trial, the jury recommended the death sentence for each of the two murders. (R 330-331, TR 916)

Circuit Judge David C. Wiggins adjudged Stein guilty of all three counts and sentenced him to death for each of the two murders and to life imprisonment for the armed robbery. (R 348-368) In support of the death sentences, the court five aggravating circumstances: (1) previous conviction for a violent felony based upon the contemporaneous murders of the two victims; (2) the homicides occurred during the commission of a robbery; (3) the homicides were committed to avoid arrest; (4) the homicides were especially heinous, atrocious, or cruel; and (5) the homicides were cold, calculated, and premeditated. (R 359-362) In mitigation, the court found one statutory mitigating circumstance that Stein had no significant history

of prior criminal activity. (R 362-365) Prior to sentencing, the judge ordered and considered a presentence investigation report. (TR 919-924)

Stein timely filed notice of appeal to this court. (R 380A, 384)

Facts -- Guilt Phase

On January 21, 1991, Silvia Ring went to work at the Pizza Hut restaurant on Edgewood in Jacksonville. (TR 442-443) Since her brother drove her to work, she arrived early, at about 7:00 a.m. (TR 444) Her job was to open the restaurant and prepare the dough for the pizzas. (TR 444) When she went inside that morning, she notice that the door was already unlocked and the vacuum cleaner was still out from having been used the night before to clean the restaurant. (TR 444-445) She began to look around to determine if anyone was present. (TR 445-446) She found nothing in the ladies bathroom and started to walk to the kitchen. (TR 445) However, she decided to look into the men's room as well. (TR 446) She opened the first door going into the restroom and noticed a puddle of blood on the floor. (TR 447) Initially, she thought she must be mistaken and she opened the second door. (TR 447) She saw two bodies in pizza hut uniforms lying on the floor . (TR 447) Ring immediately left the restaurant, ran down the street to another restaurant which was open, and someone there called the police. (TR 447-448)

Officer C.L. Sharman arrived at the Pizza Hut. (TR 452-453) He immediately went inside to the men's restroom and observed the two bodies on the floor. (TR 453-455) He called for rescue personnel and crime scene investigators. (TR 457-459)

Crime scene technician, P.C. Talamo, photographed the scene and collected evidence. (TR 475-510) He found no evidence of a point of forceful entry into the restaurant. (TR 478) The interior of the restaurant appeared as if someone had been in the process of cleaning. (TR 478-479) The chairs were on the tables, lights were on inside the kitchen, the vacuum cleaner was sitting on the floor, and the carpeting appeared not to have been vacuumed. (TR 478-479) He found some drops of blood leading from the bathroom area through the dining room to the outside parking lot. (TR 493) There were dried blood stains on the outside of the second, inner door, of the men's restroom. (TR 478) There was a large amount of blood in the bathroom areas where the two male victims were located. (TR 488-489) There was blood on the walls and floor of the bathroom. (TR 492) There were two shoe prints in blood which were visible in the hall area outside the bathroom door which proved to be made by one of the fireman responding to the scene. (TR 492, 509-510) Talamo recovered several bullet fragments from the bathroom area and eight cartridge casings. (TR 482, 484, 489)

Loretta Horn, the manager of the Pizza Hut, identified the victims as her evening shift supervisors, Bobby Hood and Dennis

Saunders. (TR 511-513) She stated that their responsibilities were to run the restaurant, including taking responsibility for the money and keeping track of the money in the cash register. (TR 513-514) Horn testified that the two men would have keys to the safe. (TR 514-515) She explained that it requires two keys to open the safe, and once the lock is activated, a timing device requires ten minutes before the safe will open. (TR 515-516) She determined that approximately $908 was missing from the safe. (TR 517-518) In the cash register area, she found an unpaid guest check relating to table designated A-3 in the restaurant. (TR 518, 522) A later examination of the check revealed a fingerprint belonging to Marc Christmas, who was a former employee at the Pizza Hut on Edgewood Avenue. (TR 519-522, 647-654, 448-449) Christmas was on work release at the time he was hired at the restaurant. (TR 524-525) Additionally, Christmas' girlfriend, Kim Brinson, was, at one time, the manager of the Pizza Hut. (TR 449)

Dr. Margarita Arruza, associate medical examiner, performed the autopsies on Bobby Hood and Dennis Saunders (TR 526-530) She found that Bobby Hood suffered five gunshot wounds -- four to the head and one in the chest. (TR 531) All of the wounds were caused by .22 caliber bullets. One bullet entered the left forehead at a slightly downward angle and travelled through the cranial cavity to the back of the head. (TR 532) Because of stippling around the wound, Arruza concluded the firearm was six to eight inches away at the time of the shot. (TR 533) The second wound entered the left temple and

traveled through the brain at the mid-line area. (TR 534) Based upon the stippling around this wound, the doctor was of the opinion that the firearm was probably four to six inches away at the time of the shot. (TR 537) The third gunshot wound entered the jaw on the left side, traveling from left to right at a downward angle. (TR 537-538) Again, the powder burns around the wound were consistent with being four to six inches away. (TR 538) The fourth wound was a through and through shot to the left side of the head, which barely fractured the skull. (TR 539) The bullet did not penetrate the cranial cavity. (TR 539) The fifth was to the chest entering just below the collarbone and traveling through the lung. (TR 539-540) It had a deep downward angle to the wound, and based upon powder burns left on the shirt, the doctor concluded the firearm was about six inches away. (TR 541) Arruza found no other injuries to Bobby Hood's body which would indicate a struggle or fight at the time of the shooting. (TR 551) She concluded that the cause of death was multiple close-range gunshot wounds. (TR 552) She was of the opinion, based upon the blood splatters at the scene and the angle of the wounds, that Bobby Hood was sitting down at the time of the shots. (TR 552-553)

Arruza also performed the autopsy on Dennis Saunders. (TR 556) He suffered four gunshot wounds. (TR 559) One wound entered the right side of the back of the neck and exited on the opposite side of the neck. (TR 559) The second wound entered the right shoulder and traveled right to left at a slightly upward angle and only involved the soft tissues. (TR

560) Based on the gun powder residue left on the shirt, the medical examiner concluded the gun was about eight inches away at the time of the shot. (TR 561) The third wound entered the left side of the chest and exited through the armpit and struck every vital organ in the chest. (TR 561) The bullet traveled through the right lung, through the aorta to the esophagus, through the left lung, where the bullet was recovered. (TR 561) The fourth wound was to the front side of the left thigh, and the bullet was recovered within the muscle of the thigh. (TR 563) The doctor recovered three bullets from Dennis Saunders body (TR 564) and four from the body Bobby Hood. (TR 532, 534, 538, 540) Arruza was of the opinion that Saunders was initially on the floor at the time the shots began and was moving around during the shooting because of the various angles of the wounds. (TR 570-571)

Kyle White, Marc Christmas, and Steven Stein were room-mates. (TR 596-598) White and Stein had lived in a trailer together since September of 1990, and Marc Christmas moved into the trailer the first week of January, 1991. (TR 598) Stein was working as a cook at the Pizza Hut on Lem Turner Road. (TR 599) Christmas was not working in January of 1990, and relied on his girlfriend, Kimberly Brinson, for spending money. (TR 599) Brinson was an assistant manager at the Pizza Hut on Lem Turner Road where Stein also worked as a cook. (TR 599-600) About a week before January 20, 1991, the day of the homicides, White, Christmas and Stein had a conversation about how to rob a Pizza Hut restaurant. (TR 609-617) White said that he over

heard Marc Christmas telling Steven Stein that they needed to keep "it" to themselves and could not trust Kyle. (TR 609) Stein indicated that Kyle could be trusted, and Marc began to ask him questions about the alarm system on Lem Turner Road. (TR 610) Kyle had worked at the Pizza Hut at the location in the past. (TR 600) During the conversation, Stein mentioned another Pizza Hut on Edgewood Avenue. (TR 610) Kyle told Marc that the alarm system at the Pizza Hut on Lem Turner would be difficult to beat. (TR 611) Marc then brought up the idea of killing the manager, Jope Vanderberg, as he was making a bank deposit. (TR 611-614) White testified that Christmas said that Vanderberg was "on a hit list of some sort." (TR 611) After defense counsel's objection and motion for mistrial denied, the prosecutor had White explain that when he said they talked about making a hit on Vanderberg, they meant to kill him in order to rob him of the bank deposit. (TR 613-614) Marc then said he had worked at the Edgewood Avenue and knew that there was no alarm system there. (TR 615) They also discussed the fact that there was a timer on the safe and it would take about 20 minutes to open. (TR 616) Marc then shifted back to the idea of killing the manager as he was making the bank deposit. (TR 616) White mentioned that a gunshot in the neighborhood would draw a lot of attention. (TR 616) White also explained to them the Pizza Hut policy of cooperating with robbers. (TR 616) According to White, both Stein and Christmas said that there could be no witnesses. (TR 617) Marc then asked to borrow White's motorcycle to follow the manager for a week or

so. (TR 616) White testified that he then realized that this was a serious discussion and he wanted no part of it. (TR 617) He refused to loan his motorcycle. (TR 617)

