IN THE SUPREME COURT OF FLORIDA

JEROME M. ALLEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 79,003

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

CORRECTED
INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On January 2, 1991, the fall term grand jury in Brevard County, Florida indicted Eugene Dion Roberson, Brian Patrick Kennedy, and Jerome M. Allen (the Appellant), for the first-degree felony murder[1] of Stephen DuMont. The grand jury also indicted the trio on one count of armed robbery[2], one count of possession of a short-barreled shotgun[3], and one count of grand theft of a motor vehicle[4]. (R3649-51)

One of the first pleadings filed by defense counsel was a Brady demand.[5] (R3659-60) The State did not contest Allen's

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[1] §§ 782.04(1)(a)2, 812.13(1), and 812.13(2)(a), Florida Statutes.

[2] §§ 812.13(1) and 812.13(2)(a), Florida Statutes.

[3] § 790.221, Florida Statutes.

[4] §§ 812.014(1) and 812.014(2)(c)4, Florida Statutes.

[5] Brady v. Maryland, 373 U.S. 83 (1963).

motion to sever, and he was tried separately. (R3363,3666,3737-38)

On March 18, 1991, Allen moved to strike all death penalty proceedings based on the fact that he was only fifteen years old at the time of the offense. (R3735-36) The trial court ultimately denied Allen's motion. (R3782-84) Allen also filed a motion to determine if the State was seeking the death penalty in good faith. (R3769) Additionally, Allen repeatedly requested that two separate juries be seated, one to determine guilt, the other penalty. (R12-13,21,45-55,3770) The court also denied Allen's motion to dismiss the indictment which was based on the exclusion of an identifiable class to which Allen belonged. (R3432-38)

Allen's motion to suppress statements that he made to police was granted in part and denied in part. The trial court denied Allen's motion to suppress his statements to Roberson in the holding cell. (R3742-45,3755-57) The trial court also denied Allen's motion to suppress a shotgun and shells seized from his house. (R3752-53,3779-81)

Allen filed a number of constitutional attacks on Florida's death penalty sentencing scheme. (R3702-28,3844-46, 3849-50,3857)

The case proceeded to a jury trial on July 8, 1991. (R1-1307) Several jurors were excused for cause over Allen's objection. (R3044-47,3153-54) During the trial, certain physical evidence was introduced over Allen's objections. (R640-

41,922-33) During Detective Carter's testimony, the trial court denied Allen's motion for mistrial which was based on testimony that implied collateral crimes. (R913-19,996-99) At the conclusion of the State's case-in-chief, Allen moved for a judgment of acquittal which the trial court denied. (R974-95) The trial court denied several of Allen's specially requested jury instructions. (R1084-85,1130-33,3795,1108-11, 3794) Over Allen's objection, the trial court instructed the jury on the presumption regarding possession of recently stolen property. (R1078-80,1254) Following deliberations, the jury returned with verdicts of guilty as charged on all four counts. (R1300-1,3829-32)

When it became apparent that the State intended to call Brian Kennedy as a witness at the penalty phase, the trial court allowed defense counsel to depose Kennedy again, but refused to allow certain areas of inquiry. (R3531-3612) Counsel subsequently moved for a continuance based upon a discovery violation regarding prior offenses involving Kennedy. (R1417-34) The trial court denied the motion for continuance and also denied defense counsel an opportunity to present much of the evidence on this issue to the jury. (R1433-34,1530-80,1618-22,1761-71)

Private counsel filed a notice of appearance prior to the commencement of the penalty phase and sought to disqualify the Office of the Public Defender based upon a conflict of interest. (R2630-76,3860-85) The trial court refused to continue the penalty phase and refused to disqualify the public defender.

(R75-76,1410-17)

On August 9, 1991, this cause proceeded to a penalty phase. (R1405-1932) During the testimony of Detective Carter at the penalty phase, the trial court denied Allen's motion for mistrial and requested curative instruction after Detective Carter commented on Allen's pretrial silence. (R1742-50,1859-62) Over Allen's numerous objections, the trial court admitted the confession of Roberson which also implicated Allen. (R1708-21,1733-36) During final summation at the penalty phase, the trial court refused to declare a mistrial despite objectionable argument by the prosecutor. (R1877-93) Following deliberations, the jury returned with a recommendation (7-5) that Jerome Allen be executed. (R1924-25, 3886)

The trial court ultimately allowed private counsel to represent Allen at the sentencing hearing. (R2251-80) The trial court subsequently denied counsel's motion to continue and a sentencing hearing was held October 24-25, 1991. (R1935-58,2283-93,2306,4113-17)

After hearing additional evidence and argument, the trial court sentenced Jerome Allen to die in Florida's electric chair. (R2111) The trial court imposed a departure sentence of life imprisonment for the robbery, ten years incarceration with a five year minimum mandatory for the possession of a short-barreled shotgun, and five years incarceration for the grand theft. (R2130-39,4188-95)

The court denied Allen's motion for new trial on November

19, 1991. (R4214) Allen filed a notice of appeal on November 25, 1991. (R4215) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Guilt Phase

On Monday, December 10, 1990, Stephen DuMont was working his usual daytime shift at the Exxon gas station in Titusville. He had received his paycheck on Friday and, according to his wife, had approximately $273.00 in his wallet at lunchtime on Monday. (R244-48) DuMont came home for dinner that night but had to return to work that evening about 10:00 to help Scott Styles, a new employee working the evening shift. After DuMont returned to work that night, Styles gave a couple of his friends a ride home at approximately 11:15 p.m. DuMont remained alone at the station. (R249-51,258-59) When Styles returned approximately five minutes later, the buzzer on the gas pumps had been activated, indicating an unauthorized purchase. (R260-62) Styles found a wounded DuMont inside the office. Styles summoned the police and medical personnel. (R262-65) A conscious Stephen DuMont told him that two blacks and a white in a white and cream-colored car shot him. (R263-64,280-81)

Detective Anthony Miller of the Titusville Police Department responded to the scene. When Miller arrived, Officer Margaret Vess was already present. Miller questioned a still conscious DuMont, who said that two blacks and a white in a silver car were responsible. (R292-97) Detective Miller noticed that DuMont's wallet was out of his back pocket, but was still attached to his belt with a chain. (R302) Styles later noticed that the cigarette rack which he had stocked earlier that evening was

missing approximately five packs of Marlboro Reds. (R264-67) On the floor of the office near DuMont, Miller found a small piece of round cardboard similar to those used in shotgun shell wadding. (R303)

Paramedics arrived at the station, treated DuMont, and loaded him in an ambulance. DuMont lost consciousness in the parking lot of the gas station. At the hospital, medical personnel were unsuccessful in their attempts to revive DuMont. (R298-301) DuMont bled to death as a result of a single shotgun blast to the left side of his torso. The shotgun was fired at relatively close range. (R382-99,419) The medical examiner could not determine the shotgun gauge, the shotgun's size, or the type of shell. (R421-22)

On Tuesday, December 11, 1990, at 4:30 a.m., Maggie Sanders discovered that her 1983 Buick Regal that she had parked in her carport the night before, was missing. (R75-76,90-93) Police later discovered that the bulb in her porch light had been unscrewed. (R116)

At the December 11, 1990, role call, Brevard County sheriff's deputies were advised to be on the look out for a silver-grayish car, possibly a two-door Pontiac Oldsmobile with black tinted windows and occupied by two black males and one white male. (R432-35) At approximately 6:00 that morning, Deputy Frank Hickman responded to the scene of Maggie Sanders' reported car theft on Mertyle Avenue in Mims. (R433) Around Mims, stolen cars are usually found eventually abandoned in the

nearby orange groves. (R449-50) Deputy Hickman contacted Deputy Bellamy and gave him the description of the stolen Buick. (R449-50) After a thirty-minute search, Deputy Bellamy found Maggie Sanders' car in the north orange groves on Wiley Road. (R440-43,450) After observing the car from a distance for over one hour, the deputies, accompanied by a canine unit, cautiously approached the rear of the car. (R443-45) The car appeared stuck in the soft sand of the orange grove. (R447-48) A white male, later identified as Brian Patrick Kennedy, was lying on the front seat with a coat over his head. (R446-47,454-55) The car's odometer revealed that it had been driven approximately one hundred miles after being stolen. (R104) The damaged steering column indicated that it had been hot-wired. (R102-3)

Two sets of footprints appeared to originate from the passenger side of the car before heading off in a northeasterly direction through the orange groves. (R500-1) The canine unit tracked one set of the footprints to a house at 2765 Hickory Circle (Eugene Roberson's abode). (R500-2,864-65,883) Police found a latent fingerprint on Maggie Sanders' porch light bulb that matched the right hand index finger of Roberson. (R626-29) A latent print lifted from the passenger door handle of Sanders' car also matched Roberson's fingerprint. (R629) The sheriff's canine indicated that Brian Kennedy had been at the gasoline pumps at the Exxon station and in the office. (R502-6) A latent print lifted from the interior rearview mirror of Sanders' stolen car matched the right palm print of Jerome Allen. (R645-47)

