IN THE SUPREME COURT OF FLORIDA

JOHN C. BARRETT,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 78,743

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CITRUS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Following a jury trial in the Circuit Court for Citrus County, the Honorable John P. Thurman presiding, John C. Barrett was found guilty of four counts of first-degree murder[1] and one count of conspiracy[2] to commit first-degree murder, as charged. (R1838-39;3918-22)[3] The jury recommended life sentences, (R1788-89;4012-16), but the trial court imposed four death sentences and a seventeen year sentence of imprisonment on the conspiracy to commit first-degree murder conviction. (R4931-45)

The sentencing order, (R4922-28; Appendix A), shows that Judge Thurman found that all four murders were committed for pecuniary gain[4], to avoid arrest[5], to disrupt/hinder the lawful

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[1] Violations of Section 782.04, Florida Statutes (1989).

[2] A violation of Section 777.04(3), Florida Statutes (1989).

[3] (R) refers to the record on appeal.

[4] Section 921.141(5)(f), Florida Statutes (1989).

[5] Section 921.141(5)(e), Florida Statutes (1989)

exercise of a governmental function or enforcement of laws[6], and that Barrett had a prior conviction for a violent felony (the murders of the other victims in this case)[7]. (R4923) Judge Thurman also determined that two murders were committed in a cold, calculated and premeditated manner, with no pretense of moral or legal justification[8]. (R4923)

The trial judge concluded that Barrett had not acted under extreme duress or the substantial domination of another person and that he was not influenced by alcohol at the time of the murders. (R4924-25) The court found that Barrett had no significant history of prior criminal activity, that Barrett has a potential for rehabilitation, and that Barrett is adaptable to prison life. (R4924) The court noted that a co-defendant (Dorsey Sanders, III; R4852) received four life sentences for his involvement in the murders, that Barrett was a good parent, son and brother, that Barrett had served in the military, and that since his arrest Barrett was a model prisoner who demonstrated a sincere conversion to Christianity. (R4924)

The sentencing order affirmatively reflects that Judge Thurman's override of the jury life recommendations was based solely on Zeigler v. State, 580 So.2d 127 (Fla.1991). (R4926) In a detailed analysis that compared the aggravating and mitigating circumstances of the Zeigler case to his perception of the facts

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[6] Section 921.141(5)(g), Florida Statutes (1989).

[7] Section 921.141(5)(b), Florida Statutes (1989).

[8] Section 921.141(5)(i), Florida Statutes (1989).

of the instant case, Judge Thurman found that he could not distinguish Zeigler's case from Barrett's. (R4926-27) The written sentencing order concluded as follows:

> Nothing was kept from the jury that would have made any change in their recommendation and it is believed by this Court that this was their honest opinion based on the entire case.
>
> But this Court's first duty is to follow the law, and it would be doing a great disservice to our criminal justice system if it allowed a different sentence for you than Mr. Zeigler received.
>
> This wrong, in substituting the Court's opinion of reasonableness over the juries [sic], if there be wrong, can only be corrected if the reviewing Court is allowed to perform its function.

(R4928).

STATEMENT OF THE FACTS

For 27 years, JoAnn Sanders was married to Dorsey Sanders, Jr., D.V.M. (R446;901-03) They had three sons. (R449) When the Sanders divorced in 1984, Dr. Sanders was awarded assets worth $750,000 and Mrs. Sanders received assets worth $280,000. (R901-03) She appealed[9] the distribution of property and ultimately was awarded an additional $480,000 in assets, to be transferred on or before August 8, 1990. (R902-907)

Dr. Sanders owned a 360 acre farm in Melrose, Florida, on which was located International Auto Sales ("IAS"), a business owned by Sanders' son, Dorsey Sanders, III. (R700-704) John Barrett worked part-time at IAS as a mechanic, trading labor to pay a $6,000 debt he incurred by buying vehicles and parts from IAS. (R1238-42;1254) Barrett, a licensed security guard employed by Wells Fargo and Cooperative Security, also attended Career City College. (R1021-22;1235-37) Barrett had aspirations of becoming a United States Marshall. (R1251)

Barrett mentioned his police related courses to Scott Burnside, who was the general manager of IAS (R693;942;1040), and Burnside asked whether Barrett would be interested in doing some investigative work by following Dr. Sanders' ex-wife to develop information that could be used against her in pending property distribution proceedings. Barrett, excited at the prospect of private detective-type employment, agreed after discussing it

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[9] Sanders v. Sanders, 547 So.2d 1014 (Fla. 1st DCA 1989); Sanders v. Sanders, 492 So.2d 705 (Fla. 1st DCA 1986).

with his common-law wife, Paula. (R1250-52) In that regard, Barrett first cleared all financial matters with Paula, who was responsible for the family budget. (R1408-09;1415-24;1254)

Barrett followed Mrs. Sanders periodically in April of 1990, but found little to report. (R1252-54) Near the end of April, Burnside told Barrett that a court date was approaching and that Dr. Sanders was going to lose most of what he had unless Mrs. Sanders could be made to drop her case. (R1257) Burnside asked Barrett if he knew anyone that could pull a trigger:

> Barrett: I asked [Burnside] about it. I said, "What do you mean?" He said, "Well, we've got to get rid of JoAnn Sanders." And I told him I didn't really, I couldn't really help him out in that. And then he told me, he said -- well, what they had in mind, really, was going and picking her up and kidnapping her and driving her off to a wooded area with ski masks on and telling her to lay off Doc or next time she wouldn't be so lucky.

(R1256). Barrett told Burnside that things could not be done that way. (R1258) Barrett was worried about Burnside and, because Paula was also working part-time at IAS, he talked to Paula about Burnside's request. (R1259;1425)

As time passed, Dr. Sanders pressured Burnside to take care of the matter; in return Burnside pressured Barrett. (R1268) One Saturday night in May, Burnside made Barrett show him where Mrs. Sanders lived. Barrett complied, knowing from his prior surveillance that she would not be there. (R1260) During the trip, Burnside told Barrett that, "something had to be done, because Doc was losing his mind, and he was eventually going to

go down there with a shotgun and kill JoAnn Sanders and then just turn the gun on his'elf, because it was tearing him apart." (R1262)

Barrett was told that he would be killed if he said anything to anyone. (R1264) Even so, Paula, who had just started working at a convenience store, was kept informed by Barrett of what was happening. (R1265-66) Paula's brother, John Withers, and Withers' wife lived with the Barrett family in May. (R1268; 958) Barrett helped Withers get part-time employment at IAS (R942), and Withers helped Barrett get a job at the Veterans Administration hospital. (R940)

In school, Barrett saw a training film that contained a brief segment on how to make silencers. (R1027) In July, after having graduated, Barrett asked an instructor from the Career College how to make a silencer in order to get back at people who had assaulted his wife. The instructor refused and told Barrett to go to the police instead. (R1026-27) It was obvious to the instructor that Barrett had been drinking and was very upset. (R1032;1026) Barrett had been a very good student and as part of the basic police courses had been taught use of the PR-24 baton and a .38 service revolver. (R1023-24;1030;32)

At Sanders' farm in July, with Burnside, Dorsey Sanders and Paula present, Barrett built and then test-fired a silencer made from pipe and steel wool. (R1035-39;1041-43;1080-83) Also in July, Paula bought a 9mm "Stallard" which Barrett exchanged for an "AP-9" the same day. (R1007-10) An AP-9 has a flash-

suppressor. (R1010-11) Typically, silencers screw onto the barrel of a pistol, and homemade silencers often cause misfires due to changes in the gas pressures which operate the automatic loading mechanism. (R1096-1101)

Burnside was threatening to harm Barrett's family if something was not done soon (R1269-70) and, at the urging of Burnside, Barrett asked John Withers whether he would help get rid of Mrs. Sanders. (R940;1269-70) Withers testified that Barrett told him that Dr. Sanders wanted Mrs. Sanders killed because of divorce proceedings and that they could be paid $6,000 apiece for doing so. (R940-42) Withers went to Sanders' farm and verified the proposal with Dr. Sanders, who stated that he would rather have someone else do it because he did not want to get his friends involved. (R943) Burnside told Withers that it should be made to look like a burglary if possible. (R944)

Twice, Withers and Barrett drove to the area where Mrs. Sanders lived. (R964) Their first trip occurred two days after the "make it look like a burglary" conversation with Burnside. Barrett and Withers drove to Floral City, where Mrs. Sanders was remodeling her house with the help of friends. Apparently, no one was home. (R945-47) The second trip occurred about a week after that first trip. (R947) Withers and Barrett drove a Mercury belonging to IAS to Floral City and feigned car trouble near Mrs. Sanders' home. (R948-950) Barrett and Withers went to the house to get water. (R950-51)

After obtaining water, Barrett and Withers returned to the Mercury. Barrett stated, "[we] should do it now." (R952) Withers told Barrett he was crazy. Barrett returned to Sanders' house, thanked them for the water and stated that he would bring some beer by the next time he was in the area. (R953) Withers claims to have been told by Burnside, Dorsey Sanders III, and Barrett that, since he was not going to help and because he knew all about it, they could no carry on with their plan. (R954) When Withers learned of the murders, he told the police the foregoing information. (R956-57) Withers did not believe that Barrett would really do anything to Mrs. Sanders, and at trial he still felt that way. (R964) After the murders, Burnside told Withers that he hoped Barrett would be killed during capture so Barrett could not testify about Burnside's participation in the murders. (R966;971)

Mrs. Sanders testified that she lived in Floral City with her fiancee, Jerry Clark. Roger Wilson stayed with them. (R410) On weekdays they worked on the house and on weekends they went to Weeki Wachee. (R409-11) On Friday, August 3rd, 1990, she left her fiancee and Wilson at the Floral City residence and went to Brooksville to buy supplies. When she returned around noon, John Barrett was there. (R411-13) She recognized him as the person who had previously brought them beer for helping with his vehicle. (R414-15)

Barrett claimed to again be having truck trouble nearby and said that he just walked over to say hello. (R414;444)

Barrett had a twelve pack of beer, which he consumed along with other beer as he helped work on the house. (R415; 417;419;440-42) Around 3:00 o'clock that afternoon, Mrs. Sanders received a call from her father stating that her mother was very sick. (R416) Mrs. Sanders went to check on her mother, who lived less than a mile away. (R417) Sanders' mother had suffered a stroke, and an ambulance and paramedics were summoned. (R419)

Mrs. Sanders briefly stopped by her house and told Wilson that she was taking her mother to the hospital. (R420-21) She heard Roger reply, "That's okay, we'll catch you later." (R421) She turned to exit and saw Barrett, with his back to her, standing by the wall near the kitchen. (R421) Sanders ran out, jumped in her car and left to catch the ambulance. (R421) As she left, however, she saw Barrett's truck parked near her driveway on US 41 and thought that Barrett was there to spy on her. (R423;447) She stopped and obtained a detailed description of the green and white Chevrolet Blazer truck bearing a temporary tag (later found to have been issued to Scott Burnside c/o IAS) and a permanent tag (found to have been issued to IAS). (R423-25;692-93;807-808) She then proceeded to the hospital. (R425)

Bob Hemingway and Larry Johnson lived next to Mrs. Sanders. (R650-51) Another neighbor, Mrs. Cashdollar, saw Hemingway and Johnson around 6:15 p.m. standing next to a dumpster close to Hemingway's house. The men were talking and looking toward Mrs. Sanders' house. (R658-59) When Mrs. Cashdollar left minutes later, Hemingway and Johnson had

disappeared. When she returned around 6:45, she saw Clark's truck turning into Mrs. Sanders' property, but she did not see who was driving that truck. (R659-61)

Around 9:30 p.m., Mrs. Sanders called home to tell Wilson and Clark that she was on her way back from the hospital, but she received no answer, which was not unusual. (R425-27) She arrived home around 10:30. The door was locked, which was unusual. (R427-28) Inside, she saw Roger Wilson lying on the floor where Barrett had been standing earlier. (R429) She thought that perhaps he had passed out from all of the drinking that had gone on that day (R429), and she went into the bedroom where she found Jerry Clark lying in a pool of blood. (R430) She checked and determined that he was cold and unmoving, then ran to another room and called 911. (R430)

Citrus County deputies responded and secured the area. (R491-92) In addition to the bodies[10] found by Mrs. Sanders, deputies found the body of Larry Johnson in the same bedroom as Clark, and the body of Bob Hemingway in a closet at the entrance to that same bedroom. (R496-97) The Medical Examiner performed autopsies the next day. (R451-55;478) Wilson had been shot twice in the back of the head and received no other injuries. (R460) Clark died from a depressed skull fracture/blunt trauma to the head. (R462-64) Hemingway and Johnson died from similar blunt trauma to the head. (R470-75;479) The medical examiner first