On the day of the homicide, Sunday, January 20, 1991, Marc Christmas, Steven Stein, and Stein's girlfriend, Christine Moss, spent the afternoon at the trailer. (TR 574-579, 617-619) Christine arrived at the trailer around 1:30 and Kyle White came home to the trailer about 4:00. (TR 579, 618) Marc and Steven left the trailer around 9:30. (TR 579, 618) Steven was wearing a blue and black plaid flannel shirt, blue jeans, black army boots, and a black leather jacket. (TR 585, 618) Steven wore his hair in a very short crew cut. (TR 585, 629) Marc Christmas was wearing blue jeans, a camouflage jacket, a T-shirt, and a pair of desert boots. (TR 585, 629) Marc wore his hair long at that time. (TR 586) Steven was carrying his Marlin, semi-automatic .22 rifle. (TR 586-587, 620-621) He said they were going to Marc's father's house to sell him the rifle for $100. (TR 587, 629) Kyle White testified that on New Year's Eve, the three of them had fired the rifle from the front porch of the trailer. (TR 628-629) Marc and Steven borrowed Christine Moss' automobile and left. (TR 587-588) Marc and Steve returned around 11:30 to 11:45 p.m. (TR 591-623) Marc, Steven, Christine, and Kyle then drove to get gasoline in the car, beer and snacks. (TR 591, 623-624)

Leonard Christmas, Marc's father, testified that he did not see his son on the evening of January 20, 1991, never loaned him any money, and had never seen Steven Stein. (TR

639-641) He also said that he never bought a .22 caliber rifle from Stein. (TR 642)

Ronald Burroughs worked at the Pizza Hut on Edgewood Avenue. (TR 423-424) He left the restaurant on January 20, 1991 at 11:15 p.m. (TR 424) The shift supervisors, Bobby Hood and Dennis Saunders, were still inside the restaurant. When Borroughs left, all of the customers except two had left the restaurant. (TR 425) Two white males who had been seated at table A-3, remained in the restaurant. (TR 425-428) The men were at the cash register as Burroughs left. (TR 428-429) A man with long black hair, camouflage jacket and blue jeans and white tennis shoes carried the guest check. (TR 429-430) The other man, who wore a black leather jacket, had short blond hair, wore black acid-washed pants, and black boots. (TR 430) In court, he identified the man with the black leather jacket as Steven Stein. (TR 430-431) He identified a photograph as being the man with Steven that night. (TR 431-432) The photograph was received as state's exhibit #1. (TR 431) The man Burroughs identified in the photograph was having a conversation with Bobby Hood. (TR 433-436) By the way they were talking, Burroughs was of the opinion that the man and Bobby Hood knew each other. (TR 436-437) They were talking about things they had done in the past. (TR 437) The man apparently asked for the manager of the Pizza Hut, saying he would like to work for that Pizza Hut again. (TR 437) Burroughs said as he left the restaurant, the man he identified in the photograph shut and locked the door. (TR 438) As Burroughs was leaving,

he observed Stein looking through the glove box of his car on the passenger side. (TR 439) Burroughs observed him take something out of the front part of the car and put in his jacket and walk back toward the restaurant. (TR 439) Someone unlocked the restaurant for him and he went inside as Burroughs rode away on his bicycle. (TR 139, 441) The item he put in his jacket was a small item. (TR 441) Steven Stein normally carried a .38 caliber pistol. (TR 595)

On January 22, 1991, Marc and Steven purchased a motorcycle. (TR 592-594, 643-646, 625-626) They made a down payment of $500 in cash and agreed to pay $50 a week. (TR 643-646) They also purchased a helmet for $199 (TR 593), and they purchased a second helmet for $50. (TR 626)

On January 23, 1991, a search warrant was executed on the trailer where Stein, Christmas, and White lived. (TR 673-681) During the execution of the warrant, White arrived at the residence and later, Christmas and Stein drove up on a motorcycle. (TR 676, 710-711) Detective Carl Thorwart arrested Christmas and Stein. (TR 709-711) White spoke with detective Scott and later turned over three expended .22 caliber casings. (TR 678) The ballistics expert later compared these casings with those found at the scene of the homicide and concluded that they were fired from the same firearm. (TR 682-686, 698-699) A box in which a Marlin .22 caliber rifle had been purchased was found in the residence. (TR 675)

After his arrest, Stein gave a statement to Detective Carl Thorwart and Detective Quinn Baxter. (TR 711-729, 731-734)

Detective Baxter asked Steven what happened in the Pizza Hut that night. (TR 718) Stein responded that he and Marc Christmas planned to rob the restaurant and that of the victims, Bobby Hood, knew Marc because Marc had worked in that restaurant in the past. (TR 718-719). Baxter asked how much money was obtained in the robbery and Stein responded $900. (TR 719) Stein was asked who got the money and he said that Marc obtained the money. (TR 719) Stein said that the two of them bought a motorcycle paying $500 and spent the rest of the money on items for the trailer. (TR 719-720) According to Detective Thorwart, Stein said that he and Marc and the two victims were the only ones present in the restaurant. (TR 720) When asked about why so many shots were fired, Stein allegedly said the robbery went bad. (TR 720, 731-734)

Detective Thorwart seized clothing from Stein which included a black helmet and gloves and a leather jacket. (TR 721-722) He also seized a camouflage jacket from Marc Christmas and a helmet and other clothing. (TR 722-723) He found some money on Marc Christmas, $108.58. (TR 724) He found no evidence of cuts or bleeding wounds on Stein at the time of his arrest. (TR 725) There was a older wound on Stein's hand. (TR 726-727)

Motion To Suppress Statements

Stein moved to suppress statements given to Detective Thorwart and Detective Baxter. (TR 79-116, R 178) Two

witnesses testified at the hearing. Detective Baxter and Steven Stein. (TR 79, 97)

The detectives began interviewing Stein on the day of his arrest, January 23, 1991, at approximately 11:30 p.m. (TR 80-81) Baxter stated that Detective Thorwart advised Stein of his constitutional rights and Stein signed a waiver of rights form. (TR 81-83) The form was introduced into evidence as state's exhibit #1 for the hearing. (TR 83) Detective Thorwart advised Stein that he was under for two counts of murder. (TR 84) Stein stated, "I got to talk to a lawyer." "I am in a lot of trouble." "I am in real bad trouble here." "I think I need to consult with a lawyer." (TR 84) At that time, Thorwart said that was his right. (TR 84) Stein then said, "I'd like to talk." "I am a new Christian, approximately been a new Christian for approximately a year." (TR 84-85) At that point, Baxter said, "That the good thing about a God, he would forgive people for what they have done." (TR 85) After that, Stein said that I'd like to talk, can you give me a minute. (TR 85) Thorwart then advised Stein that they could not legally talk to him because he invoked his rights to a lawyer. (TR 85) Thorwart and Baxter then left the room and allowed Stein to smoke a cigarette. (TR 85) Baxter said they had no intent of going back into the room. (TR 85) Baxter said that he spoke to Stein about God forgiving people because he was Christian and it was an off-hand comment to him. (TR 85) Baxter said it was not made with the intent to persuade Stein to talk. (TR 85-86) When the detectives left the room, they advised Stein that they

couldn't talk to him unless he wanted to talk to them. (TR 86) Stein was not transported back to the jail immediately. (TR 86) At about 11:55 p.m., Stein knocked on the door where the two detectives were located. (TR 86) Stein said, "I want to talk about part of it." (TR 86) The detectives readvised Stein of his constitutional rights and had him execute a second rights form. (TR 87-88) There was a notation on the second rights form written by Detective Thorwart stating that Stein asked to talk to the detectives. (TR 88-89) Baxter said the note was placed on the form before Stein executed it. (TR 89) Stein then gave the statement which was introduced during the trial. (TR 89)

Steven Stein also testified. (TR 97) He stated that he had drank a twelve-pack of beer the day of his arrest. (TR 97-98) He recalled seeing a form and signing the form advising him of his rights. (TR 98) He signed both forms. (TR 98) On signing the first form, he stated that he wanted a lawyer. (TR 98) He said he asked for a lawyer at least three times. (TR 99) Stein said they told him that an attorney could not help him and that the attorney would tell him not to talk, and they already had enough evidence to put him in Raiford. (TR 99) They said all he could do by talking was help himself. (TR 99) The detectives left the room for a short time, and Stein asked for a lawyer again. (TR 99) He said the detectives were out of the room for about five minutes. (TR 99) They said they were going to give to think about whether he wanted to talk or not. (TR 99) Between that time and the time he left the room he had

asked for a lawyer three times. (TR 99) They came back into the room, and Stein asked for a lawyer again. He did sign another rights form asking for a lawyer at that time. (TR 100) Stein said he did not know why he didn't get a lawyer. (TR 100) The detectives said they had a lot of evidence against him. (TR 100) Baxter told him that God would forgive him for whatever he did. (TR 100) He said after the second time he signed the right form, he told the detectives he still didn't want to talk. He said he did not sign any other forms except the two rights forms. He denied making any statements. (TR 102) On cross-examination, Stein said he understood his rights. (TR 103-104)