On December 11, 1990, Detective Ralph Warren of the Titusville Police Department advised Jerome Allen of his constitutional rights and began questioning him. Allen told Warren that he knew nothing about the robbery or shooting, and that he had been home by 10:00 the night before. (R866-74) Earlier that evening, he was in the company of his brother Jimmy, another boy named Dee (Eugene Roberson), and a white boy whose name he could not remember. (R874) The group had been at a pool hall in Titusville as well as the Palms Apartments that evening. After Allen's brother, Jimmy, left, the remaining trio returned to Jerome's house in Mims. Jerome continued to insist that he knew nothing about the shooting, and also denied pulling the trigger. (R875) At one point, Jerome asked Detective Warren what would happen to an individual present at a robbery who did not pull the trigger. (R875-78)

After questioning, the police placed Jerome Allen and Eugene Roberson in two separate holding cells located next to each other. A video camera aimed at the holding cells enabled the dispatchers to observe the prisoners. (R884-85) A hidden microphone between the cinder block dividing the two cells allowed police to hear and record any activity in the holding cells. (R886)

Roberson and Allen discussed their interrogations and compared notes. Roberson indicated that he had, "Told 'em everything." (R894) The police had convinced Roberson that Kennedy had "snitched" on the other two. Allen and Roberson

discussed pinning the murder on Kennedy. They also wondered how long they would be locked up, whether they would have to go to court, and their likely sentence. Allen expressed dismay when Roberson revealed he had already admitted to police that he pulled the trigger. Allen quizzed Roberson about what the police asked regarding Allen's participation. When Roberson revealed that he told police that Allen stole the car, Allen told Roberson that he "messed it all up." (R904) Allen advised Roberson to claim that the police forced him to confess. Allen told Roberson that he implicated Kennedy, so they would not get in trouble. Allen and Roberson attempted to "get their stories straight." (R893-910)

A search of Allen's home uncovered a partially filled box of shotgun shells, other ammunition, and a sawed off shotgun. (R513-36,581-91) State experts could not say with any certainty that DuMont had been killed with that particular shotgun. The expert was reasonably certain that DuMont was killed with Winchester ammunition fired from a .16 gauge shotgun. (R1704)

Police recovered one fifty-dollar bill each from Roberson and Kennedy at the time of their arrest. They seized three twenty dollar bills from Allen at the time he was booked following his arrest. (R927-33) Allen presented the testimony of three witnesses during his case-in-chief. (R1011-56) Margaret Vess admitted that in the second incident report that she filled out on the night of the shooting, she wrote that DuMont told her that his assailants were two whites and a black.

Vess insisted that she made an error in the report. (R1011-24)

Shirley Allen, Jerome's mother, and Jimmy Allen, Jr., Jerome's brother, explained how Jerome ended up with sixty dollars in his pocket on the day of his arrest. Shirley gave money for a car payment to Jimmy who, in turn, gave some of the money to Jerome. (R1024-47)

Penalty phase

Brian Patrick Kennedy, Jerome Allen's codefendant, was the State's star witness at the penalty phase. Kennedy was scheduled to be tried in ten days for his part in the crime. In exchange for his testimony against Jerome Allen, the State agreed to drop Kennedy's other pending criminal charges. These included grand theft auto and burglary. The State also agreed to refrain from calling Jerome Allen or Eugene Roberson as witnesses against Kennedy at his trial. Most importantly, the State agreed to forgo their quest to execute Brian Kennedy. (R1454-57)

Kennedy ran away from his Merritt Island home in early December, 1990. On December 10, Kennedy went to Mims looking for his friend, Jerome Allen. (R1457-59) After hooking up with Allen, Kennedy met Eugene Roberson and Jerome's mother. Mrs. Allen drove the trio to Titusville, but they eventually returned to Mims. (R460-62) At Allen's home, Jerome pulled a shotgun from underneath his couch. He showed it to Kennedy and Roberson. They discussed different ways to make money in Titusville, including a plan to sell drugs. (R1461-74) Talk eventually turned to robbing someone. The gun would be used to scare anyone

working at the business establishment that they chose to rob. Jerome Allen suggested that they use the butt of the shotgun to hit the victim in the head. (R1474-77) No mention was made of shooting anyone.

After loading the shotgun with two shells, Roberson hid the weapon in one of several pairs of baggy pants that he wore. (R1477-80) Jimmy Allen drove the other three boys to Titusville in his Nissan pickup truck. The trio returned to Jerome's house in Mims approximately one hour later. (R1478-80) After staying there for an hour, they decided to return to Titusville. They conspired to steal a car and began walking down the street. Roberson still had the shotgun concealed in his pants. (R1480-82) Kennedy handed Allen a screwdriver and they eventually located a car with a tilt steering wheel. (R1481-90) Kennedy pulled the car window open and they unlocked the door. Jerome Allen then used the screwdriver to hot-wire the car. (R1489-90) Armed with the shotgun, Roberson stood lookout.

They all piled into the car and Jerome Allen drove to Titusville to a gas station just off Interstate 95 and Garden Street. (R1490-92) Finding only one person working at the station, the boys pulled up to the gas pumps, and Jerome Allen got out to pump gas. (R1492-98) Kennedy remained in the front passenger seat, while Roberson sat in the backseat with the shotgun. (R1499) Kennedy eventually got out of the car and stood next to Jerome behind the car. When the attendant yelled that they had to prepay, Allen held up a five-dollar bill and

requested that amount of gas. The attendant came out of the office and began walking toward the car. Allen pounded on the trunk of the car, exhorting Roberson to "Go!" (R1500-1) Roberson got out of the car, pointed the shotgun, and ordered the attendant to hand over the money. Kennedy went into the office to get the cash and, in the process, grabbed several packs of cigarettes from the rack. Roberson was backing up the attendant at gunpoint into the office. (R1502-4) Roberson continued to yell at the attendant to hand over the money. DuMont repeatedly claimed he had nothing. While Roberson held DuMont at gunpoint and Kennedy rifled the office, Jerome Allen remained outside. (R1504-5) Kennedy snatched DuMont's wallet and grabbed the cash before running out of the office. (R1505-7) With the money and cigarettes in hand, Kennedy returned to the car.

At that point, Kennedy claimed that he heard Allen yelling at Roberson. Kennedy turned to see Allen pushing Roberson and urging him to shoot DuMont, saying he could identify the boys. (R1507-9) Kennedy continued in the direction of the getaway car, until he could no longer see what Roberson and Allen were doing. (R1510) As he opened the car door, he heard a shotgun blast. Allen and Roberson, with shotgun still in hand, ran back to the car and the trio drove away. (R1510-12) The trio later divided the money. Kennedy complained at trial that Allen kept $60.00 for himself while giving Roberson and Kennedy only $50.00 each. (R1521-22)

Sentencing Hearing

After finally allowing private counsel to represent Allen, the trial court heard additional evidence and mitigation to which the jury was not privy. Sue Ann Allen and Dr. Bruce Frumpkin testified at the sentencing hearing on October 24, 1991. Sue Ann Allen, Jerome's older sister, is incarcerated in Lowell Correctional Institute for women. Sue Ann admitted that she was a drug addict before she was sent to prison. In a futile attempt to aid his sister, Jerome used to fight people who sold his sister drugs. (R1963-65) On one occasion, Jerome literally snatched the crack pipe from Sue Ann's hand and threw her drugs away. (R1965-66)

Dr. Bruce Frumpkin was qualified and accepted by the State without objection as an expert in forensic psychology. (R1972-80) Dr. Frumpkin conducted a clinical interview of Jerome and also met with Jerome's mother and brother. Frumpkin reviewed a host of documents. Frumpkin also gave Jerome a battery of psychological tests. (R1980-83)

Jerome, the second youngest of five siblings, had an extremely traumatic, chaotic childhood. At the age of three, Jerome's father frequently left Jerome with his ten-year-old sister. During one of these unsupervised occasions, Jerome splattered hot grease from a frying pan on his face. This incident injured his right eye and resulted in some facial scarring. (R1984) When Jerome was very young, his grandfather killed his grandmother before taking his own life. Since

Jerome's biological father appeared to be alcoholic and extremely abusive, Jerome viewed his grandfather as a father figure. Jerome became very close to his grandfather prior to his untimely death. (R1985)

Jerome's father whipped Mrs. Allen in full view of the children. He constantly beat her and the children with belts and electrical cords. All of the kids were terrified of their father, but Mrs. Allen was unable to protect or comfort her children while Mr. Allen was present. He refused to allow Mrs. Allen to leave the house or to get a job without his prior approval. (R1986)

Examples of Mr. Allen's violent nature abounded. He once ordered Mrs. Allen to place her finger in the opening of a door. He then slammed the door on her finger hard enough to result in a partial loss of the digit. (R1986) When Jerome was approximately seven, Mr. Allen announced that he intended to shoot Mrs. Allen and ordered the children outside. (R1986-87) Once the children were outside, Mr. Allen locked the door and the children heard a gunshot. Although Mrs. Allen was not killed, the incident was very traumatic for the children. (R1987)