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[10] The state and the defense stipulated to the identity of all four victims. (R378-79)

concluded that the injuries were consistent with having been inflicted with a 2" x 4" board, but after talking with the prosecutor the medical examiner felt that the wounds had been inflicted with a cylindrical-type object. (R480) The throats of Clark, Hemingway and Johnson had been cut. (R461;466;472)

Deputies found clumps of steel wool scattered on the floor in the area where Wilson had been shot. (R575) Fragments of steel wool were also found in the wall along the trajectory of the bullets that struck Wilson. (R564-65) A spent 9mm shell casing was found in the bath tub. (R572;596) Two 9mm bullets were recovered from the interior walls of the house. (R567-70) The bullets were consistent with having come from a 9mm, "AP-9" pistol, but experts could not be more specific in the absence of a particular weapon because other pistols produce the same general characteristics as those found on the bullets. (R1091-94)

A bloodspatter expert theorized that the evidence was consistent with Clark and Hemingway having been bludgeoned while lying on or near the floor, but he could not tell how or where the first blows were struck. (R636-38;642-43) Johnson appeared to have been dragged to the closet after having been beaten. (R639-40; 645) Knowing from Mrs. Sanders that a person named "John" had been present and drinking beer at her premises when she left, deputies collected eleven "Bud Dry" cans to test for fingerprints; however, numerous other beer cans of different brands were not recovered. (R607-08)

On Sunday, deputies went to IAS and interviewed John Sanders, Scott Burnside and Dorsey Sanders, III. (R709-12) On Monday, the deputies obtained and executed search warrants for IAS and Barrett's residence. (R703) Deputies found in the woods behind Barrett's house the Blazer that had been parked along US 41 near Mrs. Sanders' driveway. The Blazer had been partially repainted and camouflaged with branches. (R647-49;660;748-54;766) Beer cans bearing Barrett's fingerprints were inside the Blazer, and Barrett's fingerprints were on the Blazer. (R790-92;1170-75)

Mrs. Sanders was shown a photographic lineup and she identified John Barrett as the person that had been at her house on Friday when she left to go to her mother's. (R731-37;742) A derringer was found in Barrett's house. (R760) During one of his trips with Withers to Mrs. Sanders' house, Barrett had possessed a derringer and some other type weapon. (R951-52) A towel found in Barrett's house (R761) had a bloodstain that could have come either from John Barrett or Roger Wilson. (R1197-97;1209) One hair, among others, found on that towel was consistent with having come from Roger Wilson. (R1223-24) The expert did not determine whether the hair was consistent with having come from Barrett. (R1227)

Co-workers established that Paula Barrett worked at the Suwanee Swifty convenience store on August 2nd and 4th. (R811-13) Paula had bleached her hair from dark brown to blond. (R820) While at work on August 4th, Paula received flowers at work and a card stating, "Thank you, Paula." (R819-20) Paula destroyed the

card. (R819-20) When Paula got off work that Saturday, she and her supervisor went to Crescent Beach with John Barrett and the Barrett's five children. (R813-14) During the trip, Barrett was very quiet and he took care of the children. (R814-16) That night, Paula's supervisor received a call from Barrett stating that Paula would not be able to work the next morning due to a family emergency. (R816-18)

Paula, John Barrett and their five children were seen by a co-worker the next day at Wal Mart loading their car with groceries. (R823-24) Paula, usually very cool, seemed nervous. (R825) On August 8, Citrus County deputies talked by telephone with Paula Barrett, who was in Hamilton, Ohio, and the deputies and an assistant state attorney (Anthony Tatti, Esq.) immediately flew to Ohio in the sheriff's airplane. (R826-30) The Florida deputies and Tatti, coordinating their efforts with local Ohio authorities, went to Barrett's parents' house. There they talked with Paula, who upon arriving in Ohio had insisted on dying her hair black (R870;1417), and learned that Barrett's brother, Joseph, had driven Barrett to a wooded area. (R858-60)

Joseph, though not arrested, was taken in an unmarked police cruiser to the wooded area where Barrett had been dropped off, and was kept in the police car for eleven hours while an unsuccessful air and ground search was conducted. (R832-37;843-44;873-74) Tatti entered the cruiser periodically. Joseph gave a statement when he was told that Tatti was prepared to file charges against him for aiding and abetting. (R874-76)

John Barrett did not stay where he had been dropped off. Instead of going into the woods to hide, he went to see a friend, Donald Campbell. Campbell came home around 6:00 p.m. on August 8th and found Barrett sitting on his porch. (R1113) Friends for many years, they went to local bars and drank heavily. During this binge Barrett talked about the murders, and told Campbell the following:

> A: (Campbell) We was sitting there at the bar drinking beer, and John -- we was talking back and forth about what he'd been doing, how he was doing, things like that. And he said, like: Well, I've got more now than I've ever had, I've got the trailer, property, cars. He said, "I've got caught up in something down here I can't get out of." He called it a whirlwind. He said, "They call me the golden boy. I've killed four people in Citrus County, Florida."
>
> Q: (prosecutor) Are those his words?
>
> A: Yes.
>
> Q: Did you respond to that statement?
>
> A: I said, "Why did you kill them, John?" He said, "I was contracted to go do this one, I went there to do one, the other ones come in and I had to do those, too."
>
> Q: Did he appear to you to be serious at that point?
>
> A: Yes, very serious.
>
> Q: Did you ask him any other questions?
>
> A: I said, "How did you kill them, John, did you shoot them?" He said, "No, I hit them in the head with a hammer and a pipe."

> Q: He say anything else about what had occurred?
>
> A: That's pretty well much of what he said about that.

(R1108-09).

Campbell and Barrett, heavily intoxicated, returned to Campbell's house around 2:30 a.m.. Barrett went to sleep on the couch and Campbell went upstairs. (R1110;1116) Campbell's wife called the police, who entered the house with her consent. (R853) Campbell, though told he was not being arrested, was taken to jail for questioning. Campbell gave a statement and was released the next afternoon. (R1111) Barrett, who was unarmed, was arrested at Campbell's house without incident. (R844;854-56)

FACTS CONCERNING BARRETT'S STATEMENTS

Barrett was then questioned by Florida Deputy Thompson, Deputy Padgett, and Assistant State Attorney Anthony Tatti, Esq.. Barrett repeatedly invoked his right to counsel during the interrogations, but the Florida officials persisted, using ploys that Barrett's family would be harmed if he did not talk:

> Q: (Deputy) Tell us who hired you?
>
> A: (Barrett) I appreciate what you're doing. You're doing your job, and I appreciate that. You're not ass holes. You're just doing your job. And I think you are both (inaudible). If I was to make any kind of statements on any subject without my attorney present, then I'd be going against what a trusting man (inaudible) who was trusted by our family. He's an attorney. I can't make any statement about anything until I sit and speak with my attorney. I have to talk to him. I have to -- I have to talk to my attorney.

Q: So you --

A: That's what I need, sir.

Q: Do you (inaudible)? In other words, that's acceptable to you. That's acceptable (inaudible). I want to make sure that you understand that what you're doing (inaudible) jeopardy of being killed. That's what we're here (inaudible). I just want to know the answer, because if something happens tomorrow or the next day, I'm going to come back and say, John, you killed them. (Inaudible.) I want to make it (inaudible).

I want to make sure if I do that, it'll be all right with you when I walk in your cell three days from now, I (inaudible), Paula just had her head cut off. Is that going to be all right? (inaudible). So I come, look at you in the eyes just like I'm looking at you right now. I'm going to say, John, well, John, she was tortured and killed, hope you are happy. (inaudible) I want to make sure I understand. That's all right?

A: That's (inaudible).

Q: Whenever she's dead and gone (inaudible). Is that it, John?

A: Sir, I just want to do what I was advised.

Q: I don't care about (inaudible). Your attorney is thinking about your rights. He's not thinking about your family.

A: I understand. I think about my family all the time.

Q: You have had enough training to know that what you say on this tape, we can't use this tape on you. You've got enough training to know we can't use it against you, don't you?

A: Yes, sir, I understand.

Q: So, you understand the statements (inaudible)?

A: Well, no, sir, not really.

Q: Okay. Let me just (inaudible).

A: I don't understand really anything in this (inaudible).

Q: This man, this man is the prosecutor. (indicating).

A: Yes, sir.

Q: He's going to prosecute your case.

A: Yes, sir.

Q: He will not use this against you. The prosecuting attorney is standing right there. That is the prosecuting attorney.

A: That's on this tape?

Q: (inaudible). That's on that video, and there's the (inaudible). He's the State Attorney, the State Attorney's Office, Fifth Judicial Circuit, State of Florida. That statement cannot be used against you.

Tatti: John, you want me to turn the tape off, the video? (inaudible). I am not going to use this. You're not going to see this in court, under any circumstances.

Q: This will never be used against you.

Tatti: The people that are responsible for starting this, the people that may be responsible for hurting your wife and children are out there. Our job is to put them away, and we're going to do it. You let them stay out there, you know what they're capable of. You know what they put you up to doing, John. I'm going to be responsible for what happens to you in the courtroom. You understand that?

A: Yes, sir, I understand that. (inaudible).

Tatti: And I'm telling you, and I'm on tape, that I'm not going to use this tape. It cannot be used against you. The jury is never going to hear it. Nobody is ever going to hear it. We'll turn all the tapes off so nobody will ever know other than what we say (inaudible)

Q: You want to do it that way? We'll turn them all off. Is that what you want? Would that help?

A: Yeah.

Q: Because you want us to turn it off?

A: This isn't about you. It's about (inaudible).

Q: It's not about you.

Q: We want to ask you how you went down there and did it (inaudible) because we know it.

Q: We want to now what transpired between you and the people that hired you to do this. That's what we want.

Q: And it will not be used against you, ever against you, ever.

Q: Now do you want this off, that off?

A: (Indicating affirmatively).

(tape ended)

(R4826-28)(emphasis added).

The next day, Barrett asked to see the people who questioned him the day before because they had promised that he would be allowed to communicate with Paula, but his jailers would not let him. The following occurred at the inception of the second interrogation:

Barrett: You had said yesterday I could give Paula a note just about how I feel about her and everything. I was wondering if that still stood?

Deputy: Sure.

Barrett: Because they wouldn't give her one. Well, we'll -- they can mail it.

Deputy: You know she's leaving today?

Barrett: No, I didn't know.

Deputy: The same (inaudible).....

Barrett: I have to talk to my attorney.

Deputy: (Inaudible) You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand those rights?

Barrett: Yes, sir.

Deputy: And you have already done -- you already have an attorney?

Barrett: This isn't about an attorney or anything. I was wondering if that still stood?

Deputy: Yeah.

Barrett: Because they didn't give her one again.

Deputy: Well, we'll give it to her.

Barrett: They can mail it and she'll get it.

Deputy: You know she's leaving today?

Barrett: No, I didn't know.

Deputy: Wouldn't it be nice if you all could have been in the same place (inaudible)? That's just the way it turned out, I guess.

Barrett: I have to talk to my attorney (inaudible).

(R4752-53)(emphasis added)(portions where tape was replayed at request of trial judge omitted. See Appendix B).

Thereafter, the deputies and Tatti exploited the theme that had so predominated the interrogation the preceding day, the concern Barrett had for his wife and family. When deputies urged, "John, now being truthful with us is going to help them." (R4767) Barrett replied, "I wanted to come down here because I know you're good men and I want (inaudible) to give that letter to Paula and kind of look out for her and to make sure she don't get hurt." (R4767) After being assured that Paula would be given the letter (R4768), Barrett gave a factual account of what had transpired up to the time JoAnn Sanders returned to her house and stated that she was going to the hospital with her mother. (R4769-72)

Barrett concluded, "That's all," (R4772), but the deputies continued. Barrett repeatedly stated that he did not commit the murders. (R4774-80) When the Florida deputies were unable to shake Barrett from maintaining his innocence, Barrett was taken from the questioning cell, whereupon one deputy stated, "We tried like hell." (R4793) The other replied, "Yeah, I know."

Barrett sought to suppress the statements because they had been coerced and were obtained in violation of his right to an attorney. (R3709-19) A suppression hearing was held July 12, 1991. (R4743-4839; Appendix B) The state stipulated that the statements of August 9, 1990, must be suppressed. (R4454) The

trial court denied Barrett's motion to suppress the August 10th statements, finding that the investigators did not know why Barrett asked to see them and that Barrett had been re-advised of his rights. (R4454-55; Appendix C) The court noted, "[T]he defendant made several admissions to the investigators but never confessed to the crimes and in fact specifically denied that he committed the crime." (R4455)

At trial, the state argued that defense counsel "opened the door" for use of the suppressed statement by asking Deputy Thompson why the police had failed to submit for comparison any hair, blood or fingerprint samples from other people that were apparently involved in the murders. (R1058-62) The court allowed the following questioning, which was directly based on Barrett's statement of August 9th:

> Q: (Tatti) Investigator Thompson, Ms. Jenkins just asked you about sending Tonya Burnside's known standards; Dorsey Sanders III's known standards; Scott Burnside's known standards; Tonya Burnside's known standards; do you recall those questions?
>
> A: (Thompson) Yes, sir.
>
> Q: Investigator Thompson, is there some reason you did not send those standards for comparison?
>
> A: Because all of the information we had showed that John Barrett was at the home by himself.
>
> Q: Has that information changed to date?
>
> A: No, sir.