The trial court denied the motion. (TR 116) The court found that the statements were freely and voluntarily made and that Stein initiated the conversation with the police officers of his volition. (TR 116) The court further found that the statement Baxter made about being a Christian did not raise the response to being any type of inducement. (TR 116)

Penalty Phase -- Sentencing

The state and the defense presented addition evidence at the penalty phase of the trial. (TR 846-868) The state presented a certified copy of a judgement and sentence for Marc Christmas. (TR 851) It was admitted as state's exhibit #1. (TR 851) The state also presented the testimony of Detective Thorwart. (TR 852) He testified that when he arrested Steven, he found a loaded .38 caliber revolver in his black leather

jacket. (TR 852-853) He also found some additional ammunition in his pocket. (TR 853) The prosecutor asked the detective if he was aware that carrying a concealed firearm is a felony which he replied that it was. (TR 853) The detective checked the criminal record of Marc Christmas and found that he had been convicted of grand theft and burglary and sentenced to three years. (TR 854) This occurred in January of 1989. (TR 854)

Sandra Griffin, Steven Stein's sister, testified about his family background. (TR 856-861) Griffin, a registered nurse, is eight years older than her brother. (TR 856-857) They were both adopted children. (TR 857) Steven was two months old when he was adopted. (TR 857) Griffin testified that she is married and has a four-year-old son. (TR 857-858) She states that Steven and her son play together and he is good to the child. (TR 858) She had a good relationship with her brother. (TR 858) She stated that he was 22 years old when he moved away from the family. (TR 859) He moved in and out several times through school. (TR 859) The first time he moved out he was eighteen years old. (TR 859) He dropped out of high school and later obtained his GED. (TR 860) He went to automotive mechanical trade school for one year. (TR 860) She said since 1984 she saw her brother fairly frequently. (TR 860-861) Since he moved from Arizona to Jacksonville, she has only seen him a couple of times during the last year. (TR 861)

Steven Stein's girlfriend, Christine Moss, also testified. (TR 862-863) She said Steven was like a father figure to her

son, Tyler. (TR 863) She said she had been Stein's girlfriend since November of 1990. (TR 865) She said he regularly carried a .38 caliber pistol. (TR 866) During the time they were dating, Stein was working at the Pizza Hut. (TR 866) She said that Stein was 23 years old. (TR 868)

Defense counsel objected to several comments the prosecutor made during his argument to the jury during the penalty phase. (TR 872, 884-887) Initially, the prosecutor began his argument by describing something about the victim's family background. (TR 871-872) Defense counsel objected and moved for a mistrial because the comment amounted to victim impact references. (TR 872-873) The court overruled the objection and the request for a mistrial and allowed the prosecutor to continue his comment about the character of the victims. (TR 872-873) The comments and colloquy with the court proceeded:

> MR. BATEH: Good Afternoon, ladies and gentlemen of the jury. Bobby Hood is dead. On January 21, 1991 he was 20 years old. He was a shift supervisor at the Pizza Hut. Not a wealthy man, rod a bike to work. He was earning his own way and just starting out in life.
>
> On that same day Dennis Saunders was working at that same business. Mr. Saunders was, I think the evidence shows 30 years old. He was married and the father of a child.
>
> MR. MORROW: Your Honor, I think that's improper argument and I would move to new penalty hearing because of that comment about he's the father of a child and that sort of thing, that is improper comment.
>
> MR. BATEH: Your Honor, I'm aware the victim comment being improper but I think some brief limited comment in reference t the victims, especially matter that have

been brought up during the course of the trial is proper. I'm not going to dwell on this at all, but I think I can made reference to the victims and put them in context as they were in this case.

THE COURT: Okay. Let's do this, Mr. Bateh; I will deny Mr. Morrow's motion, let's move on from the subject.

MR. BATEH: Yes, sir.

(In open court)

Neither Bobby Hood or Dennis Saunders were great leaders of men, they weren't senators, they weren't pillars of the community. They were two men at that Pizza Hut that were human beings. They were trying to earn an honest living to support themselves.

On January 21st the defendant and his partner walked in and executed both of those human beings, both of those men.

I would submit to you that it was Bobby Hood's and Dennis Saunder's God given right to live a full life and experience life in it's fullest. The defendant ended that on January 21, 1991 when he riddled both of their bodies with bullets.

Why did he do that? Because he didn't want them to talk about the robbery that he and his partner had committed. That was the reason for the execution of those two young men.

(TR 871-873)

Second, the prosecutor argued the actions of the defendants after the homicide as evidencing a lack of remorse. (TR 887-888) The comment and objection proceeded:

Look at the action of the defendant just a few minutes after those executions. A few minutes ago you heard the defendant's girlfriend on the stand state that within half an hour or an hour of those brutal executions the defendant came back to the trailer and was acting --

MR. MORROW: Your Honor, I object to that as improper comment and on the same grounds I have raised.

THE COURT: All right. I will overrule the objection.

MR. BATEH: Thank you, Your Honor. That he was acting normally; went out, bought beer, potato chips and came back to the trailer; socialized, listened to music and I would submit to you that that clearly shows that these murders were consciously and pitilessly carried out in an unnecessarily tortuous manner to both Mr. Saunders and to Mr. Hood, but especially to Mr. Saunders. I would submit to you that these murders were especially heinous, especially atocious[sic], and especially cruel by any standard of those words.

(TR 887-888)

## SUMMARY OF ARGUMENT

1. Steven Stein was arrested and questioned about the murders. After signing a waiver of rights form, Stein asserted his right to consult with a lawyer. The detectives failed to honor Stein's request. Instead, one detective played on Stein's revelation that he was a new Christian and suggested to Stein that God would forgive his sins, implying that he should confess. Stein's subsequent confession was obtained in violation of his rights under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

2. Stein and his codefendant, Marc Christmas, filed motions to suppress evidence. At the hearing on the motions, Christmas's attorney handled most of the presentation of the testimony. After he concluded the direct examination of the only witness, Detective Thorwart, who had executed the search warrant, Stein's lawyer announced that he had nothing further to add to the motion to suppress and waived his appearance at the remainder of the hearing. The trial court improperly allowed the hearing to proceed in the absence of Stein's lawyer, leaving Stein unrepresented during the remainder of the hearing in violation of his right to counsel.

3. Two witnesses made comments suggesting that Stein was a member of a racial hate group and may have been involved in irrelevant collateral crimes. There was no evidence that these were true, and even if true, the information had no relevance to the issues at trial. Stein's character was attacked in

violation of his right to due process. Amends. V, XIV U.S. Const.; Art. I Secs. 9 & 16 Fla. Const. Additionally, the evidence of his membership in a racist organization, if true, violated his right to freedom of speech and association as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I Section 4 of the Florida Constitution.

4. The trial court improperly sentenced Stein to death. Three aggravating circumstances should not have been found and considered. The homicides were not especially heinous, atrocious or cruel and Stein did not have a previous conviction for a violent felony committed prior to the homicides in this case. Additionally, the court improperly doubled the premeditation and avoiding arrest aggravating circumstances. Although the court found one statutory mitigating circumstance, the court failed to consider other nonstatutory mitigation.

5. At the penalty phase of the trial, the State was permitted to present evidence of a nonstatutory aggravating circumstance which tainted the proceedings. A detective testified that Stein carried a .38 caliber pistol when arrested. He also advised the jury that carrying a concealed firearm is a felony. This testimony suggested Stein committed a nonviolent felony for which he was never charged. Since even convictions nonviolent felonies are not aggravating circumstance, this testimony had no relevance at penalty phase.

6. In his penalty phase argument, the prosecutor appeal to the jury to have sympathy for the victims. This argument in-

flamed the jury and diverted its attention to irrelevant considerations. The sentencing phase was tainted and Stein was deprived of his rights to due process and a fair penalty phase proceeding. Amends. V, VIII, XIV U.S. Const.; Art. I Secs. 9, 16, 17 Fla. Const.

7. The court instructed the jury that the it could consider if the evidence supported the heinous, atrocious or cruel aggravating circumstance. However, the evidence did not support the jury instruction since the homicides were the result of a shooting and the victims died quickly with minimal pain. Giving the instruction on HAC prompted the prosecutor's argument on the issue which was improper and directed the jury to consider facts which were irrelevant. Compounding the error and misleading the jury, the court then gave a jury instruction on HAC which failed to limit and guide the jury's decisionmaking process on this point. As a result, Stein has been deprived of his rights to due process and fair sentencing phase trial. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16 & 17 Fla. Const.