On another occasion, Jerome came to the aid of his mother who was being punched in the face by his father. Apparently the beating was more severe than usual, because Jerome feared that his mother was about to be killed. He responded by slashing his father's leg with a kitchen utensil. Mr. Allen later admitted to Jerome that, if he had not "cut" him, he probably would have

killed her. (R1987) Mr. Allen threatened to kill the children on a number of occasions. (R1987)

Jerome's parents separated frequently during Jerome's formative years. Mrs. Allen never divorced her husband because of his threats to kill her, if she pursued such an action. (R1988) Mr. Allen left the household for good shortly after the shooting incident. (R1988)

Not surprisingly, Jerome Allen had emotional and behavioral problems during his early childhood. Due to his short attention span, poor reading level, poor memory, and hyper-activity, school officials referred Jerome for psychological testing at the age of nine. (R1988) Jerome's school records indicated that at the age of thirteen, one teacher described temper tantrums, excessive talking, disruptiveness in class, quickness to anger, and constant complaining. (R1988-89) About that time, Jerome was becoming involved in the criminal justice system. He was arrested for burglary, petit theft, grand theft, and fighting. (R1989) Prior to the instant crime, none of Jerome's offenses involved serious injury. (R1989)

Jerome was "held back" in the first and the fourth grades. (R1990) Dr. Frumpkin expressed surprise that Jerome was never placed in any special school programs. Jerome never received any psychotherapy, medication, or hospitalization. Although Jerome was a participant in the Eckerd Wilderness Camp for a year, Dr. Frumpkin thought the program inappropriate for Jerome's problems. (R1990)

Between the ages of ten and fifteen, Jerome had major difficulties. Numerous psychological tests showed his verbal IQ scores to be in the lower fifth to seventh percentile. Despite his obviously poor reading skills and his behavior problems, Jerome was never placed in any special education classes for learning disabled children or emotionally handicapped children. (R1989-90)

Jerome Allen viewed Reverend Jones, a family friend, as a father-figure; literally "family." Jerome talked constantly about visiting Reverend Jones, taking care of his home and dog, and being involved in various church activities. Dr. Frumpkin could tell that Jerome was very emotional about his relationship with Reverend Jones. (R1991) In July of 1990, Reverend Jones died. (R1990-91) Jerome responded with depression and excessive alcohol consumption. (R1991-92) Five months after Reverend Jones' death, Jerome was arrested for the murder of Stephen Dumont. (R1992) Dr. Frumpkin concluded that, as a result of the deaths of his grandfather and Reverend Jones, Jerome chose to distance himself from emotionally close relationships. (R2000) Dr. Frumpkin also observed that Jerome became delusional about Reverend Jones. Jerome told his mother that the reverend came to visit him in the jail. Jerome described talking to his dead grandmother and to Reverend Jones. (R2004) Dr. Frumpkin discovered that these symptoms had been present for a couple of years and appeared to be a chronic problem. (R2004) Jerome also believed that someone stole Reverend Jones' body. (R2007)

Jerome has a history of head trauma. In 1988 he fell from an eight-foot cliff and split his head open. (R2004) He received no medical treatment for the accident. Dr. Frumpkin believed that there was a high possibility that Jerome suffered from organic brain or neurological problems. (R2005) Dr. Frumpkin opined that Jerome needed to be thoroughly examined by a neurologist.

Dr. Frumpkin discovered that Jerome's aunt suffered from a psychiatric disorder and, at the time of sentencing, was hospitalized at the state hospital in MacClenney. (R2010-11) Additionally, Jerome's older sister suffered from a seizure disorder and treated with dilantin. (R2011-12)

Dr. Frumpkin testified about Jerome's test scores. Jerome obtained a verbal IQ score of 76 which placed him in the lower fifth percentile range. Dr. Frumpkin testified that ninety-five percent of sixteen-year-olds would score higher than Jerome did. (R1993) Jerome's full scale IQ range of 77 placed him in the borderline range of intellectual functioning (lower seventh percentile). (R1993) One test revealed a substantial lack of judgment and common sense. (R1996) Another test indicated a learning disability. (R1996-7) The tests and additional information led Dr. Frumpkin to conclude that Jerome is very immature psychologically with an extremely low self-concept. Although Jerome attempts to project a tough, uncaring facade, he views himself as a small boy instead of a sixteen-year-old adolescent. (R1997-98) Jerome attempted to minimize his

problems to a great degree. (R1988) His history indicated that he had auditory hallucinations and fainting spells, yet Jerome denied both of these symptoms to Dr. Frumpkin. (R1988)

Mrs. Allen described Jerome's "withdrawals" where he appeared to be "in a daze." When his mother spoke to him in this state, he later had no memory of their conversation. (R2003) Mrs. Allen also described his fainting spells which occurred approximately once a month and resulted in lack of consciousness for approximately five minutes at a time. Since she saw no cause for alarm and the family had no money, Mrs. Allen failed to seek medical attention for Jerome. (R2003) Additionally, Jerome suffered from extreme headaches that began appearing at age ten. (R2003)

SUMMARY OF ARGUMENT

POINT I: In Thompson v. Oklahoma, 487 U.S. 815 (1988), the United States Supreme Court addressed the constitutionality of the execution of a fifteen- year-old offender. Combining the four-justice plurality opinion with the concurring opinion, the Court's holding was that the Eighth and Fourteenth Amendments to the United States Constitution forbid any such execution under a death penalty statute that contains no express minimum age for death eligibility.

Appellant Allen in this case was fifteen years old at the time of the crime for which he was convicted and sentenced to death. The Florida death penalty statute under which Appellant Allen was sentenced to death contains no express minimum age for death eligibility. Therefore, the Thompson holding forbids the execution of Appellant Allen in this case.

POINT II: Article I, Section 17 of the Florida Constitution expressly prohibits unusual punishments. In Florida, actual execution of fifteen-year-old offenders ended over fifty years ago. Except for Appellant Allen, no fifteen-year-old offenders have even been sentenced to death since 1977. Appellant Allen is the sole resident of Florida's death row in this unique age category. Therefore, Appellant Allen's death sentence for a crime committed at the age of fifteen is so unusual as to be prohibited by the Florida Constitution.

POINT III: Since the State's quest for the death penalty was unlawful (See Points I and II), the trial court erred in

allowing the State to death-qualify the jury. This resulted in a more conviction-prone jury. The judge should have granted Allen's repeated requests to seat two separate juries.

POINT IV: Florida law provides that all jurors must be at least eighteen years of age. This results in a deliberate and systematic exclusion of an identifiable class (juveniles) to which Jerome Allen belongs. The result was an unconstitutional conviction and death sentence.

POINT V: The trial court should have suppressed Allen's statements to police, even those made prior to his invocation of his right to counsel. This contention is based on the totality of the circumstances (deluding Allen as to his true position, his age, his IQ, separation from mother, etc.). The holding cell conversation was surreptitiously taped. The statement was the product of a deliberate strategy by the police where they further ignored Allen's invocation of his constitutional rights, failed to transport him to the juvenile detention center, and secretly taped his conversation.

POINT VI: The trial court improperly granted two of the State's challenges for cause as to Jurors Mintern and Marshall. Although both jurors articulated that the decision would be a momentous one, they both insisted that they could follow the law and their oath.

POINT VII: The trial court allowed the State to introduce several packs of cigarettes seized from Brian Kennedy at the time of his arrest, a shotgun and ammunition seized from Allen's home,

and cash seized from all three defendants at the time of their arrest. The State could not connect any of this evidence specifically to the crimes charged. The evidence was irrelevant and any slight probative value was outweighed by the prejudice.

POINT VIII: Detective Carter identified Allen's voice on a surreptitiously taped conversation. At one point in his testimony, Detective Carter indicates that he has "dealt with [Allen] before." This clearly indicated to the jury that Allen had previous brushes with the law. The timely motion for mistrial should have been granted.

POINT IX: Allen contends that the trial court failed to adequately instruct the jury on the law of the case. The court instructed the jury on recently stolen property over defense objection. There was no basis in the evidence to give this instruction. It amounted to an impermissible comment on the evidence by the trial court. The trial court refused to instruct the jury pursuant to Allen's request regarding the independent act of another and third-degree murder. Both of these instructions went to the heart of Allen's defense and corresponding theory of the case.

POINT X: The day before penalty phase started, the defense discovered exculpatory evidence relating to Brian Kennedy, Allen's codefendant, who was scheduled to testify. The trial court should have continued the penalty phase so that defense counsel would have time to investigate the new evidence. The evidence was clearly relevant at the penalty phase and should

have been admitted. The court should have ordered a new trial as the evidence was also admissible at the guilt phase as "reverse" Williams rule evidence.

POINT XI: The public defender had a conflict in representing Allen. In addition to a relationship with the victim's family, the Office of the Public Defender had previously represented Kennedy, the key State witness and Allen's codefendant. Private counsel was available to appear on a volunteer basis. The trial court should have continued the case and allowed counsel of choice to represent Allen. Allen's prior waiver of the conflict was invalid due to his young age.

POINT XII: At the penalty phase, the State introduced codefendant Roberson's confession which also implicated Allen. Roberson never testified at trial. This clearly violated Allen's right to confront witnesses.