(R1062).

BARRETT'S TESTIMONY

Barrett testified at trial. (R1234-1396) He is 26 years old. (R1234) Two of Paula's five children are his. (R1234) He first met Dr. Sanders when he purchased a car from IAS, and Sanders let him work off the payments by doing mechanic work on vehicles belonging to IAS. (R1238-42;1247) At Sanders' request, Barrett watched JoAnn Sanders and, when nothing developed, the surveillance turned into a plot to kidnap and intimidate her into dropping her court claim. (R1249-1256)

At Burnside's request, Barrett asked Withers if he wanted to make some money by helping him do something to Mrs. Sanders. (R1270-71) Barrett and Withers, without any intention of doing anything, made two trips to Mrs. Sanders' residence. (R1273-76) Burnside and Barrett also made an aborted trip to Mrs. Sanders' house sometime after July 4th. (R1277-79) Burnside was acting crazy and was threatening Barrett and his children. (R1279) Paula, while working at IAS, overheard Dorsey and Burnside talking about the plan to kidnap Mrs. Sanders, and she told them that Barrett would help. (R1287)

When Paula told Burnside that Barrett knew how to make a silencer, Burnside asked Barrett to make one. Barrett tried, but it did not work. (R1288;1345) Barrett saw Dorsey Sanders making a second silencer. (R1289) Withers backed out (R1366-67) and was able to avoid the people at IAS, but Barrett had to go there to work because of his debt. (R1284) Barrett borrowed $2,000 from Paula's grandfather and gave it to IAS. (R1285)

Barrett began to drink; his drinking escalated in June and became horrible in July. (R1281-82) In July, Paula bought Barrett a 9mm pistol, which Barrett exchanged for one similar to a pistol owned by Burnside. (1291-92) Though the same make as Burnside's, Barrett's pistol had a clip on flash-suppressor, whereas Burnside's pistol was threaded and the flash-suppressor screwed on the barrel. (R1293-94) At the end of July, Paula told Barrett that they were broke and that, if the utilities were shut off, she would take the children and move in with her mother.[11] (R1297-1300)

When Barrett confided in Paula that he was only pretending to go to Mrs. Sanders' house so Burnside would believe he actually went, she pressured him to go along with Burnside to keep the family safe. (R1303-04) Soon after Barrett squabbled with Paula, Burnside told Barrett that he knew Barrett was not going to Mrs. Sanders' house and that he was tired of fooling around. (1305-06) On August 1, Barrett went to the convenience store to talk to Paula, and she told him that Burnside wanted to see him right away, so he went to IAS. (R1306-07) Barrett was told to go to Mrs. Sanders' that night; he did not. (R1307) The next day, Barrett saw Burnside at Paula's store and Burnside asked Barrett what his problem was. (R1308) Barrett replied that

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[11] At this point, defense counsel objected because Tatti was making facial expressions as Barrett testified. (R1299) The state attorney (Bradley King), who also prosecuted this case and was present, replied to the court at sidebar, "I haven't been looking, Your Honor, so I don't know. I do find it very hard to keep a straight face." (R1299)

he just could not do it and was told by Burnside that he would go the next day (August 3), park the truck near the road and prop up the hood as a signal to Burnside that Mrs. Sanders was home, "or else." (R1308-09)

On August 3, Barrett drove to Mrs. Sanders' house and helped the men work on the house; he did not know what else to do. (R1310) Barrett consumed a 12 pack of beer before arriving at Sanders' around 10 a.m., and more beer was consumed as they worked. (R1310) Mrs. Sanders arrived around 11 a.m. and remained until she received a call for her to check on her mother. (R1311-12) She returned briefly and said she was taking her mother to the hospital due to a stroke and that she would not be back until late. (R1313) Jerry had taken a load of trash to the dump (R1311) and during a break Barrett smoked marijuana. (R1328) Barrett testified that he felt nothing would happen if Mrs. Sanders was not present and that he did not think Burnside would show up until much later. (R1313-14) However, Burnside walked through the doorway. (R1314) Barrett raised his hands and Burnside shot Roger twice. (R1315) Barrett walked out of the house as Burnside talked to someone else at the rear of the house. Burnside called, "Where do you think you're going? Where's the old lady?" (R1315;1318) Barrett kept repeating, "Her car isn't here." (R1317).

Clark pulled into the yard and talked with two men who came over. (R1317) Burnside was still talking to someone at the rear of Sanders' house. (R1317) Clark asked where Roger was and

Barrett replied, "In the bathroom." (R1317) The three men walked into the house. (R1317) Barrett began sawing trim boards, and after a while Burnside came to the door, stated that the silencer was no good and told Barrett to come inside. (R1320) Barrett refused, walked to his truck and left. (R1320-21).

Barrett went to Inverness and got more beer. (R1320) He came back by Sanders' house and determined that Burnside was not there. (R1320-23) Barrett, armed, then went to Burnside's house because he thought Burnside would be looking for him. (R1323) Barrett found Burnside and they agreed that the Blazer would have to be repainted and the tires changed, and the next day Barrett began to do those things. (R1323-26;1375) Barrett saw Dr. Sanders and Burnside burning Roger's credit cards and driver's license, and he saw in Sanders' truck a blue bag containing a hatchet and a bent pipe. (R1324-26)

Barrett went to the beach with Paula and the children, and when they returned helicopters were flying around the house. (R1329-31) They spent the night in a motel and the next day they went to Ohio. (R1329-31) Barrett admitted telling Campbell while they were both drinking just prior to his apprehension that four people had been killed and that he had been caught up in a whirlwind. However, Barrett clarified that he had not referred to himself as the "Golden Boy," but instead as the "do boy." (R1383-84)

During cross examination of Barrett by assistant state attorney Tatti, the following transpired:

Q: (Tatti) You had the opportunity to speak with Jerry Thompson and Marvin Padgett on August 10, 1990; didn't you?

A: (Barrett) Yes, sir, I did.

Q: You didn't tell them about Scott Burnside killing anybody, did you?

A: No, sir. But it was my understanding that Scott Burnside was to be arrested along with Dorsey Sanders, III, and that they were going to try to arrest Doc Sanders also. So I figured that if you guys didn't mess it up, and you got a hold of Scott, then I would be able to tell you everything. But, of course, my faith in the police were (sic) correct, and they were unable to apprehend Scott Burnside.

Q: The police messed this all up?

A: The police made a mistake and they let Scott Burnside get away.

Q: You knew, on August 10, 1990, that the police were interested in arresting Dorsey Sanders, Jr.; Dorsey Sanders, III; and Scott Burnside for hiring you to kill the four people in Inverness or in Floral City, right?

A: Correct.

Q: That's what you knew?

A: I knew they were going to arrest them, yes, sir, correct.

Q: For hiring you?

A: Yes, sir.

Q: Not for killing anybody?

A: I knew that's what you were charging me with, yes, sir.

Q: But you never mentioned Scott Burnside?

> A: No, sir. I was not going to have it written in the paper that man says so-and-so kills four people in Floral City, and then wake up in a jail cell and read in the paper that my children were murdered, no, sir. I didn't have that kind of faith in you.
>
> Q: And you haven't said anything about Scott Burnside doing that until today, have you?
>
> A: I told the people that were defending me.
>
> Q: But you didn't tell the police?
>
> A: The people that were defending me came and asked me.

(R1385-87).

Thereafter, on redirect, Barrett sought to present his statements of August 9th and 10th in order to explain the answers Barrett had given when Tatti asked whether he told the police about Burnside when given the "opportunity to speak with the police." (R1437-38) The state objected on the grounds that the Barrett's prior statements were "self-serving hearsay."

> Tatti: Your Honor, the question, I asked him if he had the opportunity to speak with the police, and did you tell them that Scott Burnside committed the murders, that's the only question I asked. The statement is still a self-serving declaration on the part of the defendant and the rules say he can't add his own self-serving hearsay.
>
> Defense Counsel: I want further evidence of the defendant's state of mind at the time.
>
> The Court: I'm not going to allow it.

(R1438-39).

FACTS CONCERNING THE DISCOVERY VIOLATION

Deputy Thompson, one of the two lead investigators, testified several times during the state's case in chief. During cross-examination by defense attorneys, Thompson testified that he did not know whether Burnside's fingerprints had been sent to state experts for comparison with the prints found at the scene of the crime. Thompson did know that he had not ordered that such a comparison be made. (R1051-54) Officer Strickland testified that he compared Barrett's fingerprints to 44 others that had been recovered from various sources and determined that John Barrett's fingerprints were on a styrofoam cup and a Bud Dry beer can. (R898) Strickland testified that he had not been provided with fingerprints from Burnside or Dorsey Sanders, III. (R898)

Thereafter, the state had Strickland compare Burnside's prints to those found in Mrs. Sanders' house. When Barrett rested, the state presented Strickland as a rebuttal witness: Strickland testified that none of the latent prints found inside Mrs. Sanders' home belonged to Burnside. (R1450-51). On cross-examination, Strickland testified that he had been provided Burnside's known prints or two days previously; fingerprints were given to him by Citrus County Investigator Shleip, and palmprints came from a prior arrest in Seminole County. (R1451-52)

Defense counsel moved for a mistrial and asked for an inquiry to address a discovery violation. (R1453) The court denied the motion for mistrial and deferred conducting an inquiry, stating, "Well, we can do all that later, but I don't

see any reason to do that at this time." (R1453) After the state rested, defense counsel renewed the discovery objection and again asked for an inquiry. (R1456) The court stated, "Isn't this like the cart after the horse or before the horse or something, because you all didn't raise an objection until after the testimony had concluded." (R1457)

The court conducted a cursory inquiry. (R1456-61; Appendix D) The state first asserted that the objection was untimely; next contended that because Strickland was listed as a defense witness instead of a state witness there could be no discovery violation; and, finally, quipped:

> (King): . . . The palm prints were not delivered to them, but I fail to see what use they could have made of them since never (sic) one of them have ever been qualified to examine latent fingerprints, that I know of.

(R1457-58). King continued that the palm prints had not been provided because the prints had been in Pinellas County prior to the preceding day, and when the prints arrived in Citrus County they went straight to Lieutenant Strickland. (R1459) King argued that, until Barrett showed prejudice, there could be no discovery violation, and the most that Barrett was entitled to was a recess during which he could be given the prints to conduct his own comparisons. (R1460-61) The court ruled, "All right. I've ruled that it is untimely, so I'm going to stand with that ruling." (R1461) The court did not address whether the violation was intentional or prejudicial.

SUMMARY OF ARGUMENTS

POINT I: This issue concerns the exclusion of evidence sought to be introduced by the defense. Barrett testified at trial that he was present at Mrs. Sanders' residence when Burnside committed the murders. On cross-examination, the state impeached Barrett by establishing that Barrett had not, in previous statements to the police, expressly stated that Burnside committed the murders. To rebut the express insinuation that Barrett's trial testimony was inconsistent with what had been said to police, Barrett sought to introduce his prior statements so the jury could determine whether any inconsistencies existed. The trial court sustained the state's objection and excluded the evidence.

The exclusion of this relevant evidence in a capital trial was fundamentally unfair and a denial of due process under the state and federal constitutions. By bringing up and using Barrett's "opportunity" to make statements to the police, the state made relevant what Barrett said. The state implied that Barrett's prior statements to the police were inconsistent with his trial testimony because he did not expressly mention Burnside's participation in the crimes. The state opened the door for introduction of the statements by cross-examining Barrett on those statements. The trier of fact was entitled to hear the prior statements to determine whether the statements to the police were inconsistent with Barrett's trial testimony, as had been implied by the state. Thus, the convictions should be reversed and the matter remanded for retrial.

POINT II: This issue concerns a discovery violation. A state fingerprint expert testified that Barrett's fingerprints were found at the crime scene. On cross-examination, the expert admitted that he had not compared Burnside's prints with those recovered from the crime scene. After Barrett testified, the state recalled the expert who testified that, after testifying, he had been given Burnside's prints, performed comparisons, and had now determined that Burnside's prints were not among those found at the scene.