## ARGUMENT

### ISSUE I

THE TRIAL COURT ERRED IN ADMITTING STEIN'S STATEMENTS IN EVIDENCE SINCE THE STATEMENT WAS OBTAINED IN VIOLATION OF STEIN'S RIGHTS UNDER ARTICLE I, SECTION 9 OF THE CONSTITUTION OF FLORIDA AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Stein moved to suppress statements given to Detective Thorwart and Detective Baxter. (TR 79-116, R 178) Two witnesses testified at the hearing -- Detective Baxter and Steven Stein. (TR 79, 97)

The detectives began interviewing Stein on the day of his arrest at 11:30 p.m. (TR 80-81) Baxter testified that Thorwart advised Stein of his constitutional rights and Stein signed a waiver of rights form. (TR 81-83) The form was introduced into evidence as state's exhibit #1 for the hearing. (TR 83) Thorwart advised Stein that he was under arrest for two counts of murder. (TR 84) Stein stated, "I got to talk to a lawyer. I am in a lot of trouble. I am in real bad trouble here. I think I need to consult with a lawyer." (TR 84) At that time, Thorwart told Stein that was his right. (TR 84) Stein then said, "I'd like to talk. I am a new Christian, approximately been a new Christian for approximately a year." (TR 84-85) At that point, Baxter said, "That the good thing about a God, he would forgive people for what they have done." (TR 85) After that, Stein said, "I'd like to talk, can you give me a minute." (TR 85) Thorwart then advised Stein that they could not legally talk to him because he invoked his rights to a lawyer.

(TR 85) Thorwart and Baxter left the room and allowed Stein to smoke a cigarette. (TR 85)

Baxter said they had no intent of going back into the room. (TR 85) He said that he spoke to Stein about God forgiving people because he was Christian and it was an off-hand comment. (TR 85) Baxter said he did not make the comments with the intent to persuade Stein to talk. (TR 85-86) When the detectives left the room, they advised Stein that they could not talk to him unless he wanted to talk to them. (TR 86) Stein was not transported back to the jail immediately. (TR 86) Around 11:55 p.m., Stein knocked on the door where the two detectives were located. (TR 86) Stein said, "I want to talk about part of it." (TR 86) The detectives readvised Stein of his constitutional rights and had him execute a second rights form. (TR 87-88) There was a notation on the second rights form written by Thorwart stating that Stein asked to talk to the detectives. (TR 88-89) Baxter said the note was placed on the form before Stein executed it. (TR 89) Stein then gave the statement which was introduced during the trial. (TR 89)

Steven Stein also testified. (TR 97) He stated that he drank a twelve-pack of beer the day of his arrest. (TR 97-98) He recalled seeing a form and signing the form advising him of his rights. (TR 98) He signed two forms. (TR 98) On signing the first form, he stated that he wanted a lawyer. (TR 98) He said he asked for a lawyer at least three times. (TR 99) Stein said the detectives told him that an attorney could not help him and that the attorney would tell him not to talk. The

detectives said they already had enough evidence to put him in Raiford and that all he could do by talking was help himself. (TR 99-100) When the detectives left the room for a short time, Stein asked for a lawyer again. (TR 99) He said the detectives were out of the room for about five minutes, saying they were going to give him time to think about whether he wanted to talk or not. (TR 99) Between that time and the time he left the room, he had asked for a lawyer three times. (TR 99) When the detectives came back into the room, Stein again asked for a lawyer. Although he signed a second rights form, he asked for a lawyer at that time. (TR 100) Stein said he did not know why he did not get a lawyer. (TR 100)

The trial court denied the motion. (TR 116) The court found that the statements were freely and voluntarily made and that Stein initiated the conversation with the police officers of his own volition. (TR 116) The court further found that the statement Baxter made about being a Christian was not intended to be any type of inducement. (TR 116)

The United States and Florida constitutions require that all questioning of an in custody defendant cease when he asserts his right to counsel during custodial interrogation. Amends. V, IX, U.S. Const.; Art. I, Sec. 9 Fla. Const.; Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966); Traylor v. State, 17 FLW S42 (Fla. 1992); Kyser v. State, 533 So.2d 285 (Fla. 1988); Long v. State, 517 So.2d 664 (Fla. 1987); Smith v. State, 492 So.2d 1063 (Fla.

1986). No other form of questioning is permitted, unless the defendant voluntarily initiates further questioning about the subject of the offense. Ibid. If the request is equivocal, or seems to be a desire to talk and have counsel at the same time, inquiry may be made solely to the issue of clarifying the request for counsel. E.g., Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); Long, 517 So.2d 664; Smith, 492 So.2d 1063. Moreover, once a defendant asserts his right to counsel, there can be no valid waiver of his rights without the actual presence of counsel. Minnick v. Mississippi, ___ U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); Traylor, 17 FLW S42. The detectives here failed honor Stein's request for counsel. The subsequent confession should have been suppressed.

According to Baxter's testimony, Stein requested counsel immediately upon being advised of the charges against him. Baxter testified about the exchange as follows:

> A. Basically Detective Carl Thorwart advised him that he was under arrest for two counts of first degree murder and armed robbery.
>
> Q. And what was his response?
>
> A. Mr. Stein stated I got to talk to a lawyer. I am in a lot of trouble. I am in real bad trouble here. I think I need to consult with a lawyer.
>
> Q. And what if anything did you or Thorwart say at that time?
>
> A. Detective Thorwart stated that that was definitely his right. At that time the defendant stated I'd like to talk. I am a

new Christian, approximately been a new Christian for approximately a year.

Q. And what if anything was said after that and by whom?

A. I talked to him about this. He said that the good thing about God he would forgive people for what they have done.

(Tr 84-85) The prosecutor asked Baxter why he spoke to Stein about God. Baxter responded as follows:

Q. What was your purpose in telling him about God forgiving people for their sins?

A. Basically he brought up God, and I just responded because I am, too, a Christian and it was just an offhanded comment to be honest with you.

Q. Was it made with the intent to persuade Mr. Stein to talk to you and waive his right to counsel?

A. Certainly not, no, sir.

(Tr 85-86) After Baxter's remarks about God forgiving sins, Stein allegedly said that he would like to talk, but would like a few minutes alone. (Tr 85) Detective Thorwart said they could not talk to him unless he wanted to because he had invoked his right to counsel. (Tr 85) The detectives left Stein in the interview room to smoke a cigarette. (Tr 85) A few minutes later, Stein knocked on the door and told the detective that he wanted to talk about part of it. (Tr 86)

Instead of honoring Stein's request for counsel, Baxter's comment about God forgiving sins was continued interrogation. The statement made in these circumstances of a custodial interrogation was of the type which would elicit an incriminating response. Stein clearly invoked his right to counsel and then

explained to the detectives that he would like to talk because he was a Christian. However, Stein's expression of a desire to talk was not an abandonment of his request for counsel. Therefore, Baxter's comments about God forgiving sins directly undermined Stein's unequivocal request for counsel. Instead of ceasing all interrogation, Baxter's comments played directly to Stein's religious beliefs and suggested he should confess his sins and be forgiven. It is well settled that once a defendant asserts his right to counsel he cannot questioned, in any manner, and any subsequent expression of a desire to talk cannot be a valid waiver. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); Smith v. State, 492 So.2d 1063 (Fla. 1986).

The trial judge found that Baxter's comments about God and forgiveness were not made to induce Stein to talk. (Tr 116) Baxter testified that he did not talk about God and make his comments about God forgiving people for the purpose of eliciting incriminating responses from Stein. (Tr 85) However, Baxter's subjective intent in making the statements is not the test. The question is whether, objectively, the comment would tend induce Stein to talk. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); Jones v. State, 497 So.2d 1268, 1270-1271 (Fla. 3d DCA 1986); Lornitis v. State, 394 So.2d 455, 458 (Fla. 1st DCA 1981) Regardless of Baxter's subjective intent in talking about God, the effect was to convince Stein to talk about the offense. See, Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

Another incorrect conclusion the trial judge made was that Stein initiated the making of the statements after his request for counsel. This conclusion presupposed that the officers indeed stopped the interrogation. Since interrogation actually continued through Baxter's comments, there was never a break and Stein never, in fact, reinitiated anything. The fact that the officers left the room to allow Stein time "to think" was not a cessation of questioning. The interrogation never actually stopped. Stein's knocking on the door and saying he was ready to talk was not the re-initiation of questioning about the offense. Stein was left alone in the room after Baxter talked to him about God and forgiveness. This was merely a short break in the continuing interrogation. Baxter's comments about God and forgiveness played to Stein's weak point, and Stein's subsequent actions were the fruit of this continued, subtle interrogation.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING A HEARING ON THE MOTION TO SUPPRESS EVIDENCE TO PROCEED IN THE ABSENCE OF STEIN'S COUNSEL WHO WAS CALLED AWAY ON A FAMILY EMERGENCY THEREBY DEPRIVING STEIN OF HIS RIGHT TO COUNSEL AT THE HEARING.