POINT XIII: At the penalty phase, Detective Carter testified that, "Mr. Allen did not want to talk ... ." This was a direct comment on Allen's invocation of his right to remain silent. The mistrial should have been granted. At the very least, the requested curative instruction should have been given.

POINT XIV: During final summation at the penalty phase, the prosecutor argued Allen's lack of remorse, misstated the law as to mitigating evidence, commented on the character of the victim, and raised the specter of Allen's release from prison. Individually or at least cumulatively, the improper argument tainted the jury's recommendation. The numerous motions for

mistrial should have been granted or, in the alternative, curative instructions given.

POINT XV: Reversible error occurred when the trial court refused to instruct the jury at the penalty phase on a clearly applicable statutory mitigating circumstance, i.e., Section 921.141(6)(d) [defendant's minor participation as a mere accomplice]. Allen waited outside the gas station while Roberson held the gun and Kennedy robbed the victim. Roberson was the actual triggerman who committed the murder. This statutory mitigating circumstance was certainly arguably present. The issue should not have been removed from the jury's consideration.

POINT XVI: The State failed to establish beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner. There was no plan or discussion to kill the victim. The only plan involved a robbery. The discussion prior to the commission of the crime included talk of using the gun to "scare" the victim and to perhaps hit the victim with the butt of the shotgun. The killing during the course of the robbery was a spontaneous act that was not "calculated" prior to the robbery.

POINT XVII: Allen contends that the death sentence is disproportionate to his crime and his background. This contention is based on his deprived upbringing, his low IQ, his tender age, the trial court's faulty weighing of the mitigating evidence, the lack of substantial aggravation, nature of the crime, and the disparate treatment of the codefendants.

POINT XVIII: Allen makes numerous attacks on the constitutionality of Florida's death penalty statute.

ARGUMENT

Jerome Allen discusses below the reasons which, he respectfully submits, compel the reversal of his conviction and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I of the Florida Constitution, and such other authority as is set forth. Appellant believes that Points I and II are dispositive of any issue relating to the imposition of the death sentence. As such, if this Court holds that the federal or state constitutions prohibit the imposition of the death penalty on a fifteen-year-old, this Court need not consider Points XI through XVIII as they will be moot. Counsel points this out in an attempt to be helpful and to conserve the time and energy of this Court.

POINT I

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FORBID THE EXECUTION OF ANY OFFENDER, INCLUDING APPELLANT ALLEN, WHO WAS AGE FIFTEEN AT THE TIME OF THE CRIME.

The Eighth Amendment to the United States Constitution expressly forbids the infliction of "cruel and unusual punishments" on United States citizens. This provision is made applicable to the States via an express provision of the Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law." See, e.g., Robinson v. California, 370 U.S. 660 (1962). Several United States Supreme Court decisions have addressed the applicability of these fundamental Constitutional provisions to the execution by any state of an offender whose crime was committed at a very young age. One result of the Supreme Court's lengthy and careful consideration of this issue has been to declare unconstitutional the execution of an offender who was under age sixteen at the time of the crime. Thompson v. Oklahoma, 487 U.S. 815 (1988). No subsequent holding by the United States Supreme Court or by any other appellate court has cast doubt on the continuing viability of the Court's interpretation of the Eighth and Fourteenth Amendments in Thompson.

A. Execution for Crimes Committed Below Age Eighteen Has Always Been Examined Carefully by the United States Supreme Court.

The United States Supreme Court probed and studied this

general issue for several years before facing it squarely. In 1981 the Court considered a certiorari petition putting forward the specific issue of the constitutionality of capital punishment for an offense committed when the defendant was only sixteen years old. Eddings v. Oklahoma, 450 U.S. 1040 (1981) [granting certiorari in Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), reversed on other grounds, 455 U.S. 104 (1982)]. When deciding Eddings in 1982, however, the Court didn't get to the direct constitutional issue, observing only that "the chronological age of a minor is itself a relevant mitigating factor of great weight." Eddings v. State, 455 U.S. at 116. A four-Justice dissent written by Chief Justice Burger would have reached the ultimate constitutional issue and would have rejected any constitutional bar to the execution of sixteen-year-old offenders. Eddings v. State, 455 U.S. at 128. (Burger, C.J., dissenting).

After Eddings in 1982, the Court continued to be tempted by the issue but for several years didn't grant certiorari on the question. Burger v. Kemp, 483 U.S. 776 (1987), decided five years later, was a case in which the offender was only seventeen years old at the time of his crime but which did not directly raise the age issue. In his dissent, Justice Powell nonetheless questioned the constitutionality of the death penalty for seventeen-year-old offenders and lamented the majority's unwillingness to wait for a decision squarely on this issue. Burger v. Kemp, 483 U.S. at 822 n.4, 823 n.5, (Powell, J.,

dissenting).

Even as Burger was being decided, the Court had already granted certiorari in the case of a fifteen-year-old offender. Thompson v. Oklahoma, 479 U.S. 1084 (1987) [granting certiorari in Thompson v. State, 724 P.2d 780 (Okla. Crim. App. 1986), vacated and remanded, Thompson v. Oklahoma, 487 U.S. 815 (1988)]. None of the pre-Thompson cases had involved an offender under age sixteen but nonetheless had sharply divided the Supreme Court as to the constitutionality of executing even an offender age sixteen or seventeen at the time of the offense.

B. The United States Supreme Court held in Thompson v. Oklahoma that the Eighth and Fourteenth Amendments Prohibit the Execution Under Current Statutes of Offenders Age Fifteen and Younger At Time of the Crime.

In Thompson the issue was couched as "whether the execution of [a death] sentence would violate the constitutional prohibition against the infliction of 'cruel and unusual punishments' because petitioner was only 15 years old at the time of his offense." Thompson v. Oklahoma, 487 U.S. at 818-19, (Stevens, J., plurality opinion). Thompson held that such an execution would be unconstitutional. Thompson v. Oklahoma, 487 U.S. at 818, (Stevens, J., plurality opinion). The Thompson ruling resulted from a four-Justice plurality to which Justice O'Connor added the fifth vote on more narrow grounds. Thompson had three dissenters, with Justice Kennedy not voting since his appointment had not been confirmed until after oral argument had been conducted in Thompson.

Justice Stevens' Thompson plurality opinion began with the

benchmark consideration of the "evolving standards of decency that mark the progress of a maturing society." Thompson v. Oklahoma, 487 U.S. at 821, (Stevens, J., plurality opinion) [quoting Trop v. Dulles, 356 U.S. 86, 101 (1958), (Warren, C.J., plurality opinion)]. According to the Thompson plurality, determining such standards required consideration of (1) current legislation on the acceptance or rejectance of the death penalty for offenders younger than certain age limits, (2) jury willingness to impose death sentences on juveniles even where authorized, and (3) views of informed organizations and other nations on the acceptability of the juvenile death penalty. Thompson v. Oklahoma, 487 U.S. at 821-22, (Stevens, J., plurality opinion).

The Thompson plurality noted that every state which had enacted a minimum age in its death penalty statute had chosen an age of at least sixteen. Thompson v. Oklahoma, 487 U.S. at 829, (Stevens, J., plurality opinion). The Thompson plurality included consideration of the many distinctions in other, non-death penalty statutes pertaining to children, either denying them basic adult rights and privileges or granting them special children's rights and privileges. Thompson v. Oklahoma, 487 U.S. at 823-25, (Stevens, J., plurality opinion).

This opinion also considered the frequency of death sentences for and actual executions of juvenile offenders. The Thompson plurality interpreted the extreme rarity of such sentences as evidence that they must be considered generally

abhorrent by juries. Thompson v. Oklahoma, 487 U.S. at 832, (Stevens, J., plurality opinion). Finally, the plurality's conclusions were based in part on the rejection of the juvenile death penalty by almost all foreign nations and by many significant organizations, such as the American Law Institute and the American Bar Association. Thompson v. Oklahoma, 487 U.S. at 830, (Stevens, J., plurality opinion).

The Thompson plurality reaffirmed that the Court is the ultimate arbiter of the limits of cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Thompson v. Oklahoma, 487 U.S. at 833, (Stevens, J., plurality opinion). The opinion measured the unique culpability of juveniles and the contribution of the juvenile death penalty to the acceptable social purposes of that penalty. Thompson v. Oklahoma, 487 U.S. at 833, (Stevens, J., plurality opinion). The Thompson plurality concluded that juveniles generally have less culpability for their misdeeds and have a significant capacity for growth. Thompson v. Oklahoma, 487 U.S. at 833-37, (Stevens, J., plurality opinion). These unique characteristics, when blended with society's fiduciary obligations to its children, led the plurality to conclude that retribution "is simply inapplicable to the execution of a 15-year-old offender." Thompson v. Oklahoma, 487 U.S. at 837, (Stevens, J., plurality opinion). The other major criminological purpose of the death penalty -- general deterrence of other similarly-minded, homicidal juveniles -- was also discounted by the plurality as

inconsistent with what is known about the manner in which adolescents contemplate and evaluate the consequences of their behavior. Thompson v. Oklahoma, 487 U.S. at 837-38, (Stevens, J., plurality opinion).