Immediately after the expert testified defense counsel moved for a mistrial and asked for a Richardson inquiry to address the discovery violation. The trial court ruled that the request was untimely because the motion occurred after the witness had testified. The state admitted having Burnside's prints at least the day before the rebuttal testimony, and the court so found for the record, but no further inquiries or determinations were made. The failure of the trial court to conduct an adequate Richardson inquiry when the discovery violation was brought to its attention denied due process under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. Pursuant to the express holdings of Brown v. State, 515 So.2d 211 (Fla.1987), Smith v. State, 500 So.2d 125 (Fla.1986), and Richardson v. State, 246 So.2d 771 (Fla.1971), *per se* reversible error has occurred. The convictions must be reversed and the matter remanded for retrial.

POINT III: This issue concerns the propriety of overriding the jury's life recommendation. The jury recommended life sentences based on evidence that can reasonably be viewed as showing that Barrett, while intoxicated, was reluctantly present when four murders were committed by Scott Burnside and at least one other person. Other valid mitigating considerations support the life recommendation. The trial judge failed to follow the standard required by Tedder v. State, 322 So.2d 908 (Fla.1975) and interposed his own perception of the facts instead of determining whether a valid basis existed for the jury to recommend life sentences. The death sentences must be reversed and the matter remanded for imposition of life sentences in accordance with the recommendation because the jury recommendation was justified.

POINT IV: This issue concerns whether a pretense of moral or legal justification precludes application of the cold, calculated and premeditated statutory aggravating factor. The trial court found that aggravating factor to apply to two of the murders. In doing so, the court failed to consider Barrett's uncontroverted testimony that he was compelled to help Burnside because of Burnside's threats to himself and his family. The jury could reasonably have believed that testimony, and Burnside's threats form at least a pretense of moral justification as that term has been defined previously. The CCP statutory aggravating factor does not apply because the state failed to prove beyond a reasonable doubt that a pretense of moral justification is not presented by Burnside's threats to Barrett and his family.

POINT V: This issue addresses whether the finding that the murders were committed to eliminate the victims as witnesses is supported by substantial, competent evidence. The trial court found that the murders were committed to avoid lawful arrest, but the evidence fails to show that the dominant or sole motive for these people to be killed was to eliminate them as witnesses. Instead, it is as likely that Burnside killed them in order to prevent them from interfering with the murder of Mrs. Sanders. In light of the jury recommendation of life, the trial court's determination was error. The "murder committed to prevent a lawful arrest" statutory aggravating factor has not been proved beyond a reasonable doubt.

POINT VI: This issue concerns whether the evidence supports Judge Thurman's finding that Barrett committed the murders to interfere with the function of government. The finding is not supported by substantial, competent evidence. This jury could and evidently did reasonably conclude that Barrett's motivation for participating in the crimes was to protect himself and his family. Determining the propriety of a death sentence is an individualized determination, and in that regard Barrett's culpability should be viewed in a light most favorable to the jury's life recommendation. The state failed to show beyond a reasonable doubt that Barrett's sole, dominant or only motive for participating in Burnside's plan to kill Mrs. Sanders was to interfere with the lawful exercise of a governmental function. The trial judge erred by so finding.

POINT VII: The death penalty is unconstitutional on its face and as applied because this Court, rather than the legislature, has provided the substance of the terms set forth in Section 921.141, in violation of the separation of powers doctrine. The statutory aggravating factors are too broad to sufficiently narrow the discretion of the jury/sentencer in recommending/imposing the death penalty, and/or of this Court in reviewing the imposition of the death penalty. Additionally, improper considerations are arbitrarily used under the broad umbrella of vague statutory aggravating factors. Further, the absence of jury findings concerning the existence of aggravating and mitigating factors precludes application of a truly meaningful harmless error analysis. Additionally, the denial of notice as to which statutory aggravating factor(s) the state seeks to prove violates the notice and due process requirements of the state and federal constitutions. Finally, the Florida death penalty legislation unconstitutionally places the burden on the defendant to prove that the mitigation outweighs the aggravation and, even when the burden shifting problem is corrected, the "outweigh" standard unduly dilutes the state's constitutional burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted in a particular case. Because Florida's death penalty violates the state and federal constitutions, the death sentences should be vacated and sentences of life imprisonment with no possibility of parole for twenty-five years imposed.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PREVENTING BARRETT FROM INTRODUCING INTO EVIDENCE THE TAPES OF HIS INTERROGATION ON AUGUST 9 AND 10TH BECAUSE THE EVIDENCE WAS RELEVANT/ADMISSIBLE AND BECAUSE THE STATE OTHERWISE OPENED THE DOOR FOR ITS USE BY CROSS-EXAMINING BARRETT ABOUT THE CONTENT OF THE STATEMENTS.

Stated simply, the material facts concerning this issue are as follows: Barrett testified at trial that he was present at Mrs. Sanders' house when Burnside and another unidentified person committed the murders. On cross-examination, the state brought out and then emphasized the fact that Barrett did not, in his prior statements to the police, state that Burnside had committed these murders:

> Q: (Tatti) You had the opportunity to speak with Jerry Thompson and Marvin Padgett on August 10, 1990; didn't you?
>
> A: (Barrett) Yes, sir, I did.
>
> Q: You didn't tell them about Scott Burnside killing anybody, did you?
>
> A: No, sir. But it was my understanding that Scott Burnside was to be arrested along with Dorsey Sanders, III, and that they were going to try to arrest Doc Sanders also. So I figured that if you guys didn't mess it up, and you got a hold of Scott, then I would be able to tell you everything. But, of course, my faith in the police were (sic) correct, and they were unable to apprehend Scott Burnside.
>
> Q: The police messed this all up?
>
> A: The police made a mistake and they let Scott Burnside get away.

Q: You knew, on August 10, 1990, that the police were interested in arresting Dorsey Sanders, Jr.; Dorsey Sanders, III; and Scott Burnside for hiring you to kill the four people in Inverness or in Floral City, right?

A: Correct.

Q: That's what you knew?

A: I knew they were going to arrest them, yes, sir, correct.

Q: For hiring you?

A: Yes, sir.

Q: Not for killing anybody?

A: I knew that's what you were charging me with, yes, sir.

Q: But you never mentioned Scott Burnside?

A: No, sir. I was not going to have it written in the paper that man says so-and-so kills four people in Floral City, and then wake up in a jail cell and read in the paper that my children were murdered, no, sir. I didn't have that kind of faith in you.

Q: And you haven't said anything about Scott Burnside doing that until today, have you?

A: I told the people that were defending me.

Q: But you didn't tell the police?

A: The people that were defending me came and asked me.

(R1385-87).

When Barrett thereafter sought to introduce the statements of August 9th and 10th to show that his trial

testimony was consistent with what he said in those statements and to demonstrate the context in which the omission of reference to Burnside occurred, the judge sustained the state's objection and excluded the evidence as hearsay. (R1438-39) Barrett respectfully contends that the foregoing ruling was reversible error and a clear violation of Article I, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The state's cross-examination directly implied that Barrett had given inconsistent statements to the police and that his trial testimony was recently fabricated. This line of questioning entitled Barrett to present the statements of August 9th and 10th so the jury could determine whether the prior statements were in fact inconsistent and to enable the jury to determine what weight should be afforded any inconsistency found to exist by the trier of fact.

> The charge of recent contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now, i.e., as a self contradiction. . . . The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story. . . .

IV Wigmore on Evidence, Section 1129.

Stated a different way, a prior consistent statement of a witness is admissible when an attempt to impeach is based on the claim of a prior inconsistent statement and there is an issue as to whether the prior statement is, in fact, inconsistent with the trial testimony. Kellam v. Thomas, 287 So.2d 733 (Fla. 4th DCA 1974). "While it is true that the general rule is that prior consistent statements are inadmissible to rebut impeachment based on prior inconsistent statements, this general rule is not applicable in a situation, such as that herein at issue, in which there is a controversy over whether the witness did, in fact, utter a self-contradiction." Ho Yin Wong v. State, 359 So.2d 460, 461 (Fla. 3d DCA 1978).

By cross-examining a witness about a prior statement, the adverse party opens the door for presentation of the entire statement. See United States v. Parodi, 703 F.2d 768, 784-786 (4th Cir. 1983). For instance, in United States v. Baron, 602 F.2d 1248, 1251 (7th Cir. 1979), the trial judge observed that a defendant wanted both custody and consumption of the cake when his attorneys, claiming recent fabrication, used portions of a memorandum to impeach a witness' testimony, only to object on the basis of hearsay when the witness sought to introduce the memorandum itself to show its consistency with the witness' trial testimony. That is precisely what occurred here.

The "opens-the-door" approach is analogous to the common law "rule of completeness." That rule, now codified in Section 90.108, Florida Statutes (1989), provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

Thus, where a party introduces (uses) a portion of a statement, the adverse party is entitled as a matter of fairness to present the entire writing or statement so that the finder of fact will not be misled and/or so that what has been placed before the jury will not be distorted or misconstrued. The segment is properly placed in context by showing the whole.

The United States Supreme Court recently addressed the corresponding federal rule in Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). There, the court stated:

> In proposing Rule 106, the Advisory Committee stressed that it "does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case." Advisory Committee's Notes on Fed Rule Evid 106, [citation omitted]. **We take this to be a reaffirmation of the obvious: that when one party has made use of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402.** See 1 J. Weinstein & Berger, Weinstein's Evidence ¶106[02], p 106-20 (1986). The District Court's refusal to admit the proffered completion evidence was a clear abuse of discretion.

Beech Aircraft Corp., 488 U.S. at 172 (emphasis added).

Where the state in a criminal prosecution offers evidence of inculpatory statements by the defendant, the defendant has a right to have placed before the jury the entire conversation or all the statements made by the defendant at the same time relating to the same subject matter, whether such statements or the remainder of such conversation is exculpatory or not. Morey v. State 72 Fla. 45, 72 So. 490 (1916). So, too, when the state implies that a defendant has given a statement to the police that is inconsistent with his or her trial testimony, fairness dictates that the defendant is entitled to place the entire statement before the trier of fact. It seems fundamentally unfair for the state to claim that Barrett's statements to the police are inconsistent with his trial testimony, yet argue that the statements must be excluded because they are consistent.

This Court's attention is respectfully drawn to pages 4772 through 4793 of the record on appeal, commencing with the police question, "Is that when you shot Roger?" and Barrett's, "That's all." reply. Barrett consistently maintained his innocence and claimed that someone else committed the murders, as shown by these examples:

> Barrett: I myself, John C. Barrett, as a sane and mental person, am not guilty of murder. Not as --
>
> Police: Well, then, tell me who is. If it's not you, then who is it?
>
> Police: Well, then, who was it?
>
> Barrett: It's not me.

Police: Who is inside your body doing this?

Barrett: It's not me. It's not me. I'm telling you, it's not me.

Police: I see you're not going to grab a hold of it.

Barrett: It isn't. It isn't. It isn't.

(R4775).

Police: Tell us what happened. Get it out, that person inside.

Police: Face him down and defeat him right now.

Barrett: It wasn't me.

(R4779).

Police: John. John.

Barrett: (indicating negatively)

Police: John, God made us responsible for our actions, and you know that.

Police: John, get it out.

Police: John.

Barrett: I'm --

Police: John.

Barrett: I didn't hurt nobody.

Police: You did hurt them, John. You killed them. Face it. Face it, John. you brought the bag (inaudible). When the man that was inside you brought the bag in there, was the gun in it?

Barrett: It wasn't me.

Police: When the man that was inside you brought that bag back in, was the gun there?

Barrett: It wasn't me.

Police: That man that was inside you, the man that was inside you, the man that was right inside you, when that man brought that bag back in that house, he may have used your body, he may have used your body.

Barrett: (inaudible)

Police: Well, just be sick. When he used your body, did he bring the gun back inside there? Now, when the man that was in your body brought the bag back in the house, was the bag inside the house, John?

Barrett: It can't be nobody else. (inaudible) I hurt nobody. I wouldn't hurt --

Police: John, you better face it. You'd better face it. You'd better face it. Face it.

Barrett: (inaudible)

Police: Yeah, but you're lying to yourself. You're lying to yourself.

Police: You know in your mind that you did, John.

Police: John, you're lying to yourself. You are lying to the only one that's in here. You're lying to yourself, John.

Barrett: Somebody else must have done it.

(R4786-87).

The remainder of Barrett's statement is replete with the police telling Barrett that he was a murderer, and Barrett protesting that he was not and that someone else did it. In light of the inaudible statements in the transcript and, when the tape is viewed, the whispers uttered by the police and the denials of John

Barrett, it is a miscarriage of justice to allow assistant state attorney Tatti insinuate that Barrett was not in prior his prior statements claiming that someone other than he actually committed these murders.