Stein and his codefendant, Marc Christmas, filed motions to suppress evidence seized from their residence. (R 116) At the hearing on the motions, Christmas's attorney, Alan Chipperfield, handled the presentation of the testimony. (R 116-174) After Chipperfield concluded the direct examination of the only witness, Detective Thorwart, who had executed the search warrant, the court took a brief recess. (R 151) Stein's lawyer, Jeff Morrow, then announced that he had nothing further to add to the motion to suppress and waived his appearance at the remainder of the hearing:

> THE COURT: All right. Gentleman[sic], let's take about five minutes the come back and we will resume at that time. Gentleman[sic], before we take a recess Mr. Morrow wanted to state something.
>
> MR. MORROW: There is nothing further that I was going to add on the motion to suppress that Mr. Chipperfield has, and so I waive my appearance.
>
> THE COURT: You want to take Mr. Stein back at this time?
>
> MR. MORROW: Yes.
>
> MR. COMPION [PROSECUTOR]: I am not -- I didn't have an opportunity to cross examine the witness, Judge. You want him present for that or not?
>
> MR. MORROW: There is no need for that. We can waive that, Judge.

> THE COURT: Okay. All right. With that let's take a five minute recess then we will come back, Mr. Morrow.

(R 151-152)

After the recess, Stein was present, but his lawyer was gone. (R 152) Apparently, Morrow's daughter was ill and he left. (R 152) The court inquired of Stein's wishes concerning his right to be present during the remaining part of the hearing as follows:

> THE COURT: Well, I guess I better talk to Mr. Stein. He told me that his daughter was ill and that he was asked, so I was kind of expecting him to come back or -- I saw he and Mr. Stein go into the back, but I thought they were going to discuss it.
>
> MR. CHIPPERFIELD: I didn't even know his daughter was sick. I didn't even know she was sick.
>
> THE COURT: Let's bring Mr. Stein out. Mr. Stein, if you will -- Mr. Stein, I was going to take a break because be had been going for the last hour-and-a-half or so and so I just took a break and when we -- I took the break Mr. Morrow came up to the bench here and he showed me a -- somebody had called him that his daughter had taken ill and somebody had called him. I don't know who it was, that he needed to go and tend to her. Did he discuss this with you?
>
> THE DEFENDANT: Yes, he did. That's pretty much what he told me, too.

(R 153) The Court then asked Chipperfield to examine the motion filed in Stein's case. (R 153) He did and responded that the motion Morrow filed was "similar or more identical" to the one he filed. (R 153) Chipperfield also stated that he did not know if there were any differences in the motions. (R 153) The judge then asked Stein if wanted to remain during the

remainder of the hearing. (R 153) Stein replied, "Sir, I wouldn't mind staying here if the Court don't mind, listening tohat[sic] is going on." (R 154) The prosecutor cross-examined the witness, Chipperfield conducted a redirect examination and the hearing was concluded. (R 154-171)

Stein was left to represent himself during the remainder of the suppression hearing. However, the court never made any inquiry as to Stein's desire to waive his lawyer's presence or his desire to represent himself. None of the requirements for waiving counsel were met. See, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Smith v. State, 407 So.2d 894 (Fla. 1981). When defense counsel fails to appear for a hearing or proceeding in a criminal case, the court is not free to forge ahead without counsel's presence unless the defendant waives counsel and chooses to represent himself. For example, in Hall v. State, 495 So.2d 194 (Fla. 5th DCA 1986), defense counsel did not appear for the defendant's sentencing. The court offered to continue the sentencing, but the defendant asked to waive counsel and "`just go ahead and get it over with.'" 495 So.2d at 196. No inquiry was made to establish if the defendant was making a knowing and intelligent waiver. The appellate court reversed holding that there was no waiver of counsel established on the record since the defendant was never asked about his understanding of the right he was giving up. Ibid. Here, Stein never requested to represent himself. He never asked to waive counsel's presence at the hearing. Stein's lawyer, himself, proposed to waive his own presence at

the hearing. (R 151-152) Stein was not offered a continuance of the hearing. The record demonstrates that Stein had no idea of his right to counsel's presence, what rights he was giving up, or the fact that he was being left to represent himself at the remainder of the hearing. Indeed, he even timidly told the court he would like to remain in the courtroom for the conclusion of the hearing. (R 153-154)

Although Stein's co-defendant's lawyer, Alan Chipperfield, conducted the rest of the suppression hearing, he was not representing Stein. (R 153) Chipperfield had not been asked to represent Stein for the hearing. (R 153) He did not even know the content of Stein's motion to suppress until he read it at the court's request. (R 153) Moreover, since the defendants had competing interests, Chipperfield could not have undertaken representation of Stein for the remainder of hearing if asked to do so. See, Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Stein was simply left unrepresented during the hearing.

When defense counsel had to leave the hearing because of a family emergency, the court should have continued the hearing. See, Reynolds v. Cochran, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961); Kimbrough v. State, 352 So.2d 925 (Fla. 1st DCA 1977). Stein was entitled to have his lawyer present and representing him throughout the hearing. Stein has been denied his right to counsel and his right to due process. Amends. VI, XIV, U.S. Const.; Art. I, Secs. 9 & 16 Fla. Const. He urges this Court to reverse his convictions.

## ISSUE III

THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL AFTER TWO WITNESSES MADE REFERENCES WHICH IMPLIED THAT STEIN MAY HAVE BEEN A MEMBER OF A HATE GROUP AND THAT ANOTHER PERSON, MENTIONED IN CONVERSATION IN CONNECTION WITH A DISCUSSION ABOUT A ROBBERY, MAY HAVE BEEN ON A "HIT LIST."

Comments two witnesses made improperly suggested that Stein was a member of a racial hate group and may have been involved in irrelevant collateral crimes. First, Kyle White testified that one of Marc Christmas' robbery plans included killing a Pizza Hut manager named Jope Vanderberg. (R 611) Christmas allegedly said they could then "kill two birds with one stone." (R 611) White then explained that Vanderberg was on "a hit list of some sort." (R 611) Second, during Detective Scott's testimony in a deposition to perpetuate his testimony he referred to Stein as a "skin head" thereby suggesting to the jury that Stein was a member of a white supremacist group characterized by their short hair. (R 669-670) There was no evidence that the subject of either of these comments was true, and even if true, the information had no relevance to the issues at trial. Stein's character was attacked in violation of his right to due process. Amends. V, XIV, U.S. Const.; Art. I, Secs. 9 & 16, Fla. Const. His jury was prejudiced with the suggestion that he may have been involved in other crimes, including other murders. Furthermore, evidence of his membership in a racist organization, if true, violated his right to freedom of speech and association as guaranteed by the First and

Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Florida Constitution.

The prosecutor realized that the witnesses' comments were irrelevant and prejudicial and he had made efforts to prevent them. (R 611-614, 669-670) The detectives involved in this case believed that Christmas and Stein were involved in a white supremacist organization. (R 146) Recognizing that this was not an issue in this case, the prosecutor attempted to prevent the detectives beliefs from being communicated to the jury. Both the State and the defense had agreed that Detective Scott's reference to Stein as a "skin head" in his deposition would not be read to the jury. (R 669-670) Unfortunately, the reader mistakenly read the comment. (R 669-670) When Kyle White made the "hit list" comment, the prosecutor, and the court's direction over defense objections, had White try to explain the "hit list" comment away as referring only to the robbery plan the men were then discussing. (R 611-614) These efforts were unsuccessful and the jury was prejudiced.

This Court has reversed convictions where similar comments from witnesses injected irrelevant, unfounded evidence of irrelevant, collateral crimes into the case. In Jackson v. State, 451 So.2d 458 (Fla. 1984), a State witness testified that the defendant once boasted about being a "thoroughbred killer." Concluding this testimony was irrelevant evidence suggesting collateral crimes, this Court reversed stating:

> Turning to the merits of the issue, we agree with Jackson that the testimony was impermissible and prejudicial. We envision

> no circumstance in which the objected to testimony could be "relevant to a material fact in issue," nor has the state suggested any. The testimony showed Jackson may have committed as assault on Dumas, but that crime was irrelevant to the case sub judice. Likewise the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the beast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2). As the Third District Court of Appeal said in Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977),
>
> > [t]here is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded [citing to Williams].

