IN THE SUPREME COURT OF FLORIDA

MICHAEL MORDENTI,

Appellant,

vs. Case No. 78,753

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

Did the trial court commit fundamental error by failing to require one of the prosecutors, the two of whom were married to one another, to remove him or herself from the trial of this matter?

Did the trial court commit fundamental error by failing to replace the juror, whose employer required him to work until midnight after trial each day, before the trial began, when the juror himself opined that such a demand would affect his ability to serve on the jury?

Did the trial court err by allowing testimony of the victim's mother as to the deceased's identity, and by admitting highly prejudicial and inflammatory photographs of the victim when neither the identity nor the cause of death was disputed?

Did the trial court err by admitting testimony which implied appellant's collateral crimes when it was not relevant to any material issue, the danger of unfair prejudice outweighed its probative value, and it constituted a non-statutory aggravating factor?

Did the trial court violate the Eighth and Fourteenth Amendments by instructing the jury upon the aggravating factor of this offense as being heinous, atrocious, and cruel?

Did the trial court err in permitting the prosecutor's reference to the appellant as a "con man" and a "con artist" during the penalty phase?

Did the trial court err in permitting the state to threaten to rebut proof of no significant history of prior criminal activity

with evidence of alleged criminal activity, which involved no more than harassing phone calls, threats, and the belief of one witness that the appellant had committed arson, when the appellant was never charged with that crime, much less convicted of it?

Did the trial court err in instructing the jury regarding both the cold, calculated, and premeditated nature of the offense, as well as the fact that the murder was for financial gain, when the basis for both aggravating circumstances was the same?

Was the death sentence disproportional to the circumstances of the offense?

DECISION BELOW

The decisions of which review is sought by this appeal are the jury verdict of guilty on the charges of first degree murder and conspiracy to commit murder, entered on July 12, 1991, and the trial court's order imposing a sentence of death by electrocution of the defendant for the first degree murder conviction, and a sentence of thirty years' confinement in the Department of Corrections for the conspiracy to commit murder conviction, which order was rendered on September 6, 1991, in State v. Mordenti, Case No. 90-3870, in the Thirteenth Judicial Circuit, Hillsborough County, Florida. (R1735, 1768-72)[1]

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[1] References to the appendix of this appeal are designated by "A" and the page number. References to the record on appeal are designated by "R" and the page number.

JURISDICTION

The jury rendered its verdict of guilty on the charges of first degree murder and conspiracy to commit murder in this matter on July 12, 1991. (R1735) The trial court entered its order imposing a sentence of death for the first degree murder conviction, and thirty years of confinement for the conspiracy conviction on September 6, 1991. (R1768-72) The trial court thereafter denied defendant's motion for a new trial on September 12, 1991. (R1780-81)

Appellant has an immediate and direct right of appeal to the Supreme Court of Florida, pursuant to Article V, § 3(b)(1) of the Florida Constitution, Florida Statute § 921.141(4), (1991), and in accordance with Florida Rule of Appellate Procedure 9.140(b)(4).

STATEMENT OF THE CASE

On June 7, 1989, Thelma Royston was murdered in her horse barn in Odessa, in Hillsborough County, Florida; she was both shot by a gun and stabbed by a knife.

The Hillsborough County Grand Jury indicted the appellant, Michael Mordenti, along with Thelma Royston's husband, Larry Royston, on March 14, 1990, of both the first degree, premeditated murder, as well as the conspiracy to commit it. (R1591-93)

Larry Royston apparently committed suicide before the trial. (A1)(R1546) Appellant was tried by a jury before the Honorable Susan C. Bucklew, Circuit Judge, July 8-12, 1991. (R1-1315) The jury found appellant guilty as charged on July 12, 1991. (R1735) At the conclusion of the penalty phase of the proceedings (R1321-1506), the jury recommended the death penalty by a vote of 11 to 1. (R1753)

On September 6, 1991, the trial court adjudicated the appellant guilty of both crimes and sentenced him to death for the first degree murder conviction, and to thirty years of confinement for the conspiracy conviction. (R1768-72) Thereafter, the court denied defendant's motion for a new trial on September 12, 1991. (R1780-81) Appellant filed his notice of appeal on October 4, 1991. (R1783)

STATEMENT OF THE FACTS

The State's Case

The state's case was prosecuted by Karen and Nick Cox, assistant state attorneys who are married to each other. (R61, 1037, 1043, 1053, 1058)(A2)

The trial was heard from July 8 through July 12, 1991. But before the trial proper had begun, and before the jurors had been sworn (R279), the trial court inquired whether anything had occurred during the evening prior that would affect any juror's ability to serve on the jury. (R270) One of the jurors, Norman Haight (#1) (R29), responded that his employer wanted him to work after he was released from jury duty for the day.

> They wanted me to work last night, and I said, "Work?" And they wanted me to work tonight until I get out of here, until -- whenever, which is usually midnight. I told them I wasn't real crazy about that.

(R271) Instead of excusing the juror, or looking further into the matter, the court simply remarked, "I don't blame you. I don't think that's fair, either." The trial proceeded.

The Hillsborough County Sheriff's Office investigated the crime for nearly a year. Although the investigators obtained a laboratory analysis of the blood found on the victim, no blood other than her own was identified. Although they analyzed the hair found at the scene, no identifiable hair other than the victim's was discovered. Although they tested for fingerprints on glasses and a flashlight found at the scene, no prints of Mordenti were identified. Nevertheless, nine months after the crime, on the

strength of the immunized testimony of Gail Mordenti (Mordenti's ex-wife) alone, that her friend Larry Royston had requested that she find someone willing to kill his wife, Thelma, and that her ex-husband was that person, the appellant was arrested on March 8, 1990. Yet when the sheriff's office arrested Michael Mordenti, discovering a gun that he owned, analysis of that gun proved only that it had **not** been used to kill the victim. In fact, the murder weapon was never found.

Isabel Reger was Thelma Royston's mother, and lived with Larry and Thelma. (R311) She overheard Larry tell Thelma the night Thelma was killed that the "lights are off in the barn" (R315), although Thelma habitually and purposely left them on each evening. She and her daughter went outside to turn the lights on, when she noticed a man out at the gate at the end of the driveway. (R316-18) Thelma went out to talk to the man, and told her mother that he was there to discuss a horse Larry had for sale. (R317-18) Ms. Reger was unable to give a detailed description of the man, and what little she gave did not match the appellant. (R318) She went back inside. When her dog began barking oddly (R318-19), she went out to the barn to investigate; it was then that she discovered her daughter's body. (R319)

Ms. Reger identified state's Exhibit No. 2-P: "[t]hat's the daughter of the -- picture of my daughter and Larry Royston." (R324)

Deputy Larry Flynn was the first law enforcement officer to respond to the crime scene and he secured it. (R331-32) He also

interviewed Ms. Reger and Mr. Royston. He described his interview of Royston, noting that it appeared that Royston was avoiding his questions, and that, although Royston seemed to be crying, Flynn never actually saw any tears. (R339-40)

Sherri Loeffelholz was Thelma Royston's daughter. (R344) She described the farm operation and her mother's interest in raising "paints," (a breed of horse). (R348-52) She explained that the lights were left on in the early evening to encourage the paints' hair to remain short, as it does in the summer. (R352) She described the business that her mother and Larry had owned (R345-46), and in which she had worked. (R354)

Ms. Loeffelholz further reported that her mother had consulted an attorney about obtaining a divorce from Larry. (R356, 358) She explained that Larry had control of the funds, not Thelma, and that he insisted that if they were divorced, she would not receive half of the business. (R356, 358) For that reason, she recounted how, the February before she was killed, Thelma and she had copied certain invoices that Larry had failed to post to the books. (R357)

Marjorie Garberson, who had managed the Royston farm and taken care of Thelma's horses (R380-81), and who had had an affair with Larry Royston (R382-83), testified that he told her he wanted to divorce Thelma, but that she was asking for too much, financially. (R385-86, 387) She testified that Royston asked her to kill his wife. (R390-91) She also narrated how Royston wanted the murder committed, i.e. on a Wednesday evening when the help was not there,

by either shooting or stabbing in order to make it look like a burglary. (R392)

Dr. Charles Diggs was the medical examiner who examined the body and determined the cause of death, i.e. multiple gunshot and stab wounds. (R407-8, 409) His findings were sealed at the time. (R408-9) He was unable to determine which wounds, in particular, caused Thelma Royston's death, although he did determine that some of the wounds were not lethal. (R410-417) He was unable to identify the type of knife that inflicted the stab wounds. (R414) He was also unable to determine in what sequence the wounds were inflicted. (R415-16, 429) He was unable, therefore, to ascertain whether the victim's death was instantaneous. (R417) He was also unable to determine whether a struggle had occurred. (R429)

Dr. Diggs recovered bullets from the body, which he gave to one of the investigators, Corporal Lee Baker. (R412)

According to Fred Jenkins, Thelma Royston's life was insured by State Farm Life Insurance, and the beneficiary of both policies was Larry Royston. (R432-34)

Gerald Wilkes examined the bullets and bullet fragments (Exhibit 3) recovered from the victim's body, to ascertain caliber types and rifling characteristics. (R443-44) Initially, he determined that four of the six specimens were .22 caliber lead bullets or bullet fragments. (R447) He was unable to conclude who had manufactured the bullets, nor whether they had been fired from the same weapon. (R447) He did determine that the general rifling characteristics on all four specimens were the same, but this was

the most commonly cut type of rifling in a .22 caliber weapon. (R447-48)

Later, on March 15, 1990, the investigators provided Wilkes with two .22 caliber pistols (one had been removed from Mordenti's briefcase (R506-7), and the other had been obtained from Gail Mordenti (R661)) and asked him to determine if the bullets and fragments could have been fired by one or both of the weapons. (R448-89) He stated:

> None of the bullets or bullet fragments in [Exhibit] 3 could have possibly been fired from each of these weapons, based on differences in lands and grooves. There are are [sic] both six lands and grooves, but the land, which is about four one-hundredth, and the land, which is eight one-hundredth, couldn't have fired these particular bullets.