Further, the facts of this particular case are such that fundamental fairness requires the introduction of Barrett's entire statement after Assistant State Attorney Tatti sought to impeach him for omitting from the prior statement an express allegation that Burnside was the person he was claiming actually committed the murders. This is so because Barrett repeatedly, unsuccessfully sought to invoke his right to counsel and to not give any statement at all. It was only after outrageously improper conduct from the assistant state attorney and the police that the partial statement was given by Barrett, and even at that it can reasonably be said that Barrett was attempting to exercise his Fifth Amendment and Article 1, Section 9 rights to silence. Barrett's statement of August 10th is infected with so much misconduct and coercion that it is a miscarriage of justice to allow the state to insinuate that Barrett voluntarily gave police one story and that his trial testimony is an inconsistent, recent fabrication.

In this regard, Barrett's conduct can reasonably be viewed as an unsuccessful assertion of his right to remain silent, and no adverse inference may be drawn from the exercise of that right. It is too simplistic in light of what transpired to say, "But Barrett did not remain silent." Barrett clearly sought to invoke his rights, but was never allowed. The deputies and

assistant state attorney Tatti had informed Barrett that he could, at any time, invoke his right to remain silent and to discontinue answering questions. Barrett tried. It is evident that the only reason he "re-initiated" contact with the police on the 10th was because of the unfulfilled promise by the prosecutor and police on the 9th that he would be allowed to communicate with his wife, Paula.

Barrett told the police that he was present at Mrs. Sanders' house on the day of the murders, and clearly contended that someone other than he committed the murders. Barrett stopped short of naming Burnside as the person who committed the murders. To the extent that his conduct was an invocation of his right to stop answering questions and/or to decline to reveal early-on Burnside's commission of the murders, fairness dictates that the jury be exposed to the context in which Barrett made the prior statements. At the very least, Barrett was entitled to have the jury view the context in which the prior statement was made so that the jury could determine whether an inference of guilt should attend Barrett's exercise of his right that resulted in the failure to tell the police of Burnside's commission of the murders when Barrett gave statements to the police earlier.

An excellent analysis of the evolution of the inference of guilt that is legally permitted to be drawn from silence after a defendant has been advised of his constitutional right to remain silent and/or to cease answering police questions at any time is contained in Spivey v. State, 529 So.2d 1088 (Fla.1988):

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. (Citation omitted). Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Spivey, 529 So.2d at 1092, quoting Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976).

In Spivey, the state readily agreed that it was error to cross-examine a defendant on the exercise of his right to remain silent, and the state urged this Court to hold "that neither the state nor a codefendant may cross-examine or otherwise comment on a defendant's silence." And this Court so held, commenting, "In the case at hand, as a matter of law, Spivey's post-arrest silence to the police was not probative on the question of whether he recently fabricated the testimony he gave at trial and it was error to permit Crofton's counsel to attempt to impeach Spivey's credibility by cross-examining him on this silence." Spivey, 529 So.2d at 1093.

The same rationale must also apply where a defendant exercises his constitutional right to stop answering questions at any time during an interrogation; at the very least, it is fundamentally unfair to prevent the defendant from demonstrating

that the reason a prior statement is incomplete is because he exercised a right to which he was constitutionally entitled, from which no adverse inference should be drawn. It must be noted that Barrett is not contending that the state may introduce such statements to demonstrate that a defendant invoked his right to cease answering questions. Instead, Barrett contends that he was entitled to do so to explain the absence of information which the state contends should have been contained in the statements he had given the police.

Barrett respectfully submits that, in the instant case, the omission of Burnside's participation in the murders was done in the exercise of state and federal constitutional rights to remain silent and to cease answering questions at any time. It is fundamentally unfair for the state to tell Barrett that he may, implicitly without penalty, at any time invoke his right to remain silent and then at trial cross-examine him on his failure to include information that is entirely consistent with the prior statement, thereby implying that Barrett fabricated his trial testimony after telling the police something different. Barrett was entitled to place the omission of that information in context.

After the state brought up Barrett's prior statements and sought to impeach Barrett's credibility, as a matter of fundamental fairness and due process under Article 1, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Barrett was absolutely entitled to introduce the video tapes of the

interrogation, which would accurately place the statement before the jury so that they could decide whether an inference of guilt should be drawn from Barrett's exercise of his right to cease answering questions which resulted in the omission of reference to Burnside's commission of the murders.

The state opened the door for Barrett to introduce the statements by referring to the statements and implying that they were inconsistent with Barrett's trial testimony. The exclusion of that evidence denied Barrett a fair trial and due process under the state and federal constitutions. The convictions should be reversed and the matter remanded for retrial.

POINT II

THE STATE'S DISCOVERY VIOLATION DENIED BARRETT A FAIR TRIAL AND DUE PROCESS IN VIOLATION OF ARTICLE 1, SECTIONS 2, 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Barrett testified that Scott Burnside killed Roger Wilson, and that Burnside, probably with the help of another unidentified person, most likely killed the other three people who entered the house while Barrett remained outside. Earlier, a fingerprint expert presented by the state admitted on cross-examination that he had not compared Burnside's fingerprints to the forty-four prints found at the crime scene. (R898) Another state expert testified that the only known prints he was provided for comparison purposes belonged to John Barrett, Paula Barrett and JoAnn Sanders. (R1184)

After Barrett rested, the state recalled the first fingerprint expert. He testified that after his earlier testimony the state gave him Burnside's prints, that he had compared those prints with those recovered at the crime scene, and that none of Burnside's prints matched. (R1450-52) At the conclusion of that rebuttal testimony, Barrett's counsel moved for a mistrial based on the discovery violation caused by the state's failure to reveal mid-trial fingerprint comparisons before presenting the testimony. The court denied the motion for mistrial and deferred ruling on the alleged discovery violation. (R1453)

Defense counsel renewed the objection and motion for mistrial when the state rested its rebuttal case, and again asked

for a Richardson[12] inquiry. (R1456) The judge stated, "Let's -- I think that the objection was untimely; however, let's get to the point of material, as far as -- they're alleging, I take it, the fingerprints of Scott Burnside were not made available to the defense?" (R1457-58) Thereafter, it was established "for the record" that the state possessed Burnside's palm prints but had not provided them to Barrett's defense counsel:

> Mr. King: Because -- We didn't have the palm prints until, I think, it was yesterday. They were never here in Pinellas County for us to provide to the defense. They went directly to Citrus County to Lieutenant Strickland for him to look at **because we knew he'd been called by them to be here today. We expected he was to testify in that regard, so we went out looking for the palm prints so that he could look.** I'm sure he has them now, and if they want us to deliver them -- and you can take a recess and they can go out somewhere and find a latent print examiner to examine them. I think the court has the authority to do that. But until they show how they've been truly prejudiced by it there is no real violation.

(R1459). The state's response insofar as Burnside's fingerprints was more equivocal, in that the state attorney stated that he would have to go back and look to see whether the fingerprints had been provided to defense counsel; State Attorney King implicitly admitted that the fingerprints were in the possession of the Citrus County Sheriff's Office, stating, "But I can tell the Court that Lieutenant Strickland was deposed by them and they certainly had

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[12] Richardson v. State, 246 So.2d 771 (Fla.1971)

the ability to ask him and they had the ability to go and inspect the evidence at the Citrus County Sheriff's Office." (R1460)

The court did not determine whether the state willfully failed to comply with disclosing that a mid-trial fingerprint comparison had been conducted and, without addressing whether Barrett was prejudiced by the state's failure to disclose the fingerprint evidence or whether Barrett was entitled to a brief recess so that the unexpected introduction of the expert's testimony could be meaningfully addressed, the court ruled that the discovery objection was untimely. (R1461) It is respectfully submitted that the ruling was erroneous and that the court's failure to conduct an adequate Richardson inquiry constitutes *per se* reversible error.

TIMELINESS OF OBJECTION

Barrett's defense counsel objected at the conclusion of the expert's testimony and moved for a mistrial and a Richardson inquiry. (R1452) "To meet the objectives of the contemporaneous objection rule, an objection must be sufficiently specific both to apprise the judge of the putative error and to preserve the issue for intelligent review on appeal." Wenzell v. State, 459 So.2d 1086 (Fla. 2d DCA 1984). To be timely, an objection should be within the same time frame as the error. See Jackson v. State, 451 So.2d 458, 461 (Fla.1984) ("An objection need not always be made at the moment an examination enters impermissible errors of inquiry."); Davis v. State, 564 So.2d 606 (Fla. 3rd DCA 1990) (failure to

conduct Richardson inquiry upon learning that the state committed discovery violation error.

In the context of an alleged discovery violation, often a party will not realize that the other side has not provided information until such time as the testimony comes before the jury. The inability to predict this testimony is apparent where the witness, consistent with pre-trial discovery, already once testified, only to be called **in rebuttal** to testify about something that occurred after the witness testified previously, without advance warning by the party presenting the witness. This expert had already expressly testified for the state and stated that he had not conducted any fingerprint comparisons using Burnside's fingerprints. (R898)

Barrett's counsel could not reasonably anticipate that the state would disregard its continuing duty to provide discovery under Fla.R.Crim.P. 3.220(j) of matter controlled by Fla.R.Crim.P. 3.220(b)(1)(x); that the state, admittedly anticipating that the expert would be called by the defense, would secretly have the expert perform print comparisons using Burnside's prints and intentionally not disclose the results to Barrett's defense counsel in the hope that the information would be divulged when the expert was called by the defense as part of the defense's case. Because of the calculated nature of this hide-the-ball, ambush the other side ploy and its clear contravention of Florida's open discovery practices, sanctions could and should have been immediately imposed upon THE State Attorney who employed this improper tactic.

The trial judge was apprised of this error and given a meaningful opportunity to conduct a thorough Richardson hearing to determine whether sanctions were warranted, to determine the extent that Barrett was prejudiced, and to afford Barrett's counsel an opportunity to dispel that prejudice. See, Copeland v. State, 566 So.2d 856, 858 (Fla. 1st DCA 1990) ("Nor is the specific timing of an objection critical when it is determined that a discovery violation has occurred."). In Copeland, supra, the objection occurred the day after the testimony had been presented, yet the objection was timely because of the very nature of the error. Judge Thurman was incorrect in concluding that Barrett's objection which immediately followed the expert's testimony was untimely.

***PER SE* REVERSIBLE ERROR HAS OCCURRED**

The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive, prejudice. In that regard, this Court has observed two areas that must be focused on during the hearing. First, the judge must decide whether the discovery violation prevented the defendant from properly preparing for trial. Second, the judge must decide on which sanction to invoke for the discovery violation, "ranging from an order to comply, to exclusion of evidence, or even a mistrial." Wilcox v. State, 367 So.2d 1020, 1022 (Fla.1979). The "sanction" inquiry does not only entail what to do with the evidence, but as importantly what to do with willful misconduct by an attorney who intentionally failed to disclose relevant information. The determination concerning the prejudice suffered by the surprised party cannot be made post

trial, by either the trial court, Smith v. State, 372 So.2d 86 (Fla.1979) or an appellate court. Smith v. State, 500 So.2d 125 (Fla.1986).

In Smith, this Court re-affirmed the long established and well settled rule that the failure of a trial judge to timely conduct an adequate Richardson inquiry in the face of a discovery violation constitutes *per se* reversible error:

> We see no evidence that the clear dictates of this integral component of Florida law have imposed any significant hardship on the bench or bar or have worked any injustice. On the contrary, the requirement that a trial court merely *listen* and evaluate any claim of prejudice accompanied by the minor delay which most hearings or inquiries will impose on a trial is more than justified by the assurance of compliance with our rules and requirements of due process.

Smith, 500 So.2d at 126. Significant here is the observation that, "There is neither a 'rebuttal' nor an 'impeachment' exception to the Richardson rule." Smith, 500 So.2d at 127. See Hicks v. State, 400 So.2d 955, 956 (Fla.1981).

Judge Thurman failed to conduct an adequate Richardson inquiry and ruled instead that the objection, which immediately followed the presentation of the expert's rebuttal testimony, was untimely. The state's failure to disclose the mid-trial comparison of Burnside's prints to those recovered from the crime scene must be considered to have been an intentional ploy; the intended scenario being for the damaging information to be revealed when Barrett's defense attorneys called and questioned the expert as a defense witness. When Barrett did not call the expert, the state

did, still without revealing prior to the expert's testimony that mid-trial print comparisons had been performed and conclusions reached by the expert. Some sanction was mandated due to the state's intentional discovery violation.