451 So.2d at 461.

The district courts have also condemned similar irrelevant character attacks on defendants. For example in Salazar-Rodriguez v. State, 436 So.2d 269 (Fla. 3d DCA 1983), the prosecutor used the negative reputation ascribed to the Mariel boatlift refugees to attack the character of the defendant in this aggravated battery case. The prosecutor never directly told the jury that the defendant was a Mariel boatlift refugee, but he did track the defendant's moves about the country suggesting the defendant was a refugee. Some of the prosecutor's witnesses were boatlift refugees and he had successfully argued

that the this fact about his witnesses was inadmissible and prejudicial. The Third District Court reversed, writing,

> Next, we note that during argument in support of the state's motion to limit questioning of its witnesses the prosecutor stated that questions about the circumstances surrounding the witnesses' arrival in Florida should be avoided because:
>
> > [I]t's highly prejudicial to them because of the unfortunate reputation that's come about throughout the community of all people from the Mariel boatlift....
>
> It is just as prejudicial to point out that appellant arrived from Mariel during the boatlift as it is to reveal that fact about prosecution witnesses. The trial court's ruling that counsel could not refer to any witness, victim or to the defendant as a Mariel refugee but could inquire regarding the date of arrival in the United States did not authorize the devious tactics employed by the state.

436 So.2d at 270. In another case from the Third District, Arsis v. State, 581 So.2d 935 (Fla. 3d DCA 1991), the court relied on Jackson and reversed for a new trial where the prosecutor elicited the fact that the defendant told his accomplices that "he robbed taxicabs for a living." 581 So.2d at 935. The Second District Court in Delgado v. State, 573 So.2d 83 (Fla. 2d DCA 1990), on the authority of Jackson, reversed a murder conviction because the prosecutor elicited from a witness that the defendant allegedly told her that he had killed ten men. 573 So.2d at 84-85. Just as in these cases, the "hit list" and "skin head" references suggested other irrelevant, collateral crimes and prejudiced the jury depriving Stein of due process and a fair trial. Amends. V, XIV, U.S. Const.; Art. I, Secs. 9 & 16, Fla. Const.

Recently, the Unites States Supreme Court in Dawson v. Delaware, ___ U.S. ___, 50 CrL 2088 (1992) held that evidence that a capital defendant was a member of a white racist prison gang was irrelevant and inadmissible in the penalty phase of his trial since the homicide was not connected to the gang and had no racial overtones. The Court held that admission of evidence of Dawson's membership in the gang violated his rights under the First and Fourteenth Amendments. The comments in this case suggesting that Stein was a member of a white racist group likewise violated his constitutional rights. As the Dawson Court noted,

> Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also to relevant to help prove any aggravating circumstance, In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for ex ample, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances. But the inference which the jury was invited to draw in this case tended to rove nothing more than the abstract beliefs of the Delaware chapter. Delaware counters that event these abstract beliefs constitute a portion of Dawson's "character," and thus are admissible in their own right under Delaware law. Del. Code Ann., Tit. 11, §4209(d) (1987). Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing

> more than Dawson's abstract beliefs. Cf. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

50 CrL 2090.

Stein has been denied his rights to due process, a fair trial and his freedom of speech and association. This Court must reverse this case for a new trial.

## ISSUE IV

THE TRIAL COURT ERRED IN IMPROPERLY FINDING AGGRAVATING CIRCUMSTANCES AND IN FAILING TO FIND AND CONSIDER EXISTING MITIGATING CIRCUMSTANCES, THEREBY RENDERING STEIN'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

### A.

### The Court Improperly Found That The Homicides Were Committed In An Especially Heinous, Atrocious Or Cruel Manner.

The trial judge found that the heinous, atrocious or cruel aggravating circumstance applied to the shooting deaths in this case, and he wrote his order as follows:

> The bodies of the two victims were found in the bathroom of the Pizza Hut. As shift supervisors, the victims were to clean up the Pizza Hut before leaving, but no cleaning products or maintenance products were found in the bathroom with the victims. From this, the court concludes that the evidence is clear that the victims were forced into the bathroom. Victim Bobby Hood was then shot four times in the head and once in the chest at close range (within eight inches), with the bullets going in a downward path. From the evidence presented it appears that Bobby Hood was shot and killed before Dennis Saunders. The amount of mental anguish that Mr. Saunders must have gone through before his execution was extremely cruel and heinous as he saw what happened to his friend and fellow worker Bobby Hood, as he awaited his own fate. Victim Dennis Saunders was shot four times all around the body, including in the leg, in the arm and in the chest, indicating that he was not going down easily.

(R 361-362)

The homicides here were nearly instantaneous shooting deaths. This Court has consistently held that such killings do not qualify for the heinous, atrocious or cruel aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Multiple gunshots administered within minutes do not satisfy the requirements of this factor. See, e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee). Even execution-style killings do not necessarily qualify for this aggravating circumstance. See, Kampff v. State, 371 So.2d 1007 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1979).

This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-810 (Fla. 1988). The fact that the victim lived a few moments between the first and fatal shots does not evidence the prolonged mental suffering and terror necessary to make a shooting death heinous, atrocious or cruel. See, Brown, 526 So.2d at 906-907,

n. 11 (although victim begged not to be shot just before fatal wound, this Court rejected HAC circumstance). Furthermore, the fact that the victim may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death.

The circumstances of the shooting in Brown are virtually identical to the ones here. In Brown, victim was shot in the arm, and he said, "Please don't shoot." Brown then immediately administered the fatal shot. On these facts, this Court held that the murder was not especially heinous, atrocious or cruel. 526 So.2d at 907.

B.

The Court Improperly Found That Stein Had A Previous Conviction For A Violent Felony.

The trial court found as an aggravating circumstance that Stein had a previous conviction for a violent felony pursuant to Section 921.141(5)(b), Florida Statutes. Stein's only convictions for violent felonies were the offenses for which he was convicted in this case for crimes committed in the same criminal episode. The trial judge found the mitigating circumstance that Stein did not have a prior criminal record. (R 363) Sec. 921.141(6)(a), Fla. Stat. However, the court concluded that each homicide conviction could enhance the other and found the aggravating circumstance of a previous conviction for violent felony:

> The crime of Murder in the First Degree is a capital felony. Steven Edward Stein is

> convicted of Murder in the First Degree for the death of Dennis Saunders and Murder in the First Degree for the death of Bobby Hood. Each conviction enhances the other and this aggravating factor is properly applied to the murder of both of the victims. Correll v. State, 523 So.2d 562 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988).

(R 359-360) In enacting the aggravating circumstance provided for in Section 912.141(5)(b) Florida Statutes, the legislature never intended for the circumstance to be applied where a contemporaneously committed violent felony supplies the "previous conviction." The aggravating circumstance should not have been applied in Stein's sentencing.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed the following two relevant aggravating circumstances:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) At the time the capital felony was committed the defendant also committed another capital felony.

(Emphasis added) This language was derived directly from the Model Penal Code, Section 210.6(3)(b)(c). The Commentary to the Model Penal Code, from which the language of the Florida Statute was drawn, explains that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offenses;

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the

> defendant has a history of violence. Prior conviction of a felony involving violence to the person suggest two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

The second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous killings;

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the Legislature subsequently eliminated paragraph (c) quoted above, it expressed its intention that the aggravator at issue only be applicable where the prior conviction was obtained in a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is a reasonable position since the legislature was focusing (a) on the issue of failed rehabilitation, i.e., the defendant was already given a second chance, and (b) the issue of propensity or future dangerousness. The interpretation of this aggravator which has allowed its application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/propensity

aggravator. In this regard, this Court's conclusion in King v. State, 390 So.2d 315, 320 (Fla. 1980), that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

for which the Court gave no authority, is contradicted by the facts recited above.

Recently, this Court construed the habitual offender statute concerning predicate felony convictions which contained language identical to the language found in Section 921.141(5)(b), Florida Statute. State v. Barnes, 17 FLW S119 (Fla. Feb. 20, 1992). Section 921.141(5)(b), Florida Statutes provides for an aggravating circumstance if the defendant "was previously convicted of a another capital felony of a felony involving the use or threat of violence to the person." The habitual offender statute in Barnes, Section 775.084(1)(a), Florida Statutes discusses the predicate felonies requirement as follows: "The defendant has previously been convicted of two or more felonies in this state." This Court held in Barnes that the predicate felony convictions required for the habitual offender statute did not require sequential convictions. However, in Barnes, the convictions did arise from separate incidents and the holding did not remove the requirement that the predicate convictions arise from separate incidents. Justice Kogan, concurring specially wrote,

> I concur with the rationale and result reached by the majority, but only because this particular defendant's felonies arose from two separate incidents. Were this not

> the case, I would not concur. I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prosecutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would have enhanced the penalties for all crimes rather than resorting to a "back-door" method of increasing prison sentences.

Barnes, 17 FLW at S120. Since the language used in the two statutes are identical, the legislature must have intended a previous conviction under Section 921.141(5)(b) to likewise arise from a separate criminal incident.

The aggravating circumstance of a previous conviction for a violent felony was improperly found and considered in sentencing Stein to death. He urges this Court to reverse his sentence.

C.

The Court Improperly Found That The Homicides Were Committed To Avoid Arrest And Were Committed In A Cold, Calculated And Premeditated Manner.