(R451)

Wilkes then submitted the spent bullets and fragments (Exhibit 3) to FBI Special Agent Jack Riley, who analyzed the composition of the four bullets taken from the body, comparing them with unfired ammunition removed from Gail Mordenti's gun (Exhibit 13). (R473-76, 478, 507) Riley opined that, of six unfired bullets, four came from the same box of cartridges. (R477) Two of the bullets recovered from the victim matched those four unspent bullets, and he believed that they were either from the same box of ammunition, or from another box manufactured at the same place at or about the same time. (R479-81)

Linda Stenard, Cellular One records custodian, identified Exhibits 6A, 6B, 6C, 6D, and 6E as the records which of calls made from Larry Royston's mobile phone, for the time periods 3/6/89 to

4/5/89, 4/6/89 to 5/5/89, 5/6/89 to 6/5/89, and 6/6/89 to 7/5/89. (R457-58, 1841-60)

Detective John King was the lead investigator in the Thelma Royston murder. He had interviewed Royston regarding his agenda the day of the crime, from which account Royston neglected to mention a visit he apparently made to Gail Mordenti. (R487-89) King initiated a background check on Royston, of his associates, contacts, phone records, and business records, explaining that Royston, if involved, had to have an accomplice who had actually committed the murder. (R490-91) King obtained Royston's cellular phone records, which showed all calls made, including seventeen calls to Gail during the time period in question (R1186), including a two-minute call to Gail Mordenti's home phone the night before the crime (R516-17), and a thirteen-minute call on the day of the murder to Mordenti & Associates, appellant's business. (R493-95, 497-98) Mordenti himself, however, denied knowledge of that call. (R498)

After meeting with Gail Mordenti on March 8, 1990, King obtained arrest warrants for Royston and Mordenti, as well as a search warrant of Mordenti & Associates, during which search he discovered a loaded .22 caliber pistol in Mordenti's briefcase, along with a knife. (R500-2, 505-7, 518) King did not request an elemental analysis of the bullets in the pistol because "[t]hey were completely different from the projectiles recovered from the victim." (R508, 517) The autopsy results were sealed, and not discussed, even with the family. (R510) Finally, following up on

information obtained from Gail Mordenti, he checked the records of the Tarpon Springs Days Inn on US 19, but found no registration under the name of Mordenti. (R509-10, 518)

Glen Donnell had dated Gail Mordenti, and lived with her for a period of time. (R548) (According to him, she had been afraid of the appellant following their divorce. (R548-49)) He was also her business associate at Automation (R549-50), until he opened his own business. (R553) Donnell did business with Royston. (R551-52)

Gail Mordenti came to work for Donnell. (R554-55) During that time, Royston called her half a dozen times and came by to see her two or three times, as well. (R555) On June 7, 1989, Donnell recalled that Royston appeared in mid-afternoon to see Gail. (R556) He then made a call from his mobile phone while standing in front of the business. (R556) Donnell never saw or heard from Royston at the business again. (R559)

On March 8, 1990, at 7:00 a.m., Detective Rosalyn Kroll, along with Corporal Baker, served a subpoena on Gail Mordenti to appear at the State Attorney's Office. (R567) They drove her to that interview. (R569-70)

Not a single one of the state's witnesses, up to this point, placed Mordenti at the scene of the murder, or even linked him in any way to the crime.

Gail Mordenti testified that, while married to the appellant, who was a collector, he suggested she keep a gun for protection; he later purchased a pair of .22 caliber guns (with serial numbers in

sequence, as a good investment), one of which was for her, during a business trip to Florida. (R585-87)

They divorced in 1987, at her instigation. (R591) According to Gail, during the divorce, he threatened to kill her. (R594)

He had a full gun cabinet, including many collectors items and rifles. Despite a Williams' Rule objection, Gail testified that he had guns that were not registered to him, that he had told her were "throw away pieces." (R595-97) She explained that he habitually carried a gun, for which he had a license, as well as a knife. (R597)

Gail met Larry Royston when he gave her an estimate to fix her air conditioning, and he became a customer of her business. (R598-601) By this time, her relationship with the appellant, now divorced, had returned to friendly terms; she was no longer afraid of him. (R601-2) When her partner wanted out of their business, she tried to make a deal with Royston, but he told her that his wife didn't want him to invest in it. (R602-5) Royston told Gail that his wife was a lesbian, that they had been to counseling, but that she couldn't stop, that she had pulled a gun on him, and that he was starting divorce proceedings. (R606-8)

After Gail left Automation, she approached Royston about initiating a business together. (R609-10) He told her he could not, that he was divorced, that his ex-wife was stripping him of his assets, and that "he needed to get rid of her." (R610-11) He asked Gail if she knew of anyone who would do this for $10,000. (R611-12)

Pursuant to this discussion, Gail approached three people she knew, and then tried the appellant, because she "knew that he was dealing with some people that were shady." (The objection to this unsupported allegation was also overruled.) (R612) Royston called her at home regarding the success of her efforts. (R613) When Gail inquired whether he knew anyone "who would kill Larry's wife," Mordenti allegedly said, "Oh, hell, for that kind of money, I'll probably do it myself." (R614) Gail explained that she acted as the middle man between Royston and Mordenti, conveying information about the best time and place, a photo of Thelma Royston, and a map of the ranch, over several months. (R614-16)

Eventually, Gail accompanied Mordenti to the Roystons' place, once during the daytime and once at night. (R617-20) On the latter occasion, they stopped and registered at a motel, where Gail waited. (R620-21) (She later provided the name of the motel, the Tarpon Springs Days Inn on US 19, to the sheriff's office.) (R621) Afterwards, Mordenti allegedly informed her that it would be impossible to do the murder as Royston wanted it done, and that he would not. (R625-27) However, Royston insisted that he wanted it done, and continued to harass Gail about it. (R627-30)

On June 7, 1989, Royston came to see Gail at her workplace, unexpectedly. (R630) She called Mordenti on Royston's portable phone, so that Mordenti could tell Royston to leave her alone, and she put Royston on the phone once she had spoken with Mordenti. (R631) Royston took the phone outside, and she was unable to hear

the conversation that ensued. (R632) Once he completed the conversation, he smiled at her, waved, and left. (R633)

Although "shocked" when the news reported Thelma Royston's death, Gail couriered the payments, which had risen from $10,000 to $17,000 because Mordenti allegedly had to get rid of a car at the Mexican border that had evidence planted in it, from Royston to Mordenti. (R635-36, 638) During one delivery, Gail maintained that Mordenti described the murder, saying

> that she put up quite a fight, and that she was shot in the head with a .22. He said that she had a lot of jewelry on, rings and things, and that he felt really bad that he couldn't take them.

(R636-37) Mordenti gave between five and six thousand dollars of the payments to Gail. (R642, 693-94)

When the investigators picked her up on March 8, 1990, and conveyed her to the State Attorney's Office, she was offered complete immunity for her testimony. (R661) After providing them with her statement, she returned home and gave them the loaded .22 caliber gun which Mordenti had initially purchased for her protection, and which, she asserted, after the divorce and after the crime, he had given back her. She gave the investigators that gun because he had used a .22 for the murder, although he'd told her that he'd melted that one down. (R661-63, 684-85)

Detective Karen Kirk recovered the loaded .22 caliber gun from Gail (Exhibit 12). (R708-9)

Fred Long was the pawnbroker from whom Mordenti had originally purchased the pair of .22 caliber guns with consecutive serial numbers (Exhibit 8). (R711-13)

Michael Malone was the FBI special agent who analyzed the hair and fibers removed from the victim and her immediate environment and compared them to a hair sample provided by Mordenti. None matched. (R722-24)

Wendy Mordenti Pearson testified that the appellant asked her to convey a message to Gail Mordenti, "to ask my mother just to leave town. If she wasn't here, there would be no trial," although she failed to mention this request at her deposition. (R735-37)

According to Detective John King, Exhibit 13 consisted of the bullets recovered from the gun provided by Gail Mordenti. (R739-49)

Horace Barnes, an inmate in federal prison, stated that, when he met Mordenti (and he didn't explain whether that was in prison or not), "[he] let me know that he was in the mob." (R747) Although the court sustained an objection to this assertion, no instruction was given to the jury. (R748-50)

John King testified last, regarding unsuccessful efforts to develop latent fingerprints from a flashlight and eyeglasses, and analysis of the victim's clothing, which revealed only her blood, and specifically not Mordenti's. (R764-65)

Not one of the state's witnesses, except for Gail Mordenti, placed Mordenti at the scene of the murder, or produced any evidence at all to link him to the crime.