A brief recess could have been provided to allow Barrett to consult with a fingerprint expert. The court could have instructed the jury to disregard the testimony, or granted a mistrial due to the intentional nature of the state's discovery violation. Whatever sanction might have been appropriately imposed, none was forthcoming solely because the trial court found that the objection was untimely and stopped there. Apparently, the state attorney sought to set an example for his assistants as to how discovery requirements can be evaded. He has succeeded, at least to this point. This Court must and should correct the denial of due process under Article 1, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by reversing for a new trial pursuant to Smith v. State, 500 So.2d 125 (Fla.1986), Richardson v. State, 246 So.2d 771 (Fla.1971), and Brown v. State, 515 So.2d 211 (Fla.1987).

POINT III

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION FOR SENTENCES OF LIFE IMPRISONMENT BECAUSE REASONABLE PEOPLE COULD AND DID AGREE THAT SENTENCES OF LIFE IMPRISONMENT ARE MORE APPROPRIATE THAN THE DEATH PENALTY.

Barrett's jury recommended life sentences. Judge Thurman overrode that recommendation based on his perception of the facts and holding of Zeigler v. State, 580 So.2d 127 (Fla.1991). (R4926) Judge Thurman found that he could neither factually nor legally distinguish Zeigler's case from Barrett's. (R4926-27) The written sentencing order concluded as follows:

> Nothing was kept from the jury that would have made any change in their recommendation and it is believed by this Court that this was their honest opinion based on the entire case.
>
> But this Court's first duty is to follow the law, and it would be doing a great disservice to our criminal justice system if it allowed a different sentence for you than Mr. Zeigler received.
>
> This wrong, in substituting the Court's opinion of reasonableness over the juries [sic], if there be wrong, can only be corrected if the reviewing Court is allowed to perform its function.

(R4928). It is respectfully submitted that, as a matter of law, Judge Thurman failed to view the evidence correctly. When the evidence is considered in accordance with the appropriate legal standard, ample mitigation exists to support the recommendation for sentences of life imprisonment.

The legal standard used to review a trial court's decision to override a jury recommendation for life imprisonment was established in Tedder v. State, 322 So.2d 908 (Fla.1975), where

this Court held: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910. The Tedder standard is now firmly entrenched in Florida's capital sentencing jurisprudence. See Wright v. State, 586 So.2d 1024, 1032 (Fla.1991) ("Under well-settled Florida law, we have held that life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence."); Cochran v. State, 547 So.2d 928, 933 (Fla.1987) ("Clearly, since 1985 the court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless 'the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.'").

In that regard, a life recommendation necessitates the performance of two distinct judicial functions. First, using the Tedder standard, the evidence must be reviewed in a light most favorable to the recommendation to determine the existence of the facts material to the sentencing determination, E.g., which, if any, statutory aggravating factors were proved to exist beyond a reasonable doubt and which, if any, mitigating considerations could reasonably have been found to exist by the jury. After those material facts are determined through use of the Tedder standard, the aggravating and mitigating considerations must be weighed pursuant to Section 921.141(3) to determine whether the life

recommendation issued by the jury was reasonable. The trial court failed to follow that procedure here in overriding the jury's recommendation for sentences of life imprisonment.

Specifically, the trial judge's sentencing order, (R4922-28; Appendix A), shows that Judge Thurman found that all of the murders were committed for pecuniary gain, to avoid arrest, to disrupt or hinder the lawful exercise of a governmental function or enforcement of laws, and that Barrett had a prior conviction for a violent felony (the murders of the other victims in this case). (R4923) Judge Thurman also found that two murders were committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. (R4923) The jury, however, could reasonably have concluded that the state failed to prove beyond a reasonable doubt that several of those factors applied to Barrett, and/or, more significantly, that several of the aggravating factors overlapped. In the latter instance, the jury properly would not assess weight to those aggravating factors that pertain to the same aspect of the crime.

Three of the aggravating factors found and applied by Judge Thurman are, in separate points of this brief, separately challenged. However, for the sake of this argument[13], it will be assumed (but not conceded) that all of the factors were properly found by the jury and trial judge. Even with that assumption, and

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[13] Of course, if any of the four statutory aggravating factors independently challenged by Barrett are found to have been improperly used by the trial judge, that much more weight should be afforded the reasonableness of the jury recommendation for life sentences.

bearing in mind that the sentencing determination is a weighing process rather than a simple matter of counting the aggravating and mitigating factors, the jury, based on the facts of this case and the particular context of the sentencing factors, could reasonably (and quite properly) have given less weight to the statutory aggravating factors of a murder for pecuniary gain[14], a cold, calculated and premeditated murder without pretense of moral or legal justification ("CCP")[15], a murder to disrupt or hinder the lawful exercise of a governmental function or enforcement of laws[16], and a murder committed to avoid lawful arrest[17], because those factors can be viewed as being established by essentially the same facts. Assuming these factors exist, the jury could reasonably have given them less weight than in a situation where such factors are established independently. Under Tedder, the trial court must likewise consider whether a common aspect to these aggravating factors exists when the life recommendation is being reviewed.

The trial court's determination of which material mitigating considerations apply here is demonstrably erroneous under the Tedder standard in several respects. Judge Thurman found that the co-defendant's (Dorsey Sanders') life sentences for the same crimes were not entitled to any weight in mitigation because,

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[14] Section 921.141(5)(f), Florida Statutes (1989)

[15] Section 921.141(5)(i), Florida Statutes (1989)

[16] Section 921.141(5)(g), Florida Statutes (1989)

[17] Section 921.141(5)(e), Florida Statutes (1989)

"[Barrett's] was the hand that held the gun and instrument that smashed the heads and knife that slit their throats." (R4926) However, this jury could reasonably have concluded that Barrett was **NOT** the person who did the actual killings and that, instead, Burnside committed the killings with the help of someone other than Barrett:

> Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment. Hawkins v. State, 436 So.2d 44 (Fla.1983); Malloy v. State, 382 So.2d 1190 (Fla.1979). In the instant case, the jury might well have believed Cooper and decided that he did not kill the victim. Considering this, the non-statutory mitigating evidence, and the totality of the circumstances, we cannot say that the jury's recommendation is not reasonable.

Cooper v. State, 581 So.2d 49, 51 (Fla.1991).

The foregoing applies with full force here. Put simply, the jury could have believed Barrett's unimpeached version of what happened and still have found him guilty of first-degree murder. This Court has previously expressly held that, when a jury issues a life recommendation, a judge may not reject a defendant's unimpeached statement of what happened if it could be believed by a reasonable juror:

> . . . The only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a

> pretense of moral or legal justification, protecting his own life.
>
> The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Cannady v. State, 427 So.2d 723, 730 (Fla.1983) (emphasis added).

The fact that Barrett claims not to have actually committed the murders, combined with the fact that this jury obviously believed him, presents a huge distinction between the instant case and Zeigler v. State, 580 So.2d 127 (Fla.1991), for Zeigler's jury could NOT have believed Zeigler's version of what happened and still have found him guilty of the murders, a truism noted by this Court in the initial opinion. See Zeigler v. State, 402 So.2d 365, 368 (Fla.1981) ("To have believed his story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams and would have found no significance in other substantial evidence."). Here, the trial court's unauthorized factual determination that Barrett was the actual killer is a conspicuous deviation from his role under Tedder, and it constitutes substantial error which likely influenced his decision to override the jury recommendation. Certainly, the fact that the jury could reasonably have concluded that Barrett was not the actual murderer constitutes a compelling distinction between the instant case and that of Zeigler.

Additionally, intoxication was not a mitigating factor in Zeigler; it is not a factor here only because Judge Thurman improperly, categorically rejected intoxication as a mitigating consideration based on his perception of the operative facts. Judge Thurman reasoned:

> [T]his Court has a problem with what is offered as a Mitigating Circumstance that you were under the influence of alcohol at the time of the offense. It is undisputed that you were drinking alcohol at the time of the killing but it is also quite clear that this escapade was over a month in planning. There were certainly times at which you were sober and could reflect upon your actions. Your voluntary consumption of alcohol on the date in question may have been to fortify your resolve to complete the dispictable (sic) act you hired on to do or bathe your conscience but cannot be an excuse for these deeds **and is not a mitigating circumstance.**

(R4925)(emphasis added).

It is respectfully submitted that the rejection of intoxication as a mitigating consideration is arbitrary and erroneous under well-established precedent. Judge Thurman's idle speculation that Barrett's drinking "may have been to fortify your resolve to complete the dispictable (sic) act you hired on to do or bathe your conscience" does not comport with the court's obligation under Tedder to determine whether a reasonable juror could have considered uncontroverted evidence that Barrett was intoxicated was a valid basis to hold Barrett less morally responsible for his conduct that unfolded during the commission of the crimes than had he been completely sober and rational.

The state's own witnesses established that Barrett drank at least a twelve-pack of beer before the murders were committed. Without contradiction, Barrett testified that his drinking was a result of the pressure being put on him to commit the murders, pressure caused by Burnside, financial problems, and pressure exerted by his common law wife, Paula, to just go along; that his drinking escalated in June and became horrible in July. (R1281-82) Barrett's instructor testified that, when Barrett attended classes, he was a good student who never attended class in an intoxicated condition (R1030-32) and it was evident that, when Barrett later asked him how to construct a silencer, Barrett was upset and had been drinking. (R1026;1032) There is NO competent evidence whatsoever that Barrett became intoxicated to fortify his resolve to commit the murders, and in that regard Judge Thurman erred in rejecting Barrett's intoxication as a mitigating factor.

However, the fact that Judge Thurman's idle speculation is not at all supported by the record misses the more fundamental point, being that a trial judge should not affirmatively seek reasons to reject mitigation and/or find aggravation when a jury recommends life imprisonment. Rather, the pertinent inquiry was, and is, under the Tedder standard, whether Barrett's jurors could have reasonably concluded that Barrett had been drinking all day, that Barrett did not think anything was really going to happen because Mrs. Sanders had left and would not return until late, and that based in whole or in part on his intoxicated state, Barrett

did not know what to do when Burnside and another person showed up at Sanders' house and began killing people.

Under that scenario, which is uncontradicted by any competent evidence, Barrett's state of intoxication and its influence on his ability to think or act appropriately at the time of the murders has real significance, and it is a factor that could properly have been afforded great weight when the jury issued the life recommendation. The trial court erred in simply rejecting this consideration as mitigation for speculative reasons when the jury could have reasonably have accepted it. Intoxication at the time of the murders is another substantial mitigating consideration that is wholly absent from the Zeigler case.

The death penalty is reserved only for "the most aggravated and unmitigated of serious crimes." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla.1988). "[A] jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and [it] should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla.1983); Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987). See Hallman v. State, 560 So.2d 223, 226 (Fla.1990) ("inquiry is whether there is a reasonable explanation for the jury's life recommendation"). Thus, in Ferry v. State, 507 So.2d 1373, 1376 (Fla.1987), this Court held that the trial court erred in overriding the jury recommendation of life sentences for five first-degree murders where there was a reasonable basis in the record to support the jury's recommendation. A similar result was

reached recently in Jackson v. State, 17 FLW S239 (Fla. April 9, 1992). That same reasoning mandates that Barrett's death sentence be vacated and that the matter be remanded for imposition of life sentences.

Several factors form a reasonable basis for this jury's recommendation. The jury could have concluded that Burnside was the triggerman and dominant figure; that Barrett and the others who were involved in the murders and/or planning of the murders (John Withers, Dorsey Sanders, III, and/or Paula Barrett) were far less culpable. In the past, trial judges have erred in overriding a life recommendation that could have been based in part on a jury determination that a defendant was not the triggerman: Cooper v. State, 581 So.2d 49 (Fla.1991); Eutzy v. State, 458 So.2d 755 (Fla. 1984); Hawkins v. State, 436 So.2d 44 (Fla.1983); Barfield v. State, 402 So.2d 377 (Fla.1981); Malloy v. State, 382 So.2d 1190 (Fla.1979); Slater v. State, 316 So.2d 539 (Fla.1975).

This jury could reasonably have convicted Barrett of the first-degree murders based on a principal theory and in doing so properly have considered Barrett's lack of intent that four people be killed. See Spivey v. State, 529 So.2d 1088, 1095 (Fla.1988) ("There was a reasonable basis for the jury to believe that Spivey did not commit a contract murder."); Norris v. State, 429 So.2d 688, 690 (Fla.1983) ("The state produced no evidence that [Norris] intended to kill anyone . . ."); See also, Hallman v. State, 560 So.2d 223, 227 (Fla.1990) ("the jury reasonably could have found that Hallman should be spared because of the circumstances of the

shooting"); Smalley v. State, 546 So.2d 720, 723 (Fla.1989) (life sentence supported by observation that "it is unlikely that Smalley intended to kill the child."); Menendez v. State, 419 So.2d 312 (Fla.1982).