Since William Wayne Thompson was only fifteen years old at the time of his crime, the Court had no compelling need to address the argument in Petitioner's brief that age eighteen was the most logical point at which to draw the line. Whatever might be the zenith of this constitutional age limitation, the Thompson plurality held that the bottom line of Constitutional prohibition was certainly no lower than age sixteen. Thompson v. Oklahoma, 487 U.S. at 838, (Stevens, J., plurality opinion).

The crucial fifth vote to reverse Petitioner Thompson's death penalty was added to the Thompson plurality's four votes by Justice O'Connor's solitary concurring opinion. Thompson v. Oklahoma, 487 U.S. at 848, (O'Connor, J., concurring). In her Thompson concurrence, Justice O'Connor began with a survey of death penalty statutes and found that all express statutory minimum ages were age sixteen or above. Thompson v. Oklahoma, 487 U.S. at 849, (O'Connor, J., concurring). While she went on to consider sentencing and execution statistics as well as treaties and other information, in the end Justice O'Connor returned to the legislative issue and found that states such as Oklahoma apparently had not given the minimum death penalty age issue the careful consideration it must receive. Thompson v. Oklahoma, 487 U.S. at 857, (O'Connor, J., concurring). Until

state legislatures do, she would neither allow such states to execute offenders under age sixteen at the time of their crimes nor reach the broader question of the constitutionality of the juvenile death penalty. Thompson v. Oklahoma, 487 U.S. at 857-58, (O'Connor, J., concurring).

Because Justice O'Connor's concurrence is so pivotal in Thompson, her express language must be considered carefully:

"The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma Legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is

of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution. Thompson v. Oklahoma, 487 U.S. at 857-58, (O'Connor, J., concurring)" (footnote omitted).

Justice O'Connor made clear her view that the death penalty for fifteen-year-old offenders is at best "of very dubious constitutionality" (in the above quote), having already observed at the beginning of her opinion that "I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist ...." Thompson v. Oklahoma, 487 U.S. at 848-49, (O'Connor, J., concurring). Given such "very dubious constitutionality," Justice O'Connor required the "earmarks of careful consideration" by legislatures as manifested by an "explicit choice of some minimum age for death eligibility" before she saw the Court's unavoidable need to decide the constitutional issue. Until such "careful consideration" occurs, no execution of an offender for a crime committed below age 16 will be permitted. Justice O'Connor will go further to face the broader Eighth Amendment issue decided by the Thompson plurality only after "the ultimate moral

issue at stake in the constitutional question [is] addressed in the first instance by those suited to do so, the people's elected representatives." Thompson v. Oklahoma, 487 U.S. at 858-59, (O'Connor, J., concurring).

Justice O'Connor's resolution of the Thompson case, while labeling the death penalty for 15-year-olds as being of "very dubious constitutionality," does leave the door slightly ajar for legislatures. In order to force Justice O'Connor to decide the issue, legislatures would have to amend their death penalty statutes and enact an "explicit choice" of a minimum age under sixteen for death eligibility, say age fifteen. This is also Justice Scalia's reading of Justice O'Connor's concurrence. Thompson v. Oklahoma, 487 U.S. at 876-77, (Scalia, J., dissenting).

Following such required legislative action, if a trial court were to sentence a fifteen-year-old capital defendant to death under the new statutory provision, and such a case were to find its way to the United States Supreme Court, then and only then would Justice O'Connor see the need to decide if this practice, already adjudged "of very dubious constitutionality," is in fact in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Until and unless such a case were to come before the Court, no offenders under age sixteen may be executed "under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." Thompson v.

Oklahoma, 487 U.S. at 857-58, (O'Connor, J., concurring).

C. Appellant Allen's Death Sentence Falls Well Within the Provisions of Thompson.

William Wayne Thompson, the Petitioner in Thompson v. Oklahoma, was age fifteen years, ten months, and nineteen days on the day he committed the crime for which he was convicted and sentenced to death. Petitioner Thompson was found to be too young at the time of his crime to be eligible for the death penalty under the Oklahoma statute. Jerome Allen, the Appellant in this case, was born on April 19, 1975, and was convicted of having committed a capital crime on December 10, 1990, at which time he was age fifteen years, seven months, and twenty-one days. Thus, Appellant Allen was approximately three months younger than Petitioner Thompson, measured at the times of their respective crimes. If Petitioner Thompson was too young at the time of his crime be death eligible, then Appellant Allen was, a fortiori, too young at the time of his crime to be death eligible.

A basic premise of Justice O'Connor's pivotal concurrence in Thompson was her conclusion that "there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense." Thompson v. Oklahoma, 487 U.S. at 852, (O'Connor, J., concurring). In Petitioner Thompson's case, his status as a "child" under Oklahoma law was challenged by the District Attorney and Thompson was subsequently certified to stand trial as an adult. Thompson v. Oklahoma, 487 U.S. at 819-209,

(Stevens, J., plurality opinion). The Oklahoma Court of Criminal Appeals affirmed Thompson's subsequent "adult" conviction and death sentence in sweeping language: "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." Thompson v. State, 724 P.2d 780, 784 (1986). Included in this array of adult punishments was the death penalty, but Oklahoma's death penalty statute was one of nineteen that had no minimum age expressly stated in the statute. Thompson v. Oklahoma, 487 U.S. at 826-28 n.26, (Stevens, J., plurality opinion). The other eighteen death penalty states did have minimum ages expressly stated in their death penalty statutes, all with a minimum age of at least age sixteen. Thompson v. Oklahoma, 487 U.S. at 829-30 n.30, (Stevens, J., plurality opinion).

According to Justice O'Connor's concurrence, the fatal flaw in Oklahoma's death penalty statute was its reflection of an implicit decision to render fifteen-year-olds death eligible rather than to have manifested evidence of the careful consideration such a decision requires by including an "explicit choice of some minimum age for death eligibility." Thompson v. Oklahoma, 487 U.S. at 857, (O'Connor, J., concurring). Included among the nineteen death penalty statutes with such a flawed implied reliance was the Florida death penalty statute. Thompson v. Oklahoma, 487 U.S. at 826-28 n.26, (Stevens, J., plurality opinion). The Florida death penalty statute and the Oklahoma death penalty statute, while different in other respects, share

this same unconstitutional characteristic. Therefore, if the execution of fifteen-year-old offenders is constitutionally impermissible in Oklahoma, it is equally impermissible in Florida.

D. Post-Thompson Execution of Fifteen-Year-Old Offenders in Other Jurisdictions Without Express Minimum Ages for Death Eligibility Similarly Has Been Held Unconstitutional.

Thompson affects all nineteen states without an express minimum age standard in the same manner. The Thompson decision directly held that Oklahoma could not constitutionally execute fifteen-year-old offenders. Justice Stevens' four-Justice plurality opinion extended this ruling to any offender under age sixteen regardless of the statute. Thompson v. Oklahoma, 487 U.S. at 838, (Stevens, J., plurality opinion). Justice O'Connor's concurrence limited the ruling to offenders under age sixteen in the nineteen states where the death penalty statute specifies no minimum age. Thompson v. Oklahoma, 487 U.S. at 857-58, (O'Connor, J., concurring). Note, however, that no death penalty statute, either now or in 1988 when Thompson was decided, has an express minimum age for death eligibility that is less than age sixteen. Thompson v. Oklahoma, 487 U.S. at 829-30 n.30, (Stevens, J., plurality opinion). Justice O'Connor removed any doubt about the sweep of her opinion when she addressed her holding to "petitioner and others who were below the age of 16 at the time of their offense." Thompson v. Oklahoma, 487 U.S. at 857, (O'Connor, J., concurring).

The clarity of this ruling has not been lost on other courts

attempting to resolve similar cases. In State v. Stone, 535 So.2d 362 (La. 1988), decided only four months after Thompson, the Supreme Court of Louisiana considered the death eligibility of an offender who was fifteen years old at the time of his crime. In Stone, the state had convinced the trial court to reinstate the capital sentencing hearing of the defendant's murder trial after the defendant refused to testify against a co-perpetrator as he had agreed to do. The unanimous decision of the Supreme Court of Louisiana was that Thompson forbids such a death sentence:

> In the present case, it is undisputed that the defendant was fifteen years old at the time he committed the offense. The statutory scheme in Louisiana for allowing a minor under the age of sixteen to be tried as an adult is similar to that employed in Oklahoma at the time of the Thompson case. There is no evidence that the Louisiana legislature made the type of conscious, deliberate decision to impose the death penalty on those under the age of sixteen that Justice O'Connor found to be constitutionally mandated. Under both the plurality opinion and the concurrence of Justice O'Connor, the execution of Paul Stone would be unconstitutional. State v. Stone, 535 So.2d at 365 (footnote omitted).

In Stone several members of the court revealed personal dissatisfaction with the Thompson ruling but apparently agreed that the locus of action for the essential first step in challenging Thompson was in the state legislature. In this vein

an explicit call-to-action to the legislature was provided in the opinion of Justice Cole:

> In light of the rule adopted by the rather weak plurality in Thompson, the State of Louisiana is called upon to decide expressly whether or not it wishes to permit the execution of a person under the age of sixteen years. Only when a state legislature has done so can the issue be put squarely to the United States Supreme Court for resolution.