The Defense

Leroy Baxter's testimony was presented by deposition. He was employed by Redman Flooring at the time of the crime and testified that he was on his way to a job that evening, when he passed the Royston property. There were two vehicles on the left-hand side of the road, and two men standing between them, one grey-haired and one dark-haired, the darker one the taller of the two, maybe six feet, maybe a little taller. (R780-82) The car in front was a dark-colored car, dark maroon or deep red, an older model, and the car behind was lighter-colored. (R784-85)

The next night, Baxter was stopped by a roadblock just down the road from that location. (R785-86)

Corporal Baker explained that he had interviewed Gail Mordenti on July 12, 1989, soon after the crime. (R790) At that time she had revealed that the thirteen-minute phone call to Mordenti & Associates was in relation to a car deal. (R791)

Later, while Baker transported her to her meeting at the state attorney's office, Gail revealed that she knew the victim had been shot, a detail which had not been published. (R795, 799-800) She also claimed at that time that the crime had been committed by her ex-husband, Michael Mordenti. (R799)

George Fischell was the records custodian from Swanson Chrysler-Plymouth, who testified that Mordenti & Associates, on June 7, 1989, at 8:26 a.m., transacted business with his business. (R802-6)

John Berrisford, employed by Moorefield Paving Contractors as a scale attendant, testified that Mordenti & Associates weighed a two-axle trailer at 2:59 p.m. on June 7, 1989. (R809-11)

Kathy Leverock's testimony was presented by deposition. She was employed on the day of the crime at Leverock's Towing Service. (R816) On that day, at 4:27 p.m., Mordenti & Associates hired a tow for two vehicles, the driver for which was Christopher Fur. (R818-19)

Christopher Fur towed the two vehicles for the appellant on the day of the murder, and another the day after. (R826)

Dawn Simon was Michael Mordenti's girlfriend. (R850) They began living together in February 1989, and she also kept his books. (R854) She knew, therefore, that the business finances were good. (R855-56) She recalled the period around June 7, 1989, because she had had her will prepared in preparation for surgery. (R863-67) She also went home (which she shared with Mordenti) (adjoining his business) that day to have lunch, and discovered that Mordenti's ex-girlfriend, Anna Lee, was at the business, which upset her. (R870-71)

Donald McCabe explained that he had a conversation with Dawn Simon regarding Anna Lee, in June 1989, on a Wednesday that Michael Mordenti and Anna Lee had gone to the auction together. (R908-911)

Wayne Pennington met Anna Lee on the evening of June 7, 1989 at the Lee County auto auction. Michael Mordenti introduced them. (R914-15) The auction began at 7:30 p.m. (R916) Pennington recalled that evening in particular because he kept a ledger book

of sales, which noted the sale of a particular 280-ZX at the auction (at 8:55 p.m.) that Mordenti had helped "start the bid" on. (R929-34)

Kathleen Faulkner, records custodian from SouthTrust Bank, identified records of the account of Mordenti & Associates. (R969-71)

Rolf Grimstad met Michael Mordenti on June 7, 1989, at the Lee County auto auction. (R973) He recalled the circumstance because he needed to borrow Mordenti's car carrier to transport some vehicles he had purchased, and because Mordenti was smoking cigars, which bothered him. (R974-76) He also recalled that he was late that evening, and lost his opportunity to buy a car that he wanted. It was the first time he met Anna Lee, as well. (R982)

Anna Lee testified that, on June 7, 1989, between 6:30 and 10:00 p.m., she and Michael Mordenti were at the Lee County auto auction, where she first met Pennington and Grimstad. (R1004, 1008, 1017) She neglected to sign in at the auction, but recalled that day clearly because she had just had surgery on her shoulder, and because her birthday was June 4. (R1005) Earlier that day, Chris, from Leverock's, had towed a couple of cars. (R1014) After the auction, she and Mordenti stopped at Shoney's for two hours, where they were waited on by Lynn Bouchard. (R1026, 1032-33) And then they stopped at a rest stop and made love. (R1027-28)

Rebuttal

Paul Spangler, an official court reporter, testified, with respect to the sworn statement taken from Wayne Pennington prior to trial, that he never mentioned that Mordenti bid on the 280-Z on June 7, 1989, although he did mention the 280-Z. (R1090, 1095) He also testified, regarding the statement taken from Rolf Grimstad prior to trial, that Grimstad could not recall the date on which he first met Anna Lee, and that he testified that she wore a white uniform. (R1098)

William Herrmann, another official court reporter, testified regarding the sworn statement taken from Bill Danlovics prior to trial, that Anna Lee was present at that deposition. (R1113-14)

William Danlovics, assistant manager at the Punta Gorda Shoney's, testified as to the authenticity of the time cards of Lynn Bouchard (Exhibit 22), which did not show her working on June 7, 1989. (R1122-26) He also stated that Lynn Bouchard was the worst offender as far as remembering to punch her timecard was concerned, and that she was a call-in that day. (R1127, 1133-34)

Dominic Mussone, general manager at Shoney's, testified that the daily log for June 7, 1989 showed no call-ins for that date. (R1136-37) He agreed, however, that a call-in might have been overlooked if the restaurant was busy. The state then rested on rebuttal.

Both defense and state made closing arguments. The jury received its instructions and retired to consider the evidence. The jury found appellant guilty as charged on July 12, 1991. (R1300)

The Penalty Phase

The penalty phase of the trial commenced July 29, 1991. Initially, the defense inquired whether the state had any reason to suspect the appellant of a significant history of prior criminal activity. (R1353) Although the state agreed that he had no record of felony convictions (R1355) the state argued that he did have a history of making threats and harassing phone calls when his girlfriends terminated their romantic relationships with him (R1354), and that, although he was never charged with the crime, a girlfriend had once accused him of the arson of her home. (R1355-58) Because the state intended to offer proof of this dispute if the defense put in issue the fact that the appellant had no significant history of prior criminal activity, the defense elected not to do so.

The state therefore chose to rely upon the evidence presented in the first phase of the trial. (R1358-60, 1371)

The defense presented evidence of the appellant's value to society, his honorable service to his country in the military, his deprived childhood, that he was a good friend, a good employer, a good employee, a good parent to his girlfriend's children, fair, and hardworking, as well as other evidence of his character and

dedication to his family, and evidence of specific good deeds. The appellant also introduced evidence of his age.

Max Perez, the father of Dawn Simon's children, believed that the appellant was a positive influence on his children, that he respected them and they, him, and that he was affectionate to them. (R76-77)

Said Efran, a business associate, believed him to be an honest and hard worker. (R1379-80)

Jack White, another business associate, also felt that he was a hard worker, and that he was fair. (R1383-84)

Robert Newell, a self-employed welder who had had occasion to work for the appellant, said that he "couldn't ask for any better [treatment]." (R1388-90)

Dave Garrity, also in auto sales, testified that Mordenti had helped him get back on his feet, and that he was there to help when needed, like when he lost his hot water. (R1392-94)

Frederick Pastore, Mordenti's stepfather, simply said that Mordenti was a good son. (R1395-96)

Chris Domanski, another business associate, explained that Mordenti was reliable. (R1398)

Deborah Millett, who bartends for a living, explained that she had been without transportation and that he had not only provided her with a vehicle, but that he had subsequently forgiven her the debt for it. (R1400)

Chief Rich Ansell, of the U.S. Coast Guard, attested that Mordenti had obtained an honorable discharge from his service in the coast guard. (R1403-4)

Nelson Correa, who considered himself both a friend and an employee, told the jury the circumstances surrounding Mordenti's having helped him get a job in the factory where Mordenti worked (R1407), and that he was a good boss (R1408), and about how Mordenti put him up in his own home, gave him a car to use, a job, and helped him find a home. (R1409)

Emilinha Correa, Nelson's wife, added that he helped her find a job, as well, and that he paid for the long distance calls between the two before Nelson got settled and she could join him. (R1411)

Michael Capestany, in auto sales, explained that Mordenti "opened his home to me," treated him like a brother, and spent three days helping him look for a house. (R1415-16)

Gene Franklin, who runs the concession stand at the St. Petersburg auction, testified that Mordenti gave his wife a car to drive and himself transportation on another occasion. (R1417)

Bonnie Gould, also in auto sales, and originally from Rhode Island, explained that Mordenti put her husband up before they were able to move to Florida. (R1419)

Dawn Simon, Mordenti's girlfriend, described several other of his good deeds. (R1421-22)

Mordenti himself testified to his age, and his background as a child abandoned by his mother, and adopted and raised by his relatives. (R1425-32)

The state requested jury instructions on three aggravating circumstances (R1490-91):

1. the crime was committed for financial gain (R1435);

2. the crime was especially heinous, atrocious, and cruel (R1436-49); and

3. the crime was cold, calculated, and premeditated. (R1449-50)

Although the defense objected to giving the heinous, atrocious, and cruel instruction, arguing that there was no evidence in the record to support such a finding (R1436-37), the court nevertheless elected to give the instruction, finding that it was appropriate because of the number of wounds inflicted on the victim (nine), because she did not die instantaneously, and because she was killed in the barn located on her property. (R1441-42)

The court *sua sponte* inquired as to the basis for giving the instructions for the aggravating circumstances both that the crime was committed for financial gain, as well as that the crime was cold, calculated, and premeditated, asking "[n]o double dipping involved?" (R1443) The state attorney represented that there was no problem in giving both of these instructions, the defense failed to object to both, and so the court did give both instructions.

In his closing argument in the penalty phase, the prosecutor argued:

> But what do we know about else in their mitigation, the defendant's testimony. Mr. Mordenti is a used car salesman. That's what he does. He sells cars for a living. But Mr. Mordenti is more than that. Mr. Mordenti is a con man, con artist. That's what Mr. Mordenti is.

(R1460) Although the defense objected to the characterization, the state attorney claimed that he used the term to comment on the appellant's credibility, and the court permitted the depiction. The prosecutor continued:

> Michael Mordenti is the con man, con artist and that's what he's tried to do here today to you. He's trying to sell to you that he's a nice guy, that he is the wonderful person that his friends say he is.

He then went on to explain to the jury why this crime was especially heinous, atrocious, or cruel:

> Michael Mordenti didn't just murder Thelma Royston, he destroyed her. And those pictures show you that. He slaughtered this woman. As Michael Mordenti told Gail Mordenti, "she put up a good fight." But I guess it wasn't good enough, was it?
>
> What weight do you give to the fact that Thelma Royston died on her own property. And one of the -- one of her own buildings and the horse barn where she kept her horses that she loved so much. What weight do you give the fact that she died in the safety of her own land?
>
> What weight do you give the fact that the defendant got somebody else to go out and do this with him? What weight do you give that he got two men to go up against one woman?