As noted previously, a reasonable basis for the jury to recommend life imprisonment is Barrett's intoxication and state of mind at the time of the murders. These considerations have consistently justified a jury's recommendation to sentence a defendant to life imprisonment. See Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988) (trial court's express rejection of impaired capacity erroneous where, "The jury . . . may have given more credence to this testimony."); Robinson v. State, 487 So.2d 1040, 1043 (Fla.1986) (trial judge may not have believed evidence of impaired capacity, but jurors reasonably could have); Cheshire v. State, 568 So.2d 908 (Fla.1990); Amazon v. State, 487 So.2d 8 (Fla.1986).

Yet another reasonable basis for the jury to recommend life sentences is the fact, found to exist by the trial judge and otherwise uncontroverted by any competent evidence, that Barrett had no significant history of prior criminal activity.

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.

Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

The Florida Legislature, too, recognized the importance of this consideration by making it a statutory mitigating factor. Section 921.141(6)(a), Florida Statutes (1991). Such deference is warranted not only because the lack of prior criminal history suggests that the criminal conduct was not in true character for the defendant, but also because it indicates that the defendant has real potential to adapt to prison life and/or to be rehabilitated:

> We also find significant the fact that appellant has no prior history of violence, cf. Harvard v. State, 375 So.2d 833 (Fla.1977), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), and the finding of the trial court that the "evidence presented by the prosecution supports the conclusion that [appellant's] commission of the death act was probably upon reflection of not long duration.

Ross v. State, 474 So.2d 1170, 1174 (Fla.1985). See Callier v. State, 523 So.2d 158 (Fla.1988) (override improper where life recommendation could be based on disparate treatment afforded co-defendant and defendant's lack of history of criminal activity).

There is further justification here upon which the jury could have based its life recommendation. Barrett was a good father and provider, with a history of being gainfully employed:

> The killing of a child is especially despicable. On the other hand, Wasko had no significant prior history of criminal activity and presented testimony of his good character, good employment record, and a good family background. Moreover, the jury may have questioned the respective roles of Wasko and Pierson in this homicide. These factors gave the jury a reasonable basis for recommending life imprisonment.

Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987). See Fead v. State, 512 So.2d 176, 179 (Fla.1987) ("In the past, we have found that the defendant's qualities as a good father, husband and provider constitute valid mitigating factors that could form the basis of a jury recommendation of life.").

Further, Barrett served in the Army and demonstrated that he remained diligent in his allegiance to his country by declining to elaborate on what type of duties he performed while stationed overseas because such information was classified (R4924;1293-94;1708-11). Though the judge may be at liberty to disregard such evidence as a mitigating consideration if the jury recommends the death penalty, See Rutherford v. State, 545 So.2d 853 (Fla.1989), the jury here could have found mitigating worth in Barrett's patriotism, service, and his explanation of why he received a general discharge.

Early on, it was observed that, due to its finality, the death penalty constitutes the "absolute renunciation of all that is embodied in our concept of humanity." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The Eighth Amendment to the United States Constitution and Article 1, Section 17 of the Florida Constitution require an individualized determination of whether a death penalty is appropriate in any given case because of the irrevocability of execution. Harmelin v. Michigan, ___ U.S. ___, 51 Cr.L. 2350, 2360 (June 27, 1991); Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v.

Dugger, 481 U.S 393 (1987). Where, as here, substantial mitigation exists to support as reasonable a jury determination that a particular defendant receive a life sentence rather than being put to death, a life sentence should be imposed.

The trial court's decision to override the reasonable jury recommendation for life sentences based solely on Zeigler was erroneous as a matter of law: these material facts are far different than those of Zeigler, where an affluent businessman, motivated solely by greed, coldly plotted and carried out the murder of his relatives for insurance purposes. Zeigler's jury could not have believed that he did not personally commit the murders and still find him guilty of first-degree murder; Barrett's jury could and did. Because the jury recommendation was here based on several considerations that have, in the past, warranted imposition of life sentences, the death sentence should be reversed and the matter remanded for imposition of life sentences in accordance with the jury recommendation.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT TWO MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION BECAUSE A PRETENSE OF MORAL OR LEGAL JUSTIFICATION EXISTS.

Barrett testified that he reluctantly participated in Burnside's plan because of threats to his wife and children:

> Q: (defense attorney) Now, then, in the month of June, first part of July, did anything change again in relationship to what you've already talked about?
>
> A: (Barrett) Yes. Scott started adding my family in the threats.

(R1269). Barrett warned Paula, and she told him "that if we just stayed quiet, and stayed out of the way, that all this would pass over us and that the only important thing was taking care of our family and protecting our children." (R1272)

> Q: (defense attorney) In terms of different things that he would do, was there anything else in reference -- during this trip that we're talking about, on this particular evening, that [Burnside] indicated he'd do to you or any member of your family?
>
> A: (Barrett) He told me that he would kill me.
>
> Q: Okay.
>
> A: He told me that he didn't just like to let a person die and get off that easy. Then he told me that he would like to make a person suffer, that he would -- he would get their kids first.

(R1279-80). Barrett was not given any reason to doubt what Burnside said. (R1280).

Barrett testified that his drinking increased in July because of the pressure exerted by Burnside:

> (Barrett) I'd -- I couldn't get any sleep. I couldn't -- I don't know, I was nervous all the time. I couldn't make up my mind what to do. I was weighing my options. I mean, I knew by this time that Scott was serious, but I just didn't know whether I wanted to risk my family's life in order to try to stop him. And I couldn't make the decision. So I just -- I just tried to avoid it.

(R1283). Barrett thought that if he could just put things off until after the court date passed, things would work out: "So I figured, you know, if nothing happened until that court date came, then everything would be great." (R1283)

Barrett felt he only had three options near the end of July: "Well, I felt I could go to the police and get killed myself, or probably get my children killed. Or I could just put a stop to Scott Burnside on my own, and then go to the police. Or I could just hope to God that that court date got there and nothing happened." (R1303) At the same time, Paula was urging Barrett to go along with Burnside:

> Q: (defense attorney) What was [Paula] trying to get you to do as far as the money situation that was concerned?
>
> A: (Barrett) Just to go ahead and go along with Scott, keep our family safe -- just get myself straight. She told me to straighten up, take control of myself, quit drinking so much.

(R1305).

When cross-examined, Barrett explained that he believed the police would believe Dr. Sanders if he tried to warn

them about the plot to kill Mrs. Sanders: "If I went to Putnam County Sheriff's Office Department they would listen to Doc, they know Doc. They would listen to the people with the money." (R1351) Barrett testified:

> Q: (Tatti) But you didn't tell them?
>
> A: (Barrett) No, sir, I didn't.
>
> Q: You thought it was meaningless or useless?
>
> A: No. I just didn't trust the police to protect me.
>
> Q: Well, what about trusting the police to protect JoAnn Sanders?
>
> A: I had to look out for my children first.
>
> Q: So, you weren't really worried about JoAnn Sanders?
>
> A: Yes, I was.
>
> Q: Well, how do you reconcile those two things, Mr. Barrett?
>
> A: I looked at it this way. There's JoAnn Sanders, and then there's my wife and my children.
>
> Q: No contest, right?
>
> A: I couldn't take the chance on my children getting hurt, sir. I just couldn't do it.
>
> Q: Couldn't pick up the phone and call? The number you had, right? You had JoAnn's number, didn't you?
>
> A: Yes, I did.
>
> Q: Couldn't make an anonymous phone call: Look, you don't know who I am, and I'm not going to tell you but your

> ex-husband is talking to people about killing you?
>
> A: Just as soon as it went down Scott would have killed me.
>
> Q: How would he have known that you called him?
>
> A: He would have known.

(R1351-52).

Judge Thurman found that two of the murders were committed in a cold, calculated and premeditated manner without pretense of moral justification:

> Fourth, This Court finds as to Roger Wilson and Jerry Lee Clark your actions were cold, calculated and premeditated without any pretense of moral or legal justification. Previously stated was that these deaths were the result of a planned killing for hire. Even though these deceased were not THE intended victim, their demise was contemplated. You purchased a weapon to accomplish multiple killings and built a silencer as part of this plan. This aggravating factor is therefore established beyond a reasonable doubt.

(R4923).

It is respectfully submitted that Judge Thurman erred in finding this aggravating factor because he concentrated solely on the "premeditation" aspect of this aggravating circumstance and failed to consider the pretense of moral justification that is established without contradiction by the foregoing testimony, testimony which the jury reasonably could have relied upon to reject the presence of the CCP factor. It bears repeating that, where a jury recommends life imprisonment, the court must accept

the defendant's version of what happened unless that version is contradicted by competent evidence. See Cannady v. State, 427 So.2d 723 (Fla.1983) (trial court erred in finding CCP factor in face of life recommendation because defendant's claim that he shot victim in self defense presented at least a pretense of moral justification).

In Banda v. State, 536 So.2d 221 (Fla.1988), the working definition of the term "pretense of moral or legal justification" was set forth as follows:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Banda, 536 So.2d at 225 (emphasis added). Applying that same reasoning here, Barrett's concern for his wife and children constitutes at least a "pretense" of moral justification for his conduct because, "though insufficient to reduce the degree of homicide, [it] nevertheless rebuts the otherwise cold and calculating nature of the homicide." Id.

The trial judge erred in finding the existence of the CCP statutory aggravating factor because at least a pretense of moral justification exists for Barrett's actions, and no weight should be afforded that statutory aggravating factor when, as here, at least a pretense of moral justification exists.

POINT V

THE FINDING THAT THE MURDERS WERE COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The trial court's sentencing order reflects that Judge Thurman concluded that the murders were committed for the purpose of avoiding lawful arrest:

> Second, all four Murders were for the purpose of avoiding lawful arrest. This is proven by your statements to John Withers and the purchase of the assault-type pistol for that fateful return trip to Floral City.

(R4923). The court's finding is deficient, in that it fails to set forth with particularity what statements are being relied on to support this factor. By simply referring generically to Barrett's "statements to John Withers" but not identifying what statements in particular, or where evidence of the precise statement is contained in the record, the trial court places an onerous burden on counsel and this Court to comb the record for any statement that might arguably be the one to which the judge was referring.

After careful review of John Withers' testimony, (R938-973), the undersigned has been unable to discern any statement Barrett supposedly made to John Withers that could support the court's finding that the four murders were committed to prevent a lawful arrest. See Garcia v. State, 492 So.2d 360, 367 (Fla.1986) (evidence showing defendant and three accomplices discussed plan that expressly "included the murder of witnesses" sufficient to establish factor of murder to avoid lawful arrest.). There is no

such testimony here. The last time Withers saw Barrett was before the murders were committed. (R954) Withers and Barrett did not discuss killing anyone other than Mrs. Sanders. (R938-973)

In fact, Withers testified that he did not believe that Barrett killed anyone:

> Q: (defense attorney) You didn't believe that John would do anything to Doc Sanders' ex-wife, did you?
>
> A: (Withers) I actually still don't.
>
> Q: You still don't think he killed anyone?
>
> A: No.

(R964). This testimony fails to show beyond a reasonable doubt that Barrett killed four people to eliminate them as witnesses or to prevent a lawful arrest, bearing in mind that Barrett's jury recommended that he be imprisoned for life for these murders.

> In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the defendant's motive, Riley v. State, 366 So.2d 19 (Fla.1978), and that it be clearly shown that the dominant or only motive for the murder was the elimination of the witness. Bates v. State, 465 So.2d 490 (Fla.1985); Oats v. State, 446 So.2d 90 (Fla.1984) We have also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Caruthers v. State, 465 So.2d 496 (Fla.1985); Rembert v. State, 445 So.2d 337 (Fla.1984); Riley.

Perry v. State, 522 So.2d 817, 820 (Fla.1988).

For aught that appears in this record, the victims were killed by Burnside simply because they were in his way. These men

were unfortunately in the wrong place at the wrong time, and were but obstacles for Burnside to remove in order to get at Mrs. Sanders. The evidence is, as a matter of law, insufficient to show that John Barrett's "dominant or only motive for the murder was the elimination of the witness."

Because this statutory aggravating factor lacks a sufficient factual predicate, Judge Thurman erred in finding it to have been proved beyond a reasonable doubt. The "murder committed to avoid a lawful arrest" factor cannot lawfully be applied to this case.

POINT VI

THE FINDING THAT THE MURDERS WERE COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF A GOVERNMENTAL FUNCTION AND ENFORCEMENT OF LAWS IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

Judge Thurman found that the murders were committed to disrupt or hinder the lawful exercise of a governmental function and enforcement of laws as follows:

> Fifth, these capital Felonies were committed to disrupt or hinder the lawful exercise of governmental function and enforcement of laws. It is undisputed that these deaths occurred because the equitable distribution portion of the Final Judgement of the Eighth Judicial Circuit was about to be effectuated. It was a condition of your contract to kill Joann Sanders by August 8th, 1990. You knew the reason for the importance of that date and it motivated your actions. The aggravated circumstance is supported by the facts of this case.