State v. Stone, 535 So.2d at 365 (Cole, J., concurring). Since no such action had taken place in the Louisiana legislature, no member of the Louisiana Supreme Court thought that Louisiana could distinguish Thompson and proceed toward executing a fifteen-year-old offender.

The Thompson issue arose again a few months later in Cooper v. State, 540 N.E.2d 1216 (Ind. 1989). Appellant Paula Cooper was age fifteen at the time of her capital crime, in fact two months younger than was William Wayne Thompson at the time of his crime but one month older than was Appellant Jerome Allen at the time of the crime in this case. While, as was the case in Stone, the Indiana Supreme Court in Cooper was less than enthusiastic about being required to adhere to Thompson, nonetheless the court unanimously agreed that it must:

> We acknowledge that as a plurality decision the Thompson opinion does not carry the precedential weight that a full majority would. Nonetheless, it is clear that four of the United States Supreme Court justices agree that it is cruel and unusual punishment to execute a juvenile convicted of a murder

> committed before the age of 16, and one justice believes it is unconstitutional to execute a juvenile unless the death penalty statute itself identifies a minimum age for the death penalty.
>
> * * * *
>
> The Indiana death penalty statute under which Cooper was sentenced did not itself contain a minimum age. Such a statute, Justice O'Connor said, violates the eighth amendment. We are persuaded that Indiana's statute fits under Thompson v. Oklahoma and violates the Eighth amendment of the United States Constitution.

Cooper v. State, 540 N.E.2d at 1221.

The most recent unanimous state appellate court ruling on the Thompson issue is completely consistent with Stone and Cooper. In Flowers v. State, 586 So.2d 978 (Ala. Ct. Crim. Ap. 1991), Appellant Flowers had been sentenced to death for a capital crime committed when he was age fifteen. Echoing the reasonings and holdings of the unanimous state supreme court rulings in Stone and Cooper, a unanimous Alabama Court of Criminal Appeals held:

> The facts of Thompson are indistinguishable from those before us. The appellant, like Thompson, was 15 at the time he committed the capital offense. Alabama's death statute provides no minimum age below which the death penalty cannot be imposed upon a person. Further, Alabama's statutory scheme, which allows a child over the age of 14 to be tried as an adult, is similar to the one that was in effect in Oklahoma at the time Thompson was decided. Thus, we must vacate the appellant's sentence of death.

Flowers v. State, 586 So.2d at 989.

While the Thompson issue has not been faced squarely by an appellate court in Florida, a Florida Circuit Court has very recently ruled on this issue. In State v. Cookston, Case No. 92-279-CF-A-W, Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida, Circuit Judge Thomas D. Sawaya issued an Order Precluding the Death Penalty on May 26, 1992.[6] The defendant, Timothy Brian Cookston, had been age fifteen at the time of his crime, in fact only one week younger than had been William Wayne Thompson in Thompson but nearly three months older than had been Appellant Jerome Allen in this case. Circuit Judge Sawaya found Thompson to be controlling:

> Florida, like Oklahoma, has not enacted a statute which specifically sets a minimum age under which the death penalty may not be imposed. Therefore, a sentence of death for Mr. Cookston would not only be unconstitutional under the standards applied in the plurality decision in Thompson, it would meet the same fate under the standard adopted by Justice O'Connor.

State v. Cookston, slip op. at 6. Focussing specifically upon the Florida statutory scheme, Circuit Judge Sawaya concluded that:

> The statutory waiver provisions found in Chapter 39 of the Florida Statutes may not be used to validate an unconstitutional sentence of death when it is clear that the legislature never specifically addressed the issue of capital punishment on children under the age of 16 in this or any other statutory

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[6] This Court denied the State's Petition for Writ of Prohibition/Extraordinary Writ on November 5, 1992. State v. Thomas D. Sawaya, Judge, et al, Case No. 80,023.

scheme.

State v. Cookston, slip op. at 13. Circuit Judge Sawaya also noted that LeCroy v. State, 533 So.2d 750 (Fla. 1988) (discussed in more detail below), "does not offer anything of precedential value to death sentences imposed on children under 16. State v. Cookston, slip. op. at 11.

In summary, three different state appellate courts and one Florida Circuit Court have issued written opinions concerning the post-Thompson constitutionality of executing the fifteen-year-old offenders before them. All have unanimously concluded that fifteen-year-old offenders are not death eligible under death penalty statutes which contain no express minimum age provisions.

E. Circuit Judge Martin Budnick's Death Sentence for Appellant Allen Incorrectly Relied Upon Florida Statute 39.02(5)(c) and LeCroy v. State in Ignoring the Impact of Thompson v. Oklahoma.

Both in his Order denying Defendant's Motion to Strike Death Penalty Proceedings and in his final Judgment and Sentence, Circuit Judge Budnick relied upon Florida Statute 39.02(5)(c) as interpreted by LeCroy v. State, 533 So.2d 750, 757 (Fla. 1988), to conclude that the death sentence for a fifteen-year-old offender was authorized under Florida law. This conclusion misinterpreted the premises of the decision in LeCroy and ignored the overriding constitutional impact of Thompson.

LeCroy, decided four months after Thompson, involved a capital defendant who was age seventeen years and ten months at the time of the crime for which he was sentenced to death (two

years older than Thompson had been). LeCroy v. State, 533 So.2d at 757. This Court in LeCroy repeatedly made the point of restricting the issue presented and its resulting holding to the death eligibility of seventeen-year-old offenders. LeCroy v. State, 533 So.2d at 756-58. LeCroy expressly distinguished Thompson based on the age of the respective offenders. LeCroy v. State, 533 So.2d at 757, 758.

The Florida statutory scheme, matching closely the Oklahoma statutory scheme found inadequate in Thompson, nonetheless was found adequate in LeCroy for seventeen-year-old offenders. LeCroy v. State, 533 So.2d at 757-58. However, this Court in LeCroy expressly distinguished younger offenders from those age seventeen:

> Whatever merit there may be in the argument that the legislature has not consciously considered and decided that persons sixteen years of age and younger may be subject to the death penalty, and that issue is not presented here, it cannot be seriously argued that the legislature has not consciously decided that persons seventeen years of age may be punished as adults.

LeCroy v. State, 533 So.2d at 757. Appellant Allen was not just sixteen or younger at the time of his offense, he was, at age fifteen, two years younger than LeCroy, a pivotal fact for this Court both in LeCroy and in the case at bar.

This Court in LeCroy accurately foresaw the United States Supreme Court's ruling in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), still nearly a year away when LeCroy was decided. In Stanford, a four-justice plurality, again

with Justice O'Connor providing the crucial fifth vote through her concurrence, held that the Eighth and Fourteenth Amendments to the United States Constitution do not forbid the death penalty for offenders age sixteen or seventeen at the time of their crimes. Stanford v. Kentucky, 492 U.S. at 380 (Scalia, J., plurality opinion), 381 (O'Connor, J., concur-ring), (1989).

In concurring in most of the parts and in the judgment of the plurality opinion, Justice O'Connor opted for a different standard for offenders age sixteen or seventeen than for those under age sixteen "because it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16 or 17-year-old capital murderers." Stanford v. Kentucky, 492 U.S. at 381 (1989), (O'Connor, J., concurring). Justice O'Connor noted specifically that three states had specifically set the minimum age at sixteen for death eligibility in their death penalty statutes and that "a fourth, Florida, clearly contemplates the imposition of capital punishment on 16-year-olds in its juvenile transfer statute, see Fla. Stat. sec. 39.02(5)(c) (1987)." Stanford v. Kentucky, 492 U.S. at 381 (1989), (O'Connor, J., concurring).

Justice O'Connor nonetheless made it clear that she was not backing away from her position in Thompson. Stanford v. Kentucky, 492 U.S. at 380-81 (1989), (O'Connor, J., concurring). That Stanford did not overrule Thompson is also the unanimous understanding of the Alabama Court of Criminal Appeals. Flowers v. State, 586 So.2d at 989-90. Flowers also noted the

similarities of LeCroy to Stanford and the characteristics which distinguish LeCroy from Thompson.

F. For The Above Reasons, This Court Should Hold That the Eighth and Fourteenth Amendments to the United States Constitution, as Interpreted in Thompson v. Oklahoma, Prohibit the Death Penalty for Appellant Allen in this Case.

This Court should now decide the issue it expressly excluded from its holding in LeCroy (533 So.2d at 757). The LeCroy ruling of constitutionality for the death eligibility of sixteen and seventeen-year-olds need not be disturbed, and indeed has since been substantially bolstered by the decision in Stanford. Now this Court must craft a ruling to be in compliance with Thompson.