This Court has long held that two aggravating circumstances cannot be based on the same factual aspects of the case. E.g., Maggard v. State, 399 So.2d 973 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1979); Provence v. State, 337 So.2d 783 (Fla. 1976). The trial judge violated this principle when he found the premeditation and avoiding arrest aggravating

circumstances based on a finding that the homicides were committed to eliminate witnesses to the robbery. (R 360-361, 362) In support of the avoiding arrest circumstance, the court wrote,

> Dennis Saunders and Bobby Hood were killed for the purpose of the elimination of witnesses. Kyle White, the third roommate, overheard Steven Stein and co-defendant Christmas discuss their plan to rob Pizza Hut. Stein and Christmas discussed the need to eliminate any and all witnesses. Stein was a prior employee of Pizza Hut. Stein knew that it was the policy of Pizza Hut that if any employee is ever confronted with a robbery or placed in jeopardy, the employee is to give up the money without any resistance whatsoever. Nevertheless, Stein and Christmas discussed that they would have to kill any and all witnesses in order to ensure that they would not be identified as the robbers. In addition, at least one of the victims knew one of the Defendants, so Stein knew that if they were going to do the robbery, they were going to have to eliminate the witnesses.

(R 360-361) Finding the premeditation aggravating circumstance, the court stated:

> Steven Edward Stein and his co-defendant planned to kill any and all witnesses to their planned robbery of Pizza Hut. Stein, a former Pizza Hut employee, knew that it is Pizza Hut's policy for employees confronted with a robbery to give up the money without any resistance whatsoever. Despite this, Stein and his co-defendant discussed and planned to kill all witnesses to the robbery so that they would not be identified. The evidence indicates the two victims were forced into the bathroom, where they were each shot four or five times in order to eliminate them as witnesses, as planned and discussed by Stein and Christmas.

(R 362)

The fact of a prior plan to kill witnesses to the robbery was improperly used to find both of these aggravating circumstances. While the homicides may factually qualify for both of the aggravating circumstances, only one can be found and weighed in the sentencing equation. Otherwise, the sentencing process is skewed in favor of death because the same aspect of the case is weighed twice. This violated Stein's rights to a due process and a fair penalty determination.

D.

The Court Improperly Failed To Consider Existing Mitigating Circumstances.

Stein presented evidence of mitigating circumstances for the court's consideration. Although the trial judge found one statutory mitigating circumstance -- Stein's lack of a prior criminal history -- he failed to find and consider other mitigating factors presented. (R 362-365) First, the evidence showed a mitigating factor that Marc Christmas was the primary actor motivating this crime. According to Kyle White's testimony, Christmas came up with the idea of eliminating the witnesses and Stein merely went along with the plan. (R 629-630) White testified that the plan called for Christmas to do the killings. (R 631-633) One of the victim's knew Christmas, not Stein. (R 436-438, 718-719) Even though Stein's .22 rifle may have been used in the homicides, Christmas could have easily been the triggerman. Witnesses testified that Stein carried a .38 pistol which was not used. (R 595) The additional fact

that Stein was seen placing something small in his jacket in the parking lot of the Pizza Hut suggests that he may have been concealing his pistol at that time. (R 439-441) This would have left the .22 rifle for Christmas to use. Second, Stein presented evidence of his good character via testimony from his sister and girl friend. (R 856-861, 862-868) The court's failure to find and weigh this mitigation skewed the sentencing weighing process and rendered the death sentence unconstitutional. Amends. V, VI, VIII, XIV, U.S. Const.; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined the trial judge's duty to find and consider mitigating evidence:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find

mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

Finally, this court in Santos v. State, Case No. 74,467, 16 FLW S633 (Fla. Sept. 26, 1991), reaffirmed Rogers and Campbell, adding that "Mitigating evidence must at least be weighted in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." 16 FLW at S634. More significantly, this court, citing the mandate of the United States Supreme Court, indicated its willingness to examine the record to find mitigation the trial court had ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

16 FLW at S634. "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record ...." Wickham v. State, Case No. 73,508 (Fla. Dec. 12, 1991)(citing Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Rogers v. State, 511 So.2d 526 (Fla. 1987). The sentencing judge failed in this obligation in this case and Stein's death sentence must be reversed.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS TO TESTIFY, DURING PENALTY PHASE, TO A NONSTATUTORY AGGRAVATING CIRCUMSTANCE CONSISTING OF FACTS SUGGESTING STEIN COMMITTED THE OFFENSE OF CARRYING A CONCEALED FIREARM, EVEN THOUGH HE WAS NEVER CHARGED AND CONVICTED OF THIS NONVIOLENT OFFENSE.

The State presented Detective Thorwart during the penalty phase of the trial to testify that Stein carried a loaded .38 caliber pistol in his jacket at the time of his arrest. (R 852-853) Thorwart also testified that carrying a concealed firearm is a felony offense. (R 853) His testimony proceeded as follows:

> Q. ...Did you participate in the arrest of this defendant?
>
> A. Yes, sir, I did.
>
> Q. When you arrested the defendant did you find an item in that black leather jacket that he was wearing?
>
> A. Yes, sir, I did.
>
> Q. What did you find?
>
> A. I found a loaded .38 caliber revolver.
>
> Q. Detective, you indicated that it was loaded?
>
> A. Yes, sir, it was.
>
> Q. Did you find any other bullets on the defendant?
>
> A. There were some .38 caliber ammunition in his pocket.
>
> Q. Detective, are you aware that carrying a concealed firearm is a felony?
>
> A. Yes, sir, it's a third degree felony.

Q. Punishable by what?

A. Up to five years in the State Prison.

(R 852-853) Stein was not charged or convicted of this alleged nonviolent felony.

This testimony was inadmissible as irrelevant evidence of a nonstatutory aggravating circumstance. The only statutory aggravating circumstance remotely relating to this evidence is the one for previous convictions for violent felonies. Sec. 921.141(5)(b), Fla. Stat.; Lewis v. State, 398 So.2d 432, 438 (Fla. 1981). However, evidence of a prior crime, arrests, or pending charges does not qualify without an actual conviction. Robinson v. State, 487 So.2d 1040 (Fla. 1986); Elledge v. State, 346 So.2d 948 (Fla. 1977). Furthermore, the offense of carrying a concealed firearm does not qualify as a crime of violence because it is not a "life-threatening crime[] in which the perpetrator comes in direct contact with a human victim." Lewis, 398 So.2d at 438; Sec. 790.01(2), Fla. Stat. The evidence fails to meet the test for a statutory aggravating factor and should not have been admitted at the penalty phase trial.

The jury's receipt of this irrelevant, prejudicial inference of criminal conduct tainted the sentencing proceeding. Stein's death sentence, based upon such a tainted jury's recommendation of death, violates the Eighth and Fourteenth Amendments and Article I, Sections 9 & 17 of the Florida Constitution. Stein urges this Court to reverse his sentence for a new sentencing proceeding with a new jury.

## ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO PRESENT IRRELEVANT VICTIM SYMPATHY ARGUMENTS TO THE JURY DURING PENALTY PHASE.

During his penalty phase closing argument, the prosecutor appealed to the jury for sympathy for the victims. (R 871-873) Defense counsel objected and moved for a mistrial which the trial court denied. (R 872-873) The prosecutor's argument and defense counsel's motion were as follows:

> Good afternoon, ladies and gentlemen of the jury. Bobby Hood is dead. On January 21, 1991 he was 20 years old. He was a shift supervisor at the Pizza Hut. Not a wealthy man, rode a bike to work. He was earning his own way and just starting out in life.
>
> On that same day Dennis Saunders was working at that same business. Mr. Saunders was, I think the evidence shows 30 years old. He was married and the father of a child.
>
> MR. MORROW: Your Honor, I have a motion to make at the bench.
>
> THE COURT: All right, sir.
>
> (At side bar)
>
> MR. MORROW: Your Honor, I think that's imporper[sic] argument and I would move for a new penalty hearing because of that comment about he's the father of a child and that sort of thing, that is improper comment.
>
> MR. BATEH: Your Honor, I'm aware the victim comment being improper but I think some brief limited comment in reference to to the victim, especially matters that have been brought up during the course of the trial is proper. I'm not going to dwell on this at all, but I think I can make reference to the victims and put them in context as they were in this this case.

THE COURT: Okay. Let's do this, Mr. Bateh; I will deny Mr. Morrow's motion, let's move on from the subject.

MR. BATEH: Yes, sir.

(In open court)
Neither Bobby Hood nor Dennis Saunders were great leaders of men, they weren't senators, they weren't pillars of the community. They were two men at that Pizza Hut that were human beings. They were trying to earn an honest living to support themselves.
On January 21st the defendant and his partner walked in and executed both of those human beings, both of those men.
I would submit to you that it was Bobby Hood's and Dennis Saunder's God given right to live a full life and experience life in it's fullest. The defendant ended that on January 21, 1991 when he riddled both of their bodies with bullets.