What weight do you give each of those nine wounds that was given to Thelma Royston? What weight do you give those four gunshots, one in the back of the head, two in the face and one in the chest? What weight do you give each of those knife wounds that ripped her skin open and went into her body, two in the neck, two up in the chest, and one in the middle of the chest? What weight do you give that?

What weight do you give Dr. Diggs' testimony, the medical examiner? What weight do you give the fact that he can tell you that when each of these wounds were inflicted, she was alive. She lived through all nine of these wounds. What weight do we give that? That's heinous, atrocious, and cruel.

What weight do you give the fact that Thelma Royston was aware of what was happening to her? Dr. Diggs told you with wounds like this, you don't die instantly and you lose consciousness once the blood starts to flow into your lungs. What weight do we give that?

What weight do we give the fact that Thelma Royston knew she was dying on the barn floor alone? What weight do we give the eyes of Thelma Royston in these pictures? What weight do you give the fear the woman experienced in those eyes?

What weight do you give the fact that death was not instantaneous, as Dr. Diggs told you. And then what weight do you give the fact that the woman had to drown in her own blood? She drowned in her own blood from blood filling up her lungs. And then she was left alone in a barn on the floor of a horse barn to die. What weight do you give that? That's immense. I mean, if this woman only survived one minute after the infliction of these wounds, that's one minute too long. No one deserves that. What weight do we give that? Immense.

(R1465-67)

Finally, the prosecution concluded:

> When Thelma Royston walked in that barn on that cold -- or excuse me -- that misty night on June 7th, 1989, she was ambushed. She was executed. She didn't stand a chance, not a chance, when she walked in that barn. There was no way she was going to escape the decision that it's time to die. There was no escaping that. She didn't stand a chance.
>
> Nothing that the defense can say, nothing that the defense can do can mitigate this murder. Any killing of a human being is atrocious. Any killing of a human being is aggravating. Nothing mitigates the killing of a human being, but absolutely nothing at all mitigates this. Nothing. Nothing mitigates this.

(R1468-69)

In responses, the defense argued that the appellant had only shared responsibility for the plan to kill Thelma Royston, with Larry Royston and with Gail Mordenti. And that the financial gain was appreciated by both Larry Royston and Gail Mordenti, as well. The defense argued that the aggravating circumstance of especially heinous, atrocious, or cruel did not apply. This was not a crime designed to inflict a high degree of pain, showing an enjoyment of the victim's suffering, or unnecessary torture of the victim. (R1474-75) There were no defensive wounds.

The defense also discussed the appellant's value to society, his honorable service in the military, his deprived childhood, that he was a good friend, a good employer, a good employee, a good parent to his girlfriend's children, fair, and hardworking, and his specific good deeds. The appellant also introduced evidence of his age, and that he would seventy-five years old before he even had the possibility of parole. (R1477) The defense also argued that

it was possible the appellant was only an accomplice in the crime. (R1477-80) Finally, the defense argued the fact that a co-participant in the homicide had received disparate treatment, consequences less severe than death, in fact, Gail Mordenti had suffered no consequences at all as a result of her testimony against the appellant. (R1484; see also R1531)

The court instructed the jury that it could consider the following aggravating circumstances:

> Number one, the crime for which the defendant is to be sentenced was committed for financial gain;
>
> Number two, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless -- conscienceless or pitiless and was unnecessarily torturous to the victim.
>
> Three, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Cold, calculated, and premeditated consists of a careful plan or prearranged design to kill. A pretense of moral or legal 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.

The defense had requested instructions on a number of mitigating circumstances and the court gave three (R1492):

> the appellant was only an accomplice, not the motivating force behind the perpetration of the crime;
>
> the appellant's age, in that he would be seventy-five years old before he had even a hope of parole; and
>
> the appellant's character as an honest, reliable, and hard worker, and his family background, all of which showed that he had some value to society.

At the conclusion of the penalty phase of the proceedings (R1321-1506), the jury recommended the death penalty by a vote of 11 to 1. (R1499)

On September 5, 1991, the trial court took testimony from Dawn Simon and from Michael Mordenti, in anticipation of sentencing Mr. Mordenti.

On September 6, 1991, the trial court adjudicated the appellant guilty of both crimes and sentenced him to death for the first degree murder conviction, and to thirty years of confinement for the conspiracy conviction. In so doing, the court below considered the following aggravating circumstances:

> that the crime was committed for financial gain, was proven beyond a reasonable doubt;
>
> that the crime was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, was proven beyond a reasonable doubt;
>
> that the crime was especially heinous, atrocious, or cruel, the court did "not rely upon in making its decision." (R1543)

The court explained:

> The evidence established that the victim was both stabbed and shot. The victim's death was not instantaneous. Gail Mordenti testified the defendant told her that the victim put up a struggle. The victim was killed on her own property. The mechanism of death was suffocation caused by the victim's blood filling her lungs. The stab wounds were in the front of the body. The victim, in all probability, had knowledge of her impending death and although this murder is egregious, this Court does not find the killing so torturous to the victim as to set the case apart from the norm of capital felonies.

(R1543-44) The court considered the following mitigating circumstances, which it felt had been established by the evidence:

> the age of the defendant;
>
> the defendant had no significant history of prior criminal activity;
>
> the defendant's father died when he was young and his mother abandoned him;
>
> the defendant was a good stepson;
>
> the defendant supported the woman who lived with him and her two children, and he was kind to the children;
>
> the defendant was a thoughtful friend and employer;
>
> the defendant was fair in his business dealings;
>
> the defendant served in the military honorably; and
>
> the defendant behaved appropriately at trial.

(R1544-46) The court refused to consider that the defendant was a mere accomplice in the murder, finding this claim unsupported by the evidence. The court also refused to find that the defendant

had shown remorse, although he was sorry the victim had died, because he never took responsibility for the death. Finally, the trial court did not find that disparate treatment of equally culpable accomplices was a mitigating factor because Larry Royston was dead, and Gail Mordenti had testified against the appellant. (R1544-47) Its order was entered accordingly. (R1774-78)

Thereafter, the court denied defendant's motion for a new trial on September 12, 1991. (R1780-81)

SUMMARY OF THE ARGUMENT

ISSUE I

The trial court committed fundamental error by failing to require one of the prosecutors, the two of whom were married to one another, to remove him or herself from the trial of this matter, because it was fundamentally unfair for the state to obtain the credibility advantage that a married couple of prosecutors presents before to a jury. This error directly and substantially impacted upon the verdict rendered by the jury.

ISSUE II

The trial court committed fundamental error by failing to replace the juror, whose employer required him to work until midnight after trial each day, before the trial began, when the juror himself opined that such a demand would affect his ability to serve on the jury, making him incompetent. Yet the court did not excuse and replace the juror, directly and substantially impacting upon the verdict rendered by the jury.

ISSUE III

The trial court erred by allowing the testimony of the victim's mother as to the deceased's identity, and by admitting highly prejudicial and inflammatory photographs of the victim when neither the victim's identity nor the cause of death was disputed. This error directly and substantially impacted upon the verdict rendered by the jury.

ISSUE IV

The trial court erred by permitting testimony which implied appellant's collateral crimes, on two separate occasions, and by failing to instruct the jury to disregard such testimony on the third occasion, because it was not relevant to any material issue and the danger of unfair prejudice outweighed its probative value. It also constituted a non-statutory aggravating factor and was therefore impermissible. This error directly and substantially impacted upon the verdict rendered by the jury, as well as upon the recommendation that the jury made as to sentencing.

ISSUE V

The trial court violated the Eighth and Fourteenth Amendments by instructing the jury upon the aggravating circumstance of this offense as heinous, atrocious, and cruel. There was no evidence to support a finding that this was a torturous murder, or evinced extreme and outrageous depravity as exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

Although the fact that the lower court did not itself rely upon this circumstance in determining the appropriate sentence might obviate the error in some cases, the erroneous instruction here occurred in tandem with a heated closing argument made by the prosecutor and with other errors which infected the judgment of the jury. These errors included identification of the deceased by her mother, publication to the jury of inflammatory morgue photographs, testimony alluding to collateral crimes, as well as the inability

of the defense to argue, in mitigation, that the appellant had no significant history of prior criminal activity.

The weighing of an invalid aggravating circumstance violates the Eighth Amendment. When the jury makes a recommendation which must be weighed heavily in the sentencing process, the court is indirectly affected by the invalid factor. Thus, this was not harmless error.

ISSUE VI

The trial court erred in permitting the prosecutor's reference to the appellant as a "con man" and a "con artist" during the penalty phase. Such prejudicial "name calling" is improper and should be restrained. This portrayal of the appellant was so inflammatory and unfairly prejudicial that, when weighed in conjunction with allusions to his "shady" connections, his "throw away" guns, and his claim to be "in the mob," these comments justify a new penalty proceeding.

ISSUE VII

The trial court committed fundamental error by allowing the state's threat to rebut the defense's proof of no significant history of prior criminal activity with evidence of alleged criminal activity. The alleged criminal activity involved no more than harassing phone calls, threats, and the belief of one petentially biased witness that the appellant had committed arson. The appellant was never charged with that crime, much less convicted of it. And evidence of crimes with which the defendant has not been charged or for which the defendant has not been

convicted may not be presented to the jury in an attempt to attack credibility.

This error was fundamental, plainly impacting upon the jury's recommendation to the lower court. The defense was unwilling to run the risk of "damning the defendant in the jury's eyes." Considered in conjunction with the fact that the jury had heard allusions to the appellant's "shady" connections, his "throw away" guns, and his claim to be "in the mob," the fact that he was denied the opportunity to present evidence of his lack of a criminal history by the state's threats to put on such inadmissible evidence is fundamental error requiring reversal.