(R4923-24). One problem with Judge Thurman's finding is that Mrs. Sanders was not killed. Instead, others who happened to be in the wrong place at the wrong time were. It is obvious that, absent convoluted reasoning, the death of these four men was not in any way intended to interfere with a governmental function or to prevent the enforcement of laws.

This Court has held that the premeditation to kill one person automatically transfers to any person who dies during the commission of a plan to kill the intended victim. Provenzano v. State, 497 So.2d 1177, 1180-81 (Fla.1986), cert. denied, 481 U.S. 1024 (1987). This was a logical extension of the felony murder

rule that was unfortunately accomplished by judicial fiat rather than by the legislature. However, applying that rationale to the instant case, it remains clear that, irrespective of whether an intent to commit first-degree murder can automatically be transferred to an unintended victim, this jury concluded that Barrett's primary motivation to participate in Burnside's plan was not to interfere with the function of government, but instead to protect himself and his family from Burnside.

The existence of a statutory aggravating factor must be proved beyond every reasonable doubt. Valle v. State, 581 So.2d 40 (Fla.1991). A comparable analogy here can be made to the statutory aggravating factor of a murder committed to avoid lawful arrest; it is well established that, in order to find that a victim who is not a law enforcement officer was killed to avoid a lawful arrest, the state must prove that the primary or dominant motive was to eliminate the victim as a witness. A similar standard should apply to this statutory aggravating factor where the victim is not a law enforcement officer or participant in a trial or administrative action. This factor has, to date, been narrowly construed:

> The court's finding the murder to have been committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of the laws suffers from a similar defect. In State v. Dixon, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), in discussing this aggravating factor, this Court stated that "the definitions of the crimes intended to be included are reasonable and easily understood by the average man." The facts of this case do not support the trial court's finding.

> Compare Jones v. State, 440 So.2d 570 (Fla.1983) (sniper shot police officer in his patrol car while in uniform and on duty and while traveling from an unrelated investigation); Tafero v. State, 403 So.2d 355 (Fla.1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 694 (1982) (state trooper shot while attempting to arrest suspects); Antone v. State, 382 So.2d 1205 (Fla.), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980) (victim shot to prevent him from testifying before grand jury). Here the trial court viewed the co-defendants' call for a black revolution as a call to destroy the government. A prediction of future conduct or events, however, will not support finding an aggravating factor. White. The trial court, therefore, erred in considering this factor.

Barclay v. State, 470 So.2d 691, 695 (Fla.1985).

The motives of Dr. Sanders and Burnside should not automatically be imputed to Barrett, who initially became involved in the scheme for financial gain. In light of the jury's life recommendation, the evidence is legally insufficient to support this aggravating factor. It was therefore error for the trial judge to justify imposition of the death penalty on this factor.

POINT VII

THE TRIAL COURT ERRED IN DENYING BARRETT'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY STATUTES UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by defining the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of the separation of powers under Article II, Section 3 of the Florida Constitution. The Florida Legislature is charged with the responsibility of passing substantive laws. Article III, Florida Constitution (1976). Legislative power, the authority to make laws, is expressly vested in the Florida Legislature.

In an exercise of that power, the Florida Legislature passed Section 921.141, Fla. Stat. (1975), which purportedly established the substantive criteria required for authorization of imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Shell v. Mississippi, 498 U.S. __, 111 S.Ct. 313, 112 L.Ed. 2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla.1973), where this Court provided the working definitions of the statutory aggravating factors that were ostensibly already promulgated by the Florida Legislature. A court is not empowered to enact laws, either directly or indirectly, yet that is what has occurred through definition evolution.

This Court has rejected the premise that Florida's especially heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague based on Maynard, supra, because the working definition of the terms set forth in the HAC factor are provided by this Court through a limiting construction of that factor. See Smalley v. State, 546 So.2d 720 (Fla.1989). This Court should not have to provide the definitions for such legislation and, indeed, this Court does not constitutionally have the power to do so, yet time and again the definitions of the statutory aggravating factors have been provided by this Court in violation of the separation of powers doctrine. See Peek v. State, 395 So.2d 492, 499 (Fla.1980) (parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981) (more than three people required to constitute a great risk of death or injury to many persons)[18]; Banda v. State, 536 So.2d 221, 225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though

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[18] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.").

The vacillation that has occurred with this Court's approval of many of these factors amply demonstrates that the factors are not sufficiently clear, and this Court should not endeavor to substantively construe them. The passage of such broad legislation for it to be refined, defined, re-defined and otherwise given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions. In that regard, candid application of the law concerning the separation of powers doctrine, as discussed by this Court in Chiles v. Children A, B, C, D, E, and F, etc., 589 So.2d 260 (Fla.1991), requires that the Section 921.141, Florida Statutes (1989) be declared unconstitutionally vague and an impermissible delegation of authority (and responsibility) to this Court to substantively define the operative terms of the statute.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d

690 (Fla.1980); Elledge v. State, 346 So.2d 998 (Fla.1976); Purdy v. State, 343 So.2d 4, 6 (Fla.1977). It is respectfully submitted, however, that these "factors" are but open windows through which virtually unlimited facts may be put before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of equal protection and due process under the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding of Furman v. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the juror and/or sentencer a basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois v. State, 407 So.2d 885 (Fla.1981); Elledge v. State, 346 So.2d 998 (Fla.1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla.1989) (improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the jury/sentencer under the general heading of a statutory aggravating factor permits the use of constitutionally improper considerations to impose the death penalty.

This rationale applies to other statutory aggravating factors, which are in essence but categories through which unfairly prejudicial evidence is put before the jury/sentencer. Because the

statutory aggravating factors fail to adequately channel the jury's and/or sentencer's discretion in recommending/ imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2) and (3), Florida Statutes (1989). However, the statute places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). This Court has concluded that the burden is on the State to prove that the aggravating factors outweigh the mitigating factors. See Arrango v. State, 411 So.2d 172, 174 (Fla.1982); Alvord v. State, 322 So.2d 533, 540 (Fla.1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.") As written by the Florida Legislature, the statute places the burden of proof on the defendant in violation of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975). Rather than deviating from the clear language of

the statute and promulgating substantive legislation through judicial fiat, this Court should declare Florida's death penalty to be unconstitutional. Putting a constitutional gloss on a statute is not the same as rewriting substantive terms.

Even when the statute is changed by judicial fiat to place the burden on the State to demonstrate that the statutory aggravating factors "outweigh" the mitigation, a violation of due process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise either the jury or the sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted.

As worded, the standard instructions dilute the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. The standard instruction requires only that the State show that the death penalty is warranted by a mere preponderance of the evidence, thereby resulting in a violation of due process. See Cage v. Louisiana, 498 U.S. __, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). Imposition of the death penalty based on a preponderance of the evidence is unconstitutional. In re: Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975). By only being required to show that the aggravation "outweighs" the mitigation, the State achieves death penalty recommendation s and/or sentences by a mere preponderance standard in violation of the aforesaid cases and the constitutional requirements to due process.

LACK OF NOTICE

Barrett unsuccessfully moved for the state to disclose which aggravating factors were being relied upon in seeking the death penalty. (R3367-3371) It is respectfully submitted that the failure of the State to provide adequate notice prior to trial as to which factors the State would attempt to prove denies due process and violates the notice requirement of the state and federal constitutions. Here, the state at the penalty phase relied solely on the evidence presented during the guilt phase to carry its burden during of proving the existence of statutory aggravating factors beyond a reasonable doubt. (R1662) The denial of notice prior to trial as to which aggravating factors the state was seeking to prove when the evidence was presented denied Barrett a meaningful opportunity to address that evidence and it otherwise was a denial of due process of law guaranteed under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (citations omitted). It is equally fundamental that the right to notice and an opportunity to be heard "Must be granted at a meaningful time and in a meaningful manner." (citation omitted).

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Adequate notice provides a significant constitutional protection. See Mays v. State, 519 So.2d 618, 619 (Fla.1988) ("We agree that due process requires notice and an opportunity to be heard prior to an assessment of costs under Section 27.3455."); See

also, Jenkins v. State, 444 So.2d 947 (Fla.1984). As the United States Supreme Court noted in Fuentes, "It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights. And [n]o better instrument has been devised for arriving at truth than to give a person in jeopardy OF a serious loss notice of the case against him and the opportunity to meet it.' (citation omitted)." Fuentes, 407 U.S. at 81.

Procedural due process is not a static concept. The minimum procedural requirements necessary to satisfy due process requirements depend on circumstances and interests of the parties involved. See Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

The sentencing considerations set forth in Section 921.141(5) are both substantive and procedural statutory factors which, when proven by evidence, authorize imposition of the death penalty. See Banda v. State, 536 So.2d 221 (Fla.1988) (imposition of the death penalty not authorized if no statutory aggravating factors exist.) Unless the defendant is provided notice prior to a penalty phase as to which statutory aggravating factors the State intends to prove and/or rely on to seek the death penalty, a defendant is denied the ability to meaningfully confront the state's witnesses and to rebut the evidence presented in connection with those statutory aggravating factors.

Belated notice that the State is seeking a particular statutory aggravating factor works a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution. The Sixth Amendment right "to be informed of the nature and cause of the accusation" is applicable to the state's through the due process clause of the Fourteenth Amendment. In re: Oliver, 333 U.S. 257, 273-74 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." Cole v. Arkansas, 333 U.S. 196, 201 (1948) (emphasis added). In Cole, Petitioners were convicted at trial of one offense but the convictions and sentences were affirmed on appeal based on evidence on the record indicating that a different, uncharged offense had been committed. A unanimous United States Supreme Court reversed, finding a denial of procedural due process:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, Petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court.

Cole v. Arkansas, 333 U.S. at 201-2 (emphasis added). The same reasoning applies here, where issues concerning imposition of the death penalty were litigated without notice and/or a meaningful opportunity to be heard at the time. See Presnell v. Georgia, 439 U.S. 14, 16 (1978) (footnote 3) ("in the present case, when the

Supreme Court of Georgia ruled on Petitioner's motion for rehearing it recognized that, prior to its opinion in the case, Petitioner had no notice, either in the indictment, in the instructions to the jury or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping.").

Relying on Spinkellink v. Wainwright, 578 F.2d 582, 609-10 (5th Cir. 1978), this Court has previously rejected a Sixth Amendment "lack of notice" challenge. See Preston v. State, 444 So.2d 939, 945 (Fla.1984); Sireci v. State, 399 So.2d 964, 970 (Fla.1981); Menendez v. State, 368 So.2d 1278, 1282 (Fla.1979) (footnote 21). Careful review shows that the Fifth Circuit in Spinkellink decided the lack of notice issue on lack of preservation grounds. "A review of the record indicates that neither Spenkellink (sic) nor his attorney objected at trial to the indictment, which Fla.R.Crim.P. 3.190(c) requires in order for the alleged defect to be preserved for appellate review. Accordingly, the defect, if any, was waived." Spinkellink, 578 F.2d at 609-10 (emphasis added). Any further discussion by the Fifth Circuit was dicta. Further, the instant challenge is not only being brought under the Sixth Amendment, but also as part of procedural due process required under the Fifth Amendment, and Article I, Sections 9 and 16 of the Florida Constitution.

It cannot reasonably be claimed that the interests of fairness do not require a defendant to know when evidence is being presented what statutory aggravating circumstances the State is attempting to prove. To say that the aggravating factors are limited to those specified in statutes does not satisfy the notice requirement. All crimes are contained in statutes. It is

incumbent on the state, as the prosecuting party, to notify the defendant which statutes apply. It is incumbent on the court, as the neutral enforcer of Constitutional rights, to require proper notice. For the aforesaid reasons, the death penalty in Florida is unconstitutional on its face and as applied, and the trial court erred in denying Barrett's motion to declare Florida's death penalty unconstitutional under the state and federal constitutions under these grounds. (R3372-3428) Accordingly, Section 921.141, 782.04 and 775.082 Florida Statutes (1991) should be declared unconstitutional and the death sentence reversed.

CONCLUSION

Based on the argument and authority set forth in Points I and II, it is respectfully submitted that the convictions must be reversed and the matter remanded for retrial. This Court is otherwise asked to reverse the death sentences and to remand for imposition of life sentences based on the argument set forth in Points III through VII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Ste. 447, Daytona Beach, FL 32114 via his basket at the Fifth Distirct Court of Appeal and mailed to John C. Barrett, #122653, P.O. Box 747, Starke, FL 32091-0747, this 21st day of May, 1992.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JOHN C. BARRETT, Defendant/Appellant, v. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 78,743

A P P E N D I X

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IN THE SUPREME COURT OF FLORIDA

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