The requirements of Thompson are clear. Before capital defendants who commit their crimes while under age sixteen can be death eligible, the state death penalty statute must expressly include a minimum age for death eligibility. Appellant Allen, the capital defendant in the case at bar, was under age sixteen when he committed the crime in question, and the Florida death penalty statute does not include any express minimum age for death eligibility. Therefore, Appellant Allen respectfully asks this Court to conclude that Thompson requires this Court to declare that execution of Appellant Allen would be in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

POINT II

THE DEATH PENALTY FOR FIFTEEN-YEAR-OLD OFFENDERS IN FLORIDA IS SO UNUSUAL AS TO BE IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Article I, Section 17 of the Florida Constitution prohibits "cruel or unusual punishment." This Court recently unanimously reconfirmed that the "use of the word 'or' indicates that alternatives were intended." Tillman v. State, 591 So.2d 167, 169 n.2 (1991), citing with approval, Cherry Lake Farms, Inc. v. Love, 129 Fla. 469, 176 So. 486 (1937). It is settled in Florida that a punishment may not be in violation of "the Florida Constitution's express prohibition against unusual punishments." Tillman v. State, 591 So.2d at 169. The death penalty for fifteen-year-old offenders is such an unusual punishment and thus is in violation of the Florida Constitution.

A. Actual Execution of Fifteen-Year-Old Offenders in Florida Ended in 1941.

Florida has executed approximately 525 persons in its entire history. Watt Espy, "List of Confirmations, State-by- State, of Legal Executions as of May 20, 1992" (unpublished report from the Capital Punishment Research Project, Headland, Alabama). Of these 525 total executions, only five (1%) have been documented for offenders who were under the age of sixteen at the time of their offense. The five executions representing only three different crimes were as follows:

Date of Execution	Name of Offender	Age at Time of Crime	Race	Crime	Victim
05-06-1910	Hanchett, Irving	14	White	Murder	White female (age 15)
04-27-1927	Ferguson, Fortune	14	Black	Rape	White female (age 8)
12-29-1941	Clay, Willie	15	Black	Murder	White female (age 59)
12-29-1941	Powell, Edward	15	Black	Murder	White female (age 59)
12-29-1941	Walker, Nathaniel	14	Black	Murder	White female (age 59)

[Source of information: VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 193 (Indiana University Press, 1987)]

Following the 1941 executions of Willie Clay, Edward Powell, and Nathaniel Walker, Florida executed an additional 114 persons during the pre-Furman era, ending with the 1964 execution of Emmett Blake, all of whom were age sixteen or over at the time of their crimes. WILLIAM J. BOWERS, LEGAL HOMICIDE 425-27 (Northeastern University Press, 1984). A total of twenty-eight persons have been executed in Florida in the post-Furman era, the most recent as of this writing being that of Nollie Lee Martin on May 12, 1992, again with none being under age sixteen. NAACP Legal Defense and Educational Fund, Inc., "Death Row, U.S.A." (Spring 1992). This is a total of 142 Florida executions in the past half century, all of offenders being age sixteen or older at the time of their crimes.

Florida's execution record both reflects the national

experience and in many ways establishes Florida as a leader in the death penalty during the past half-century. Florida quietly phased out executions in the mid-1960s but reacted expeditiously when Furman effectively threw out the Florida death penalty statute. Florida led the way in enacting a new, post-Furman death penalty statute and in returning to executions.

However, despite a few death sentences for offenders under age sixteen, Florida never returned to its rare pre-Furman practice of executing them. Regardless of apparently continuing legal authorization under its post-Furman statute prior to the decision in Thompson, Florida in fact had already ended its rare practice of executions for crimes committed while under age sixteen in 1941, half a century before Appellant Allen was sentenced to death in the case at bar.

B. Of the 722 Florida death sentences from January 1, 1973, through May 15, 1992, only three (0.4%) have been for crimes committed while under age sixteen.

Just as actual execution of offenders for crimes committed while under age sixteen has disappeared since the beginning of World War II, even the imposition of a death sentence which is destined to be promptly overruled has faded away for such very youthful offenders in the post-Furman era. Only three such sentences have been imposed since Furman:

Year	Name of Offender	Age at Crime	Race	Ultimate Disposition
1974	Vasil, George	15	White	reversed in 1979; 374 So.2d 465
1977	Ross, Frank	15	Black	reversed in 1980; 384 So.2d 1269
1991	Allen, Jerome	15	Black	presently on appeal

The first two such death sentences occurred during the mid-1970s, a period of great turmoil in death penalty law and practice both nationally and in the State of Florida. Both of these sentences were reversed by this Court within a few years of their imposition.

Following Frank Ross' death sentence on October 23, 1977, Florida trial courts have imposed a total of about 600 death sentences on a wide variety of offenders. None of these offenders have been under age sixteen at the time of their crimes except for Appellant Allen. Just as actual execution of such very youthful offenders ended over fifty years ago, even imposition of a death sentence upon them disappeared about fifteen years ago -- except for Appellant Allen.

Over a decade prior to the United States Supreme Court's decision in Thompson, the State of Florida had already effectively ended the death sentence for crimes committed under the age of sixteen. Reflecting its own local evolving standards of decency, needing neither statutory amendment nor constitutional ruling, the trial judges and juries of the State

of Florida simply evolved beyond the death penalty for crimes committed while under age sixteen. The sole exception to this state-wide practice has been the death sentence for Appellant Allen on October 25, 1991.

C. Of the approximately 315 persons now under sentences of death in Florida, only Appellant Allen was under the age of sixteen at the time of the crime.

Not surprisingly, since the Florida death penalty for crimes committed while under age sixteen ended fifteen years ago except for Appellant Allen, he is the only one of the approximately 315 persons now under Florida sentences of death whose crime was committed while under the age of sixteen. The last death row resident in Appellant Allen's age bracket, Frank Ross (age fifteen at crime), left Florida's death row in 1980. Only Jerome Allen remains as a last vestige of this former Florida practice.

D. Since the Florida death penalty for crimes committed while under the age of sixteen has totally disappeared except in Appellant Allen's case, this Court should hold that such a sentence is so unusual as to be in violation of the Florida Constitution.

The Florida death penalty for crimes committed while under the age of sixteen no longer exists in practice except for Appellant Allen. He has no contemporaries on Florida's death row, and none have been similarly sentenced for fifteen years. Another Florida Circuit Court that recently considered allowing even the possibility of a comparable sentence for another fifteen-year-old offender rejected such a sentence out of hand. State v. Cookston, Case No. 92-279-CF-A-W, Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida.

All of this leads to the conclusion that Appellant Allen's death sentence is so unusual as to be the only one like it. Other contemporary examples in Florida are not just rare or unusual, they are nonexistent. Can there be a clearer case to trigger "the Florida Constitution's express prohibition against unusual punishments?" Tillman v. State, 591 So.2d 167 (1991). Appellant Allen respectfully asks this Court to hold that his sentence is in violation of Article I, Section 17 of the Florida Constitution prohibiting cruel or unusual punishment.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO DEATH-QUALIFY THE JURY AND DENYING ALLEN'S REPEATED REQUESTS TO SEAT SEPARATE JURIES WHERE THE STATE SOUGHT THE ULTIMATE SANCTION IN BAD FAITH.

A key issue at trial and on appeal is the unconstitutional application of the death penalty to a fifteen-year-old. See Points I and II. Prior to trial, Appellant repeatedly objected to the State seeking the death penalty against his fifteen-year-old client. Appellant also objected to the death-qualification of the jury on this basis. Appellant also repeatedly requested that two separate juries be seated, a non-death-qualified jury to determine guilt and a death-qualified jury to determine penalty. (R12-13,21,45-55) The trial court repeatedly rebuffed Appellant's attempts in this vein, and allowed the State to death-qualify the single jury that eventually found Jerome Allen guilty as charged and recommended that the fifteen-year-old be executed.

In Lockhart v. McCree, 476 U.S. 162 (1986), the United States Supreme Court reaffirmed its position that the so-called "death-qualification" of jurors who will sit in a capital case is constitutional. Three justices dissented pointing to "overwhelming evidence that death-qualified juries are substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve." Lockhart v. McCree,

476 U.S. at 184. The majority noted "serious problems" with the studies Mr. McCree presented to the Court but did not base their ruling on any disagreement with the findings. Instead the Court held that, at least in cases where the death penalty is a realistic option, death-qualification would be allowed even if it did produce a "somewhat more conviction-prone" jury. The majority noted but refused to consider McCree's assertion that, "the State often will request the death penalty in particular cases solely for the purpose of 'death-qualifying' the jury ..." Lockhart v. McCree, 476 U.S. at 176, n.16.

The underlying rationale of Lockhart v. McCree appears to be a balancing of competing interests. While death-qualifying a jury may produce a somewhat more conviction-prone jury, it is nevertheless necessary in order for the State to have a fair chance to impose a penalty approved by the state legislature. Allen contends that death-qualification violates the guarantee of an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 16 of the Florida Constitution, when the State has no legitimate interest in death-qualification, since death is not a realistic sentencing option.

Support for this proposition does exist in Florida caselaw. In Reed v. State, 496 So.2d 213 (Fla. 1st DCA 1986), the defendant was charged and convicted of first-degree felony murder. The evidence at trial showed that the killing was actually committed by Reed's codefendant, and there was no

evidence that Reed intended the death to occur. Therefore, the death penalty did not appear to be a realistic possibility under existing caselaw. Enmund v. Florida, 458 U.S. 782 (1982). The district court reversed Reed's conviction on the ground that it was error for the State to death-qualify the jury when the prosecutor could offer no basis for "leaving the death penalty in this case." Reed, 496 So.2d at 214.