ISSUE VIII

The trial court committed fundamental error when it instructed the jury regarding both the cold, calculated, and premeditated nature of the offense as well as the fact that the murder was for financial gain. The application of both of the aggravating factors constitutes impermissible doubling, i.e. finding two aggravating circumstances based on a single aspect of the offense. The basis for both was the same, i.e. the fact that the crime was a murder for hire. This circumstance, therefore, should have been counted as one, and not separated into two aggravating factors.

This error is fundamental, impacting significantly and directly upon the jury's recommendation to the lower court, and therefore requiring reversal and remand for a new penalty phase hearing.

ISSUE IX

The death sentence imposed was disproportionate to the circumstances of the offense and violated the Eighth and Fourteenth Amendments. The death penalty must be reserved for only the least mitigated and most aggravated of murders. This case involves a number of mitigating circumstances: the appellant's evidence of these mitigating circumstances was not rebutted by the prosecutor, and most were acknowledged by the court below.

The court below refused, however, to find that disparate treatment of equally culpable accomplices was a mitigating factor, which it should have done, as the treatment afforded Gail Mordenti in exchange for her testimony was unrebutted, and there is little here to distinguish the joint conduct of the two Mordentis which culminated in the death of Thelma Royston.

This Court must reject the jury's recommendation because it was premised upon evidence of collateral crimes, becuase the jury was unaware that the appellant had no significant history of prior criminal activity, and because the jury weighed three aggravating circumstances, instead of one. This Court must weigh the remaining aggravating circumstance, that this was a murder for hire, against the substantial number of unrefuted statutory and nonstatutory mitigating circumstances offered in this case, and should resentence the appellant to life imprisonment.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO REQUIRE ONE OF THE PROSECUTORS, WHO WERE MARRIED TO ONE ANOTHER, TO REMOVE HIM OR HERSELF FROM THE TRIAL OF THIS MATTER; IT WAS FUNDAMENTALLY UNFAIR FOR THE STATE TO OBTAIN THE ADVANTAGE THAT A MARRIED COUPLE OF PROSECUTORS PRESENTS.

Initially, the defense counsel's failure to object to the prosecution of this trial by a husband/wife team, and the court's failure to recognize, *sua sponte*, the fundamental unfairness of such a strategy, requires that this matter be reversed and remanded for a new trial. It is incontrovertible that, absent fundamental error, an issue will not be considered for the first time on appeal. Clark v. State, 363 So.2d 331 (Fla. 1978). The error must have a significant impact on the verdict, the jury's recommendation or the sentence imposed. It must go to the foundation of the conviction or of the sentence. Davis v. State, 461 So.2d 67, 71 (Fla. 1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

It is evident here, however, that this error is of precisely so fundamental a nature. Mordenti's counsel did not, like the prosecutors, have the benefit of being married one to the other. The unfair advantage to the state is implicit in permitting Mordenti to be tried by a prosecuting team which is, and which, without saying more, innately represents Mom, apple pie, "truth, justice, and the American way," and is therefore more credible and more trustworthy. (See R61, 1037, 1043, 1053, 1058; see also A1)

So fundamental an error, standing alone, requires reversal, remand, and a new trial.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO REPLACE THE JUROR WHOSE EMPLOYER REQUIRED HIM TO WORK UNTIL MIDNIGHT AFTER TRIAL EACH DAY.

Perhaps even more egregious, if that is possible, is the trial court's failure, *sua sponte*, to remove the Winn-Dixie juror from the panel, especially when the opportunity arose before the trial had even begun, but after the juror had made it clear that his employer was requiring him to work, after serving jury duty in this matter all day, until midnight each night, and that he felt it would impact upon his ability to serve as a fair and impartial juror in this matter. (R270) Norman Haight (#1) (R29) told the court that his employer wanted him to work after he was released from jury duty for the day.

> They wanted me to work last night, and I said, "Work?" And they wanted me to work tonight until I get out of here, until -- whenever, which is usually midnight. I told them I wasn't real crazy about that.

(R271) Although the court agreed that such treatment was not fair to the juror, instead of excusing the juror, or looking further into the matter, the court simply remarked, "I don't blame you. I don't think that's fair, either."

This is manifest error. How was the juror to give this trial his undivided attention, when he was not only fatigued from working until late the night before, but was also unable to concentrate on the trial because he was thinking about reporting to work again, as soon as the court released him for the evening? It cannot be

disputed that this juror was incompetent to judge this matter, and should have been excused.

It is axiomatic that Florida Rule of Criminal Procedure 3.310 vests the trial court with discretion to determine the competency of a juror, and that the court's decision will not be disturbed unless manifest error is shown. Christopher v. State, 407 So.2d 198 (Fla. 1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982); Singer v. State, 109 So.2d 7 (Fla. 1959). This is true even after the jury has been sworn. Valle v. State, 581 So.2d 40 (Fla. 1991). However, when the error is as plain as it is here, and when one juror alone would have been sufficient to preclude a verdict of guilt, as here, this Court cannot hold that the lower court's failure to recognize the Winn-Dixie juror's inability to give the same attention to this matter as that contributed by the other jurors was harmless error. In fact, the trial court's failure to replace this juror deprived the appellant of his constitutional right to a trial before an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Compare Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992). This fundamental and manifest error requires reversal, remand, and a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING TESTIMONY BY THE VICTIM'S MOTHER AS TO THE DECEASED'S IDENTITY, AND BY ADMITTING HIGHLY PREJUDICIAL PHOTOGRAPHS OF THE VICTIM WHEN NEITHER THE IDENTITY NOR THE CAUSE OF DEATH WAS IN DISPUTE.

Isabel Reger was Thelma Royston's mother. She was seventy-six years old when she testified at trial. (R312) She discovered the body of her daughter after the murder. On the witness stand, after testifying to the details of that grisly discovery, she identified state's Exhibit No. 2-P: "[t]hat's the daughter of the -- picture of my daughter and Larry Royston," and agreed that the photo fairly and accurately depicted her daughter and Larry Royston. (R324) While the jury was viewing the exhibit, the state inquired further: "[w]hile the jury is looking at that, in state's Exhibit 2-P were Larry and Thelma the two people in the center of that picture?" and she responded, "[y]es, they were." (R325) With that, the state relinquished the witness.

Recognizing the emotional trauma her testimony had undoubtedly caused Ms. Reger, the defense's cross examination commenced, "I know this is a very difficult situation for you, so I'll keep my questioning very brief." (R326)

For obvious reasons, the defense did not object to the identification of her deceased daughter by Ms. Reger. Ms. Reger's discomfiture was evident, and acknowledged by the defense in the opening of its cross. However, the fundamental nature of the error made by the lower court when it permitted Thelma Royston's mother to identify her from a photograph, especially after describing her

discovery of the body, cannot be ignored. Relatives should not be called upon to identify a victim, when unrelated, credible witnesses are available to make the identification, or, as here, when the identity of victim is not contested. (R1177) The testimony of Thelma Royston's mother was, without a doubt, inflammatory, and aroused unwarranted jury sympathy, interjecting matters not germane to the issue of guilt or punishment. Compare Welty v. State, 402 So.2d 1159 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979). When the state intends to offer such evidence, it must show that it made an effort to find witnesses other than relatives to identify the victim. The family member should be a witness of last resort.

As in Cheshire v. State, 568 So.2d 908, 913 (Fla. 1990):

> the identification was needless and thus irrelevant, since there was no dispute as to the identities of the victims.

As in Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990):

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.
>
> Here, none of the relative's testimony was necessary to establish the identity of the victims. It is apparent that such testimony was impermissibly designed to evoke the sympathy of the jury.

This Court, in Jones, found that the trial court had abused its discretion in permitting such testimony.

Upon its review of the entire record below, and considered in conjunction with the remaining errors visited in this appeal, this Court must acknowledge that this error caused the defense undue prejudice, and requires reversal of the judgment below.

Shortly after this testimony was elicited, the prosecution introduced a series of morgue photographs of the deceased. The defense made the obvious objection, i.e. that the probative value of the photographs was outweighed by the prejudicial impact they would have, especially when, as here, there was no dispute as to the manner of death:

> They have seen a picture of this lady dead. There is no issue. There is no contest about that. These are not pictures at the scene, these are now -- some are at the morgue, and the body had been moved. I don't see the relevance. It's an uncontested issue, and inflames the emotions of the jury.

(R418) Nevertheless, the lower court admitted nearly all of the photographs, Exhibits 9-A through 9-G (except for 9-B). (R420-29)

The law is clear that the trial court has discretion, absent abuse, to admit photographic evidence so long as the evidence is relevant. Welty, 402 So.2d at 1163. In this case, however, it was not relevant to establish the victim's identity, nor to show, for example, that an out-of-court confession was consistent with the physical evidence found at the scene. Compare Thompson v. State, 565 So.2d 1311 (Fla. 1990). Here, the gruesome nature of the photos renders the decision to admit them an abuse of discretion requiring reversal of the judgment below. See Czubak v. State, 570 So.2d 925, 929 (Fla. 1990) (limited probative value of photographs

outweighed by their shocking and inflammatory nature); Hoffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA), rev. denied, 570 So.2d 1306 (Fla. 1990) (danger of unfair prejudice outweighed probative value of autopsy photograph).

The prosecution used those photographs, which should never have been admitted in the first place, in its penalty phase, closing argument, as follows:

> Michael Mordenti didn't just murder Thelma Royston, he destroyed her. And those pictures show you that. He slaughtered this woman.
>
> * * *
>
> What weight do we give the eyes of Thelma Royston in these pictures? What weight do you give the fear the woman experienced in those eyes?