(R 871-873)

This Court has condemned this type of prosecutorial argument which inflames the jury and diverts the jury to irrelevant considerations. See, Taylor v. State, 583 So.2d 323 (Fla. 1991); Jackson v. State, 522 So.2d 802 (Fla. 1988); Bertolotti v. State, 476 So.2d 130 (Fla. 1985). The inability of the victims to experience life is not an appropriate consideration in sentencing and is not subject to prosecutorial argument. Ibid. Furthermore, neither the victims' good character nor standing in the community is a relevant factor. Jackson v. State, 498 So.2d 908, 910 (Fla. 1986). Finally, any impact on the victims' family members is likewise an improper sentencing consideration. Grossman v. State, 525 So.2d 833 (Fla. 1988). The prosecutor and the trial judge were fully aware that the subject of the prosecutor's remarks were improper. (R

872) In fact, the prosecutor admitted, in response to objection, that his argument contained references to irrelevant victim impact information. (R 872) Instead of stopping the prejudicial comments, the judge condoned them by allowing the prosecutor to continue. (R 872-873) The sentencing phase jury was tainted and Stein's sentencing prejudiced. A reversal of the sentence is required.

Stein was deprived of his rights to due process and a fair penalty phase proceeding. Amends. V, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const. He asks this Court to reverse his death sentence.

ISSUE VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE SINCE THE EVIDENCE DID NOT SUPPORT THE GIVING OF THE INSTRUCTION, ALLOWING THE PROSECUTOR TO IMPROPERLY ARGUE THE EXISTENCE OF THE CIRCUMSTANCE BASED ON IRRELEVANT FACTORS, AND THEN, GIVING AN INSTRUCTION WHICH UNCONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE WHEN EVALUATING WHETHER THE CIRCUMSTANCE WAS PROVED.

The court instructed the jury that the it could consider if the evidence supported the heinous, atrocious or cruel aggravating circumstance. (R 908-909) The evidence did not support the jury instruction since the homicides were the result of a shooting and the victims died quickly with minimal pain. This Court has consistently held that such homicides, as matter of law, do not qualify for the heinous atrocious or cruel aggravating circumstance. (See, section 1 of this Issue, infra) Giving the instruction on HAC prompted the prosecutor's argument on the issue which was improper and directed the jury to consider facts which were irrelevant. (See, section 2 of this Issue, infra) Further compounding the error and misleading the jury, the court then gave a jury instruction on HAC which failed to limit and guide the jury's decision-making process on this point. (See, section 3 of this Issue, infra) These errors could have affected the jury's sentencing recommendation for death and ultimately the court's sentence, since a life recommendation would have triggered the standard in Tedder v. State, 322 So.2d 908 (Fla. 1975). See, Omelus v.

State, 584 So.2d 563 (Fla. 1991). Stein has been deprived of his rights to due process and fair sentencing phase trial. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16 & 17 Fla. Const. This Court must reverse Stein's death sentence.

1. The Evidence Did Not Support An Instruction On HAC

The homicide here was committed quickly with shots fired at close range. (R 361-362) This Court has repeatedly and consistently held that simple, quick, shooting deaths do not fall outside the norm of first degree murders so as to be classed as especially heinous, atrocious or cruel. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976); see, also, Issue IV , A, supra, and authorities cited therein. Nevertheless, the trial court gave a jury instruction on the heinous, atrocious or cruel aggravating factor. The instruction was not supported by the evidence, and the court erred in giving it and misleading the jury.

2. The Prosecutor Improperly Argued State Of Mind As A Variable To Consider When Evaluating HAC

During his penalty phase argument to the jury, the prosecutor suggested that the jury consider Stein's state of mind when deciding if the homicide was especially heinous, atrocious or cruel. His argument, in pertinent part, was as follows:

> Look at the actions of the defendant just a few minutes after those executions. A few minutes ago you heard the defendant's girlfriend on the stand state the within half an hour or an hour of those brutal executions the defendant came back to the trailer and was acting --
>
> MR. MORROW: Your Honor, I object to that as improper comment and on the same grounds I have raised.
>
> THE COURT: All right. I will overrule the objection.
>
> MR. BATEH: Thank you, your Honor. That he was acting normally; went out, bought beer, potato chips and came back to the trailer; socialized, listened to music and I would submit to you that that clearly shows that these murders were conciously[sic] and pitilessly carried out in an unnecessarily tortuous manner to both Mr. Saunders and to Mr. Hood, but especially to Mr. Saunders. I would submit to you that these murders were especially heinous, atocious[sic], and especially cruel by any standard of those words.

(R 887-888)

This argument was improper. First, the perpetrator's state of mind at the time of the homicide is irrelevant for determining if the homicide is especially heinous, atrocious or cruel. Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Michael v. State, 437 So.2d 138, 141-142 (Fla. 1983). Furthermore, even if the perpetrator's state of mind was relevant, here the prosecutor's argument focused on Stein's state of mind at a time after the alleged crime, not at the time of the homicide. Stein's behaviors after the homicide are irrelevant and this information, alone, rendered the prosecutor's argument improper and misleading.

Second, the prosecutor's argument constituted an improper suggestion to the jury to consider lack of remorse as an aggravating factor in reaching its sentencing decision. Emphasizing the testimony of Stein's girlfriend that Stein allegedly acted normally at one point after the shooting, the prosecutor implied that Stein lacked remorse and invited the jury to consider that in sentencing. (R 887-888) In Pope v. State, 441 So.2d 1073, this Court recognized that lack of remorse is not an aggravating circumstance, accord, Hill v. State, 549 So.2d 179 (Fla. 1989); Patterson v. State, 513 So.2d 1263 (Fla. 1987); McCampbell v. State, 421 So.2d 1072 (Fla. 1982), and further held that "absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope, 441 So.2d at 1078. This Court explained the rationale for the holding as follows:

> The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered, nor is the defendant's mind set ever at issue. Thus, we find any consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel.

Pope, at 1078. (emphasis added)

In Hill v. State, 549 So.2d 179, this Court reversed a capital case for a new sentencing phase trial because of remarks made in the jury's presence which invited the consideration of the defendant's lack of remorse. Just as in this

case, the prosecutor in Hill drew the jury's attention to behaviors of the defendant some time after the homicide. Ibid, at 184. The prosecutor made the same mistake here -- the defendant's state of mind was not at issue and a suggestion that he lacked remorse was improper, misleading and inflammatory. Just as this Court did in Hill, Stein's death sentence must also be reversed for a new penalty phase trial.

3. The Instructions To The Jury Failed To Limit And Guide The Findings Necessary To Satisfy HAC

Steven Stein's jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court instructed on the aggravating circumstances provided for in Section 921.141(5)(h), Florida Statutes as follows:

> [T]he crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

(R 908) Additionally, the court defined the terms "heinous", "atrocious" and "cruel" as follows:

> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outragiously[sic] wicked and vile.
>
> Cruel means to inflict a high degree of pain with utter indifference to or even enjoyment for the suffering of others.
>
> The crime intended to be committed was heinous, atrocious or cruel and one accompanied by the additional act that shows that the crime was conscenseless[sic] or pitiless and unnecessarily tortuous[sic] to the victim.

(R 908-909) Although this explanation of the aggravating circumstance was taken from this Court's decision in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it is inadequate to guide and limit the jury's sentencing function. The instructions given are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV, U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

In an effort to correct these unconstitutional instructions, Stein requested a special HAC instruction which apprised the jury of some of the limitation this Court has imposed on the applicability of this factor. This instruction stated,

> To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

(R 322) The requested instruction was one adopted by this Court's committee on Standard Jury Instructions in Criminal Cases. (R 322) However, the court denied the request since this instruction had not been approved as a standard instruction. (R 846)

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The

Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S. Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); State v. Dixon, 283 So.2d at 9., the jury was not adequately instructed on the

limitations imposed via this Court's opinions. The instructions, as given, could have lead the jurors to "believe that every unjustified, intentional taking of human life is `especially heinous'." Maynard, 100 L.Ed.2d at 382. Steven Stein's jury was left with no guidance and unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using precisely the same wording as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Stein's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Stein's jury were likewise constitutionally inadequate.

Proper jury instructions were critical in the penalty phase of Stein's trial. Although no instruction on HAC should have been given, Stein was, at least, entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments and Article

I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse his death sentence.

## CONCLUSION

For the reasons and authorities presented in Issues I through III, Steven Stein asks this Court to reverse his convictions with directions to give him a new trial. Alternatively, in Issues IV through VII, Stein asks this Court to reduce his death his death sentences to life in prison.

Respectfully submitted,

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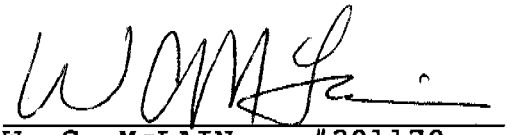
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by U. S. Mail to Mr. Richard B. Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Steven Stein, DOC #122551, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 27 day of April, 1992.

W. C. McLAIN