(R1465-66) The prejudice to the defense in the guilt phase is obvious. But the prejudice that resulted in the penalty phase is indisputable. This error requires reversal and a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S PRIOR INVOLVEMENT WITH CRIME, ON THREE OCCASIONS, BECAUSE IT WAS NOT RELEVANT TO ANY MATERIAL ISSUE AND THE DANGER OF UNFAIR PREJUDICE OUTWEIGHED ITS PROBATIVE VALUE.

Improper Williams rule evidence,[2] consisting of a series of related, irrelevant, and prejudicial statements, had the direct and undeniable result of making the appellant, who had no significant history of prior criminal activity, appear to the jury to be a career criminal, someone involved in the mafia, someone familiar with and capable of committing a murder for hire, which this was alleged to be. The comments should have been excluded, and their introduction into evidence, especially as a group, was manifest error, the prejudice of which alone requires a new trial.

Despite a Williams rule objection which was overruled by the court below, Gail Mordenti testified that the appellant had guns that were not registered to him, which he had told her were "throw away pieces." (R595-97) Although not defined at trial, throw away weapons are referenced on television "cop shows" sufficiently routinely that several of the jurors no doubt explained the term to any not familiar with it; a throw away weapon is carried by an individual, usually a police officer, who anticipates killing another, and who, after doing so, places the weapon in proximity to the dead body so that he may claim self defense. And Gail's claim was that the appellant had an unspecified number of these weapons!

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[2] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

Relevant evidence should not be excluded merely because it points to the commission of a separate crime. Williams v. State, 143 So.2d 484 (Fla. 1962). However, it **must** be relevant to a material issue other than propensity or bad character. Yet, the fact that Mordenti owned "throw away" guns, even if true, has no logical or legal relevance to any issue involved in this case. There was no hint that such a weapon was used in this case; in fact, the type of murder was entirely different. Clearly, the **only** reason that Gail's statement was offered was to demonstrate Mordenti's bad character.

Furthermore, the state cannot argue that the jury was unable to determine to what reference was being made. In Omelus v. State, 584 So.2d 563 (Fla. 1991), the state's reference to another murder was deemed harmless error because

> the jury, in our view, would not have known that there was a second murder unless they had prior knowledge and could distinguish minor factual variations in the two murders.

Id. at 566. The same simply is not true here.

More on point is Drake v. State, 441 So.2d 1079 (Fla. 1984), in which the trial court had permitted the jury to hear that Drake was on parole, and a witness had answered in the affirmative as to his knowledge of the nature of the crime for which Drake was on parole, expressing his concern [therefore] for the victim's safety. This Court found no theory of relevance persuasive (either to show identity or to demonstrate motive), and that the comment had been offered only to show bad character. Id. at 1082.

The trial court's failure to sustain the defense's objection to this testimony was reversible error, giving the jury the impression that Mordenti was in the mafia, or, at the very least, that he was involved in mafia-type activities and regular killings, someone who was much more likely to commit the crime for which he was on trial.

Hard on the heels of this testimony, Gail went on to explain that she had approached Mordenti to commit the crime because "I knew that he was dealing with some people that were shady." Again, the objection to this unsupported allegation was overruled. (R612) Again, the fact that Mordenti was dealing with "shady" people, even if true, has no logical or legal relevance to any issue involved in this case. There was no hint that he obtained the weapon used in the murder from "shady" people, nor that "shady" people helped him commit the crime. (Why Gail solicited him to commit the murder is irrelevant, and, even if relevant, the prejudice this statement caused, in conjunction with the other two, far outweighed the necessity of its introduction.) Again, clearly, the **only** reason that Gail's statement was offered was to emphasize Mordenti's bad character. Again, the failure to prohibit the statement was egregious error, bolstering the jury's dawning understanding that Mordenti was involved with the mafia, or, at the very least, with mafia-type people.

Although two of these three statements were made by Gail Mordenti, his ex-wife and the only witness to place Mordenti at the scene of the crime or to provide any evidence whatsoever of his

involvement, credence was lent them by the claim soon after made by Barnes, an apparently disinterested witness, that, when they met, Mordenti "[l]et me know he was in the mob." Although defense counsel's objection to this allegation was sustained, the court's failure to instruct the jury to disregard it (R747-50), especially after permitting Gail's related and heretofore unsupported allegations, is, without doubt, error of the most egregious kind.

The basic test for the admissibility of evidence is relevancy. Evidence which is relevant to any material issue at trial, other than the bad character or propensity of the defendant to commit crime, is generally admissible, while irrelevant evidence is not. Czubak, 570 So.2d at 928; Williams v. State, 110 So.2d 654, cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Florida Statute §§ 90.401, 90.402, and 90.404.

If only one of these comments had been permitted, the argument might be advanced that the statement was brief and the testimony undeveloped, as it was in Dailey v. State, 594 So.2d 254 (Fla. 1991). In that case, the defendant's efforts to avoid extradition were held irrelevant and prejudicial, and the evidence should have been excluded, but this Court found that the statements were so brief that the error did not affect the verdict. Id. at 256.

Such a finding is impossible here. The erroneous admission of such evidence is subject to harmless error analysis. Craig v. State, 510 So.2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988). Application of the harmless error test:

> requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

State v. Diguilio, 491 So.2d 1129, 1135 (Fla. 1986). The focus of the analysis is on the effect of the error on the trier-of-fact, with the burden remaining on the state to show that the error was harmless. Id. at 1139. And "[e]rroneous admission of collateral crimes evidence is presumptively harmful." Czubak, 570 So.2d at 928. The error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988).

Clearly, the electrifying information, first from his ex-wife that appellant had "throw away pieces," and that "he was dealing with some people that were shady," and, finally, from Barnes, that he had introduced himself (to someone in prison, perhaps when he himself was in prison?) as someone "in the mob," is not the kind of error that will **not** effect the jury's deliberations. In view of the fact that the case against Mordenti was premised completely upon Gail Mordenti's testimony against him, bolstered by a few

shreds of circumstantial evidence, this error was far from harmless.

In Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), the defendant killed a used car lot owner, then confessed to his girlfriend and his brother-in-law. The trial court admitted testimony by the defendant's cellmate that the defendant said he tried to have his brother-in-law killed to prevent him from testifying, to discredit his girlfriend, and to avoid conviction. This Court ruled that evidence of a suspect's endeavors to evade a threatened prosecution is admissible when it is relevant to show the defendant's consciousness of guilt. 399 So.2d at 968.

This matter differs from Sireci because the state's evidence was not probative of any issue material to this case. But even if the appellant's statements to Gail and to Barnes were somehow probative of his "shady" connections and of collateral crimes in which he was involved, Florida Statute § 90.403 proscribes the admission of relevant evidence when its probative value is outweighed by the danger of unfair prejudice. See Czubak, 570 So.2d at 929 (limited probative value of photographs outweighed by their shocking and inflammatory nature); Hoffert, 559 So.2d at 1249, (danger of unfair prejudice outweighed probative value of autopsy photograph).

The state's evidence of the appellant's statements was extremely prejudicial because it implied that the appellant had been involved in other offenses. Yet no such prior offenses were

ever proved or shown to be relevant to any material issue at trial. See Czubak, 570 So.2d at 928 (evidence that murder defendant was an escaped convict was not relevant to any material issue); Jackson v. State, 451 So.2d 458, 461 (Fla. 1984) (evidence that defendant pointed gun at witness and boasted of being a "thoroughbred killer" was impermissible); Drake, 441 So.2d at 1082 (evidence that defendant was on parole was not relevant to murder charge). As the District Court of Appeal so lucidly pointed out, in Paul v. State:

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

340 So.2d 1249, 1250, (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977)

The discretion of the jury to recommend, and of the trial court to impose sentence in a capital case must be guided and channeled to prevent arbitrary and capricious application of the death penalty. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). The sentencing process should not be contaminated by the unguided and unchanneled consideration of this irrelevant and highly prejudicial evidence.

The erroneous admission of irrelevant collateral crime evidence is presumed to be harmful error because of the danger that the jury will take such evidence of bad character or propensity to

commit crime as evidence of guilt of the crime charged. Czubak v. State, 570 So.2d at 928; Castro v. State, 547 So.2d 111, 115 (Fla. 1989); Peek v. State, 488 So.2d 52, 56 (Fla. 1986). In this case, the collateral crime evidence was harmful not only during the guilt phase of trial, as in Czubak and Peek, it may very well have carried over and improperly infected the jury's recommendation of death, as in Castro. 547 So.2d at 116. (Here, the state chose to rely upon the evidence presented in the first phase of the trial during the second phase. (R1371)) If so, it was plainly a nonstatutory aggravating factor, impermissibly considered by the jury in making its recommendation, and reversible error. Colina v. State, 570 So.2d 929, 932 (Fla. 1990) (reversible error to permit state to introduce improper nonstatutory aggravating evidence of defendant's lack of remorse).

This obvious error was exacerbated by the fact that, although Mordenti had no significant history of prior criminal activity, defense counsel was forced to refrain from making this point to the jury. (See, infra, ISSUE VII.) Although the state agreed that he had no record of felony convictions, the prosecution argued that he did have a history of making threats and harassing phone calls to his girlfriends (R1354), and that a girlfriend had once accused him of the arson of her home. (R1355-58) Although never charged with the arson, because the state indicated its intent to offer proof of **the girlfriend's suspicions alone** (R1356), Mordenti was never able to rebut the jury's impression that he was involved with the mafia, not even during the penalty phase.

Only statutory aggravating factors may be considered in the penalty phase. Miller v. State, 373 So.2d 882 (Fla. 1979). The jury's consideration of the appellant's shady mafia connections and possible involvement in crimes requiring the use of throw away guns, especially without benefit of the mitigating fact that Mordenti had no significant history of prior criminal activity, is reversible error.

The improper admission of irrelevant and highly prejudicial statements cannot be deemed harmless unless the state demonstrates, beyond a reasonable doubt, that there is no possibility that the evidence affected the verdict. State v. Lee, 531 So.2d 133, 136 (Fla. 1988); DiGuilio, 491 So.2d at 1135. The erroneous admission of evidence of collateral crimes in this case was not harmless because there is a substantial likelihood that it influenced the jury's rejection of the appellant's alibi defense during the guilt phase of trial and of his mitigating evidence during the penalty phase of trial. The conviction and sentence must be reversed, and the case remanded for a new trial.

ISSUE V

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON THE AGGRAVATING FACTOR OF THIS OFFENSE AS BEING HEINOUS, ATROCIOUS, AND CRUEL.

The court below instructed the jury that it could consider the aggravating circumstance that the crime was especially heinous, atrocious, or cruel, over the defense's objection. But the trial court did not rely upon that aggravating circumstance to sentence the defendant, finding that it had not been established beyond a reasonable doubt. (R1543-44)

Yet because the court permitted the jury to consider that possibility, the prosecutor argued that the crime was especially heinous, atrocious, or cruel:

> Michael Mordenti didn't just murder Thelma Royston, he destroyed her. And those pictures show you that. He slaughtered this woman.
>
> * * *
>
> What weight do you give the fact that she died in the safety of her own land?
>
> What weight do you give each of those nine wounds that was given to Thelma Royston? What weight do you give those four gunshots, one in the back of the head, two in the face and one in the chest? What weight do you give each of those knife wounds that ripped her skin open and went into her body, two in the neck, two up in the chest, and one in the middle of the chest?
>
> * * *

> What weight do you give Dr. Diggs' testimony, the medical examiner? What weight do you give the fact that he can tell you that when each of these wounds were inflicted, she was alive. She lived through all nine of these wounds. What weight do we give that? That's heinous, atrocious, and cruel.
>
> What weight do you give the fact that Thelma Royston was aware of what was happening to her? Dr. Diggs told you with wounds like this, you don't die instantly and you lose consciousness once the blood starts to flow into your lungs. What weight do we give that?
>
> * * *
>
> And then what weight do you give the fact that the woman had to drown in her own blood?
>
> * * *
>
> I mean, if this woman only survived one minute after the infliction of these wounds, that's one minute too long. No one deserves that. What weight do we give that? Immense.

(R1465-67)

Finally, the prosecution concluded:

> When Thelma Royston walked in that barn ... she was ambushed. She was executed. She didn't stand a chance....
>
> Nothing that the defense can say, nothing that the defense can do can mitigate this murder. Any killing of a human being is atrocious. Any killing of a human being is aggravating. Nothing mitigates the killing of a human being, but absolutely nothing at all mitigates this. Nothing. Nothing mitigates this.

(R1468-69)

First, the prosecutor misconstrued the testimony given by Dr. Diggs, who clearly stated that he could not determine whether the victim's death was instantaneous, or not. (R417)

Second, however, the prosecutor did not understand the legal nature of this aggravating circumstance. As this Court recognized in Jackson v. State:

> All murders are by their nature repugnant to society. However, as we have repeatedly held, this aggravating factor is to be utilized only in those cases "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

502 So.2d 409, 411 (Fla. 1986) (cite omitted.)

Finally, it should be reasonably evident that the remarks of the state attorney influenced the jury to reach a more severe recommendation than it might otherwise have done. Under such circumstances, the law requires a new penalty phase hearing. Compare, Darden v. State, 329 So.2d 287, at 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977) (statements made by prosecutors in closing argument were not so inflammatory and abusive as to have deprived the appellant of his right to a fair trial, when defense counsel opened the door to such comments). Thus, this argument alone should mandate the reversal of the sentence here, with a remand for a new penalty phase hearing.

This Court will be mindful of the fact, however, that the trial court, despite the jury's recommendation, correctly did not make a factual finding of this factor in her sentencing order. This was not a torturous murder, evincing extreme and outrageous depravity as exemplified by the desire to inflict a high degree of

pain or utter indifference to or enjoyment of the suffering of another. Wickham v. State, 593 So.2d 191, 193 (Fla. 1991), cert. denied, --- U.S. ---, 112 S.Ct. 3003, 120 L.Ed.2d 878 (1992); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). There were no defensive wounds here, as there were in Nibert v. State, 574 So.2d 1059 (Fla. 1990).

> A murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel.

Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) (circumstance not proven despite that victim received multiple rifle and shotgun wounds.)

In many cases, the fact that the court did not rely upon this circumstance in deciding upon the appropriate sentence would obviate any error. However, here the Court must consider this erroneous instruction in tandem with the argument that the prosecutor made and with the other errors infecting the jury's judgment when considering their recommendation in this instance. These errors include the identification of the deceased by her mother, the publication to the jury of the inflammatory morgue photographs, the references made to the appellant's involvement with the mafia, his possession of "throw away" guns, and his dealings with "shady people," as well as the inability of the defense to argue, in mitigation, the fact that the defendant had no significant history of prior criminal activity.

The jury easily could have believed that the appellant was a "hit man" and that he should be punished accordingly. The jury easily could have believed that the murder was heinous, atrocious, or cruel, and that the appellant should be punished accordingly. As in Jones, in which the same instruction was improperly given, this Court cannot say under these facts that the error was harmless under the standard announced in Diguilio. 569 So.2d at 1238-39.

It is well established that the Eighth and Fourteenth Amendments to the U.S. Constitution prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); U.S. Const. Amends. VIII and XIV. The state is required to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id., 446 U.S. at 428 (footnotes omitted). "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

The weighing of an invalid aggravating circumstance violates the Eighth Amendment. See Sochor v. Florida, 504 U.S. ---, ---, 112 S.Ct. 2114, 2119, 119 L.Ed.2d 326 (1992). When the jury makes

a recommendation which must be weighed heavily in the sentencing process, the court is indirectly affected by the invalid factor. As in Espinosa v. Florida:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so [cite omitted], just as we must further presume that the trial court followed Florida law [cite omitted], and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor [cite omitted] and the result, therefore, was error.

--- U.S. ---, ---, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992) reh. den. --- S.Ct --- (September 4, 1992). Thus this Court explained in Omelus, under remarkably similar conditions as those of the case at hand:

> Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence.... Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one

> mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that the error is not harmless beyond a reasonable doubt....

584 So.2d at 567. And so the Court should conclude here, vacating the sentence and remanding to the trial court for a new penalty phase proceeding before a jury.

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR'S REFERENCE TO THE APPELLANT AS A "CON MAN" AND A "CON ARTIST" DURING THE PENALTY PHASE, WHICH ERROR RESULTED IN UNFAIR PREJUDICE TO THE APPELLANT.

In his closing argument in the penalty phase, the prosecutor argued:

> But what do we know about else in their mitigation, the defendant's testimony. Mr. Mordenti is a used car salesman. That's what he does. He sells cars for a living. But Mr. Mordenti is more than that. Mr. Mordenti is a con man, con artist. That's what Mr. Mordenti is.

(R1460) Although the defense objected to the characterization, the state attorney claimed that he used the term to comment on the appellant's credibility, and the court permitted the depiction. The prosecutor continued:

> Michael Mordenti is the con man, con artist and that's what he's tried to do here today to you. He's trying to sell to you that he's a nice guy, that he is the wonderful person that his friends say he is.

Such prejudicial "name calling" is improper and should be restrained. Darden, 329 So.2d 287. And unlike defense counsel in Darden, the defense here did nothing to open the door to the language used by the state to characterize the appellant. Such a portrayal of the defendant was so egregious, inflammatory, and unfairly prejudicial that, when considered in conjunction with his representation as "dealing with some shady people" and "in the mob," these comments justify a new penalty proceeding.

ISSUE VII

THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO THREATEN TO REBUT THE DEFENSE'S PROOF OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY WITH EVIDENCE OF ALLEGED CRIMINAL ACTIVITY, WHICH INVOLVED NO MORE THAN HARASSING PHONE CALLS, THREATS, AND THE BELIEF BY ONE POTENTIAL WITNESS THAT THE APPELLANT HAD COMMITTED ARSON, WITHOUT HIS BEING CHARGED WITH THAT CRIME, MUCH LESS CONVICTED OF IT.

In the penalty phase, as in the guilt phase, evidence of crimes with which the defendant has not been charged or for which the defendant has not been convicted may not be presented to the jury in an attempt to attack the witness' credibility. Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986) (defendant was prejudiced during sentencing phase of trial by state's use of uncharged crimes to undermine the credibility of defendant's character witnesses). In Garron v. State, 528 So.2d 353, 358 (Fla. 1988), this Court found that the fact that the prosecutor had been permitted to raise the point that the appellant had allegedly killed somebody in Greece or Turkey was error. The number of times such inadmissible evidence was permitted was irrelevant.

Initially, the defense here inquired whether the state had any reason to suspect the appellant of a significant history of prior criminal activity. (R1353) Although the state agreed that he had no record of felony convictions, the state argued that he did have a history of making threats and harassing phone calls when his girlfriends wanted to terminate their romantic relationship (R1354), and that, although he was never charged with the crime, a girlfriend had once accused him of the arson of her home. (R1355-

58) Because the state intended to offer proof of this dispute if the defense put in issue that the appellant had no significant history of prior criminal activity, the defense elected not to do so.

The state could not have relied on this alleged crime of arson to prove the aggravating factor of previous conviction of a violent felony. Dougan v. State, 470 So.2d 697 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986). To argue, as it no doubt will, that offering such information to the jury by attacking appellant's credibility is permissible is a very fine (and, as in Robinson, a meaningless) distinction:

> it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went to far in this instance.

487 So.2d at 1042.

Absent fundamental error, an issue will not be considered for the first time on appeal. Clark, 363 So.2d 331. The error must have a significant impact on the verdict, the jury's recommendation or the sentence imposed. It must go to the foundation of the conviction or of the sentence. Davis, 461 So.2d at 71.

This error is of precisely so fundamental a nature, impacting significantly upon the jury's recommendation to the lower court. The defense was unwilling to run the risk of "damning the defendant in the jury's eyes." Considered in conjunction with the fact that the jury had heard evidence of his "throw away weapons" and his "dealings with shady people," and that he was "in the mob," the

fact that he was denied the opportunity to present evidence of the lack of a criminal history by the state's threats to put on such inadmissible evidence is fundamental error requiring reversal, and a new penalty phase proceeding.

ISSUE VIII

THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON BOTH THE COLD, CALCULATED, AND PREMEDITATED NATURE OF THE OFFENSE AND THE FACT THAT IT WAS FOR FINANCIAL GAIN; THE BASIS FOR BOTH WAS THE SAME AND THE INSTRUCTION THEREFORE CONSTITUTED IMPERMISSIBLE DOUBLING OF AGGRAVATING CIRCUMSTANCES.

The application of both of the aggravating factors that the crime was committed for financial gain and was committed in a cold, calculated, and premeditated manner constitutes impermissible doubling, i.e. finding two aggravating circumstances based on a single aspect of the offense. This Court has repeatedly held that application of two aggravating circumstances is error when they are each based on the same essential feature of the capital felony. See, e.g., Jackson v. State, 498 So.2d 406 (Fla. 1986), cert. denied, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987).

In Bello v. State, for example, this Court found that both the factor that the crime was committed to avoid a lawful arrest, and the factor that it was committed to disrupt or hinder law enforcement constituted impermissible doubling, when:

> Bello clearly fired to prevent the police officers from entering the bedroom to take him into custody. This had the incidental effect of preventing the officers from coming to the assistance of the injured [detective]. However, that alone is not sufficient to justify two separate aggravating circumstances on these facts. Therefore only one of these two statutory aggravating circumstances may be properly found.

547 So.2d 914, 917 (Fla. 1989).

The same must be said here. This was a murder for hire. When the trial court entered her sentencing order, she said:

> Gail Mordenti testified that she acted as an intermediary between Larry Royston and Michael Mordenti in arranging the killing of Thelma Royston for money. Michael Mordenti did not know Thelma Royston but killed her for the sum of $17,000.

(R1774) Regarding the aggravating circumstance that the crime was committed in a cold, calculated, and premeditated manner, the court noted:

> The murder of Thelma Royston was a contract murder, a murder solely for financial gain.

(R1775) As the lower court herself explained, both the fact that the murder was executed for pecuniary gain and the fact that it was planned (i.e. cold, calculated, and premeditated) derive out of that one simple fact, that it was a murder for hire. This circumstance, therefore, should have been counted as one, and not separated into two aggravating factors.

Absent fundamental error, an issue will not be considered for the first time on appeal. Clark, 363 So.2d 331. The error must have a significant impact on the verdict, the jury's recommendation or the sentence imposed. It must go to the foundation of the conviction or of the sentence. Davis, 461 So.2d at 71.

This error is of precisely so fundamental a nature, impacting significantly upon the jury's recommendation to the lower court, and therefore requiring reversal of the death sentence in this case.

ISSUE IX

THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT WAS DISPROPORTIONATE TO THE CIRCUMSTANCES OF THE OFFENSE AND VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1, 9 (1982); U.S. Const. Amends. VIII and XIV. This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is imposed neither arbitrarily nor irrationally. Parker v. Dugger, 403 U.S. --- , 111 S.Ct. --- , 112 L.Ed.2d 812, 826 (1991). Such a review requires individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

This Court has consistently followed a policy of reviewing death sentences to determine whether they are proportionate to the circumstances of the offense and to the sentences imposed in other capital cases.

> A high degree of certainty in procedural fairness, as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.

Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). The death penalty must be reserved for only the least mitigated and most aggravated of murders. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); Dixon, 283 So.2d 1. And the death penalty is not required

in all cases involving contract killings, either. See, e.g., Omelus, 584 So.2d at 567.

This case involves a number of mitigating circumstances, most of which were acknowledged as proven by the court below:

> the age of the defendant;
>
> the defendant's father died when he was young and his mother had abandoned him;
>
> the defendant was a good stepson;
>
> the defendant supported the woman who lived with him and her two children, and he was kind to the children;
>
> the defendant was a thoughtful friend and employer;
>
> the defendant was fair in his business dealings;
>
> the defendant served in the military honorably; and
>
> the defendant behaved appropriately at trial.

(R1544-46) The court also found that the defendant (at fifty years of age) had no significant history of prior criminal activity, which the jury had not known when it made its recommendation of death.

The appellant's evidence of these mitigating circumstances was not rebutted by the prosecutor. This Court has ruled that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d at 1062. And so it did.

The court below refused, however, to find that disparate treatment of equally culpable accomplices was a mitigating factor, because Larry Royston was dead, and Gail Mordenti had testified against the appellant. Nevertheless, the lower court should have considered the treatment afforded Gail Mordenti in exchange for her testimony, as that evidence was unrebutted.

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

Slater v. State, 316 So.2d 539, 542 (Fla. 1975). In Slater, the defendant was the accomplice; the triggerman had entered a plea of *nolo contendere* to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So.2d at 543.

In Craig v. State, the Court explained:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

510 So.2d 857, 870 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988). There, because the defendant was the planner and the instigator of the murders, rather than the accomplice, whose help had been solicited by the defendant, the disparate treatment afforded the accomplice was not a factor that required the court to accord a life sentence.

Conversely, there is little here to separate the joint conduct of the two Mordentis which culminated in the death of Thelma Royston. Gail initially solicited Michael's involvement, as she did at least three others (R612), because she wanted Larry Royston's funds freed to invest in business with her. (R609-11) Although she was not present at the actual murder, she helped Michael plan the crime, and travelled with him to the scene on two separate occasions beforehand. She also benefitted from the proceeds of the murder for hire. And, **after she was promised immunity** (R661), she denounced Michael and provided all the incriminating testimony that she could against him. The court should have found that disparate treatment of equally culpable accomplices was yet another mitigating factor in this case.

In considering the whole record of this matter before the court below, this Court must reject the jury's recommendation because it was premised upon evidence of collateral crimes which was unfairly prejudicial to the defense. Further, in making its recommendation, the jury was unaware of the fact that the appellant had no significant history of prior criminal activity. The jury was not aware that there was no evidence to support a finding that the crime was especially heinous, atrocious, or cruel. And finally, the jury was incorrectly instructed upon two separate aggravating circumstances, when only one was permissible, either that the crime was committed for pecuniary gain, or that the crime was cold, calculated, and premeditated.

This Court must weigh the remaining aggravating circumstance, that this was a murder for hire, against the substantial number of unrefuted statutory and nonstatutory mitigating circumstances offered in this case. That this was a contract murder does not necessitate the death penalty. Omelus, 584 So.2d at 567. Under these circumstances, the death penalty was disproportional punishment. As this Court said in Songer, 544 So.2d at 1011, this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving "either nothing or very little in mitigation." This is not one of those cases.

This case involves substantial mitigation, which includes the fact that the appellant has no history of prior criminal activity. Compare McKinney v. State, 579 So.2d 80 (Fla. 1991) (death sentence disproportional when only one valid aggravating circumstance and mitigating factors include no significant history of prior criminal activity); Nibert, 574 So.2d 1059 (death sentence disproportional despite heinous, atrocious, or cruel nature of stabbing victim seventeen times, where some of victim's wounds were defensive); Blakely v. State, 561 So.2d 560 (Fla. 1990) (death sentence disproportional in domestic dispute despite finding two aggravating circumstances of heinous, atrocious, or cruel, and cold calculated, and premeditated); Smalley v. State, 546 So.2d 720 (Fla. 1989) (substantial mitigation made death penalty disproportional despite proof of heinous, atrocious, or cruel, in murder of twenty-eight-month-old girl who died after defendant struck child repeatedly, and banged her head on the floor); Lloyd v. State, 524 So.2d 396

(Fla. 1988) (one aggravating circumstance and one mitigating circumstance, that the appellant had no significant history of prior criminal activity, mandate life sentence); Rembert v. State, 445 So.2d 337 (Fla. 1984) (death sentence disproportional when one valid aggravating factor and considerable amount of mitigating evidence). As this Court explained in Klokoc v. State:

> In State v. Dixon [cite omitted], we held that "[r]eview by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." In applying that principle to the instant case, we find that the one statutory aggravating factor does not outweigh the unrefuted mitigating factors when comparing this cause to other death penalty decisions.

589 So.2d 219, 222 (Fla. 1991). In this case, as well, the Court should reverse the death penalty decision and remand this case for the imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the court below and remand this case to the trial court for the following relief:

1. a new trial (Issues I, II, III, and IV);

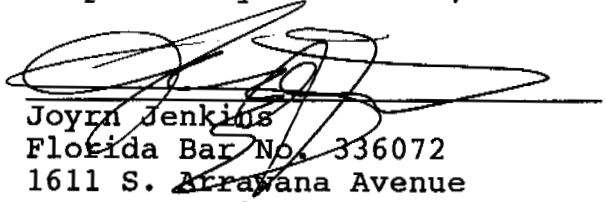
2. a new penalty phase trial before a new jury (Issues V, VI, VII, and VIII); or

3. resentencing to life (Issue IX).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert S. Krauss and Candance Sunderland, Suite 700, 2002 N. Lois Avenue, Tampa, Florida 33607 this 14th day of September, 1992.

Respectfully submitted,



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