In a later case, the First District Court of Appeal held that the time to raise the issue of whether death-qualification was proper was after trial in a motion for new trial.[7] Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990). This holding was based on this Court's decisions in State v. Bloom, 497 So.2d 2 (Fla. 1986), and State v. Donner, 500 So.2d 532 (Fla. 1987), holding that a circuit judge lacked the authority to decide prior to trial whether the death penalty would be imposed. Based on these cases, the First District Court reasoned: "The judge, therefore, cannot prior to trial determine whether the prosecutor is pursuing the death penalty in good faith." The court went on to hold:

> There may be cases, however, after all the evidence has been heard, where the court should conduct an inquiry as to whether the prosecutor's pursuit of the death penalty was in good faith. Such an inquiry should only be made where the facts indicate evidence of bad faith, and the defense has properly

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[7] In his motion for new trial filed before the penalty phase, Allen contended that the trial court should have granted his request for separate juries or, in the alternative, should have stricken the penalty phase. (R3852-55)

> requested an inquiry after trial. We cannot, in the instant case, reach that issue here in light of the fact that the defense, after all the evidence was before the court, never asked for such a determination.

Smith v. State, 568 So.2d at 968.

Although Jerome Allen was sentenced to death, that sentence and the State's pursuit of the ultimate sanction was an unlawful quest. See Points I and II. If the State sought to death-qualify a jury in a grand theft case or a second-degree murder trial, there would be no question that the State's efforts constituted bad faith. The State's pursuit of the ultimate sanction against a fifteen-year-old defendant who was a non-triggerman in a felony murder should be no different. The pronouncements of the United States Supreme Court are clear. The United States Constitution bars the imposition of the death penalty on defendant's younger than age sixteen. See Points I and II. Jerome Allen should not have been subjected to a more harsh, conviction-prone jury. The trial court's ruling resulted in the excusal of otherwise qualified jurors. [See, e.g., jurors Romano (R2924-26), Smith (R2968-71), Marshall (R3030-48), and Mintern (R3131-54)]. Jerome Allen's trial was tainted by constitutional error. He is entitled to a new trial free of such taint.

POINT IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THE GRAND JURY WAS NOT COMPOSED OF THE DEFENDANT'S PEERS.

Counsel for codefendant Eugene Roberson filed a written motion to dismiss the indictment based on the exclusion of an identifiable class (juveniles) to which the defendants belong. At the May 9, 1991 hearing on the motion, counsel for Allen orally adopted and incorporated Roberson's motion. (R3438) After hearing argument, the trial court denied the motion. (R3432-39)

At the time of his indictment, Jerome Allen was fifteen years old. (R2483) Section 40.01, Florida Statutes, requires that all jurors be at least eighteen years of age. Appellant could legally be indicted only by a grand jury of his peers, to-wit: persons under the age of eighteen, but above fourteen, and the failure to have such jurors or the possibility of such jurors is constitutionally lacking. The indictment should have been dismissed.

As was said in Rose v. Mitchell, 443 U.S. 545, 551 (1979):

> ... A criminal defendant "is entitled to require that the state not deliberately and systematically deny the members of his race the right to participate as jurors in administration of justice."

While the instant issue does not deal with a racial matter, it does deal with a class of persons. The systematic exclusion of the class of person with respect to a defendant, who is, in fact,

a member of that class, is a violation of equal protection guaranteed by the Fourteenth Amendment. Again, as was stated in Rose, 443 U.S. at 556:

> The exclusion from grand jury services of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice.

(emphasis added). If Jerome Allen was qualified to be facing the death penalty in a criminal trial, then certainly other people his age should be qualified constitutionally to serve as his peers on a grand jury.

> Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, the court will correct the wrong, will quash the indictment.

Id. It matters not that Allen was convicted by a petit jury, which was constitutionally sound. Id.

While Kibler v. State, 546 So.2d 710 (Fla. 1989), held that a jury need not mirror the community, this Court stated that a systematic exclusion of any group from jury duty is unfair. A defendant tried or indicted by such a jury is denied his constitutional right to an impartial jury. Id.

In Ciudadanos Unidos De San Juan v. Hidalgo Cty., Etc., 622 F.2d 807, 809 (1980), the court used the following language with respect to the right of a person to be judged by his peers:

> Almost 800 years ago, the Magna Charta proclaimed, "No free man shall be ... imprisoned ... or in any way destroyed, except by the lawful judgment of his peers ..." From this seed planted in the early spring of English legal

> culture has grown our "very idea of a jury ... a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status as that which he holds."

(footnote omitted). Ciudadanos was concerned with the constitutionality of grand juries, which systematically excluded identifiable groups in the community, specifically Mexican-Americans, women, young people and poor people. The court stated:

> An individual citizen should not be, and under the Constitution cannot be, deprived of individual equality under the law solely because he belongs to an identifiable segment of society against which official discrimination has been leveled. An individual's youth or property bears no relation to his competency for grand jury service, and an exclusionary classification based on those criteria is unreasonable.

Ciudadanos, 622 F.2d at 819. Since a minor can be indicted and prosecuted as an adult, Florida's exclusionary classification based on youth is unreasonable and therefore unconstitutional. A rallying cry frequently heard in the 1960's before the ratification of the Twenty-Sixth Amendment to the United States Constitution was, "Old enough to fight, old enough to vote." The same logic should apply in Jerome Allen's case. Old enough to execute, old enough for jury duty.

POINT V

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE ALLEN'S STATEMENTS TO THE POLICE, AS WELL AS THE SURREPTITIOUSLY TAPED CONVERSATION IN THE HOLDING CELL AFTER ALLEN HAD INVOKED HIS CONSTITUTIONAL RIGHTS.

Introduction

Police arrested Allen at approximately 1:38 p.m. He was handcuffed and taken to the police station. (R2435-38) The Miranda[8] sheet indicated that Allen was merely being interviewed, not arrested. (R2437-38) Detective Carter "assumed" that Allen knew he was under arrest. (R2439) Carter told Allen that they wanted to talk to him about a "robbery and shooting," not a murder. (R2439,2459-60)

When Jerome was first brought to the police station, he asked to speak to his mother. The police told Jerome that they needed to do some paperwork first. Once he entered the interview room, Jerome repeated his request. (R2491) Jerome Allen's mother arrived at the police station shortly after Jerome's arrest. (R2441) Several times during the interrogation, Jerome attempted to telephone his mother but was unable to make contact. (R2461) This was probably due to the fact that she was either already at the police station or was in transit. Jerome did reach his HRS counselor and had a private conversation with her on the telephone. (R2460)

Shirley Allen asked to speak to her son immediately upon

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[8] Miranda v. Arizona, 384 U.S. 436 (1966)

arriving at the police station. Police informed her that he was being questioned and that she would have to wait. Over the next forty-five minutes to an hour, Mrs. Allen made three other futile requests to speak to her son. (R2502-5) Mrs. Allen was finally allowed to speak with Jerome after the interrogation ended. (R2462)

During the interrogation, Detective Warren admitted that he ignored Allen's repeated requests for a lawyer. (R2462-64) Detective Warren simply continued the interrogation which lasted approximately two hours. (R2466-67) During the interrogation, Detective Warren also raised the specter of the electric chair. (R2467-68)

After Detective Warren completed the interview of Allen and Detective Carter completed the interview of Roberson, they compared notes. They decided to place Allen and Roberson in adjoining holding cells and surreptitiously taped their conversation. (R2443-44,2452) The police admitted that this was a deliberate strategy with the intent to obtain further incriminating statements. (R2444,2449-50) Police admitted there was no reason not to transfer the boys to the juvenile shelter at that point. (R2447-49)

A. Suppression of Allen's Statements to Police Following His Arrest

Although the trial court granted Allen's motion to suppress statements that he made to Detective Warren after he invoked his right to counsel, the trial court allowed the State to introduce Allen's statements prior to that invocation. (R3755-57) Before

invoking his right to counsel, Allen denied any knowledge of a robbery or a shooting and claimed that he was at home by 10:00 p.m. Allen admitted that he had been with Roberson and a white boy whose name he could not remember. Although denying any knowledge of the event, Allen told Detective Warren several times that he did not pull the trigger. Allen also questioned the detective about the culpability of someone present at a robbery who was not the triggerman. (R874-75) This testimony was elicited over Allen's renewed objections based on the denial of the motion to suppress. (R873-74)

As he did below, Allen contends on appeal that even the statements made before the invocation of his right to counsel were involuntary and should have been excluded. This contention is based upon the "totality of the circumstances." Mincey v. Arizona, 437 U.S. 385, 401, n. 17 (1978). Several factors contribute to the "totality of the circumstances" that render Allen's statements involuntary.

Age is perhaps the most common impediment to a finding that a waive of rights is knowing and intelligent. A suspect's youth has combined with other factors to lead a number of courts to a finding that a waiver was ineffective. Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972) [suspects aged fifteen and sixteen, low I.Q.'s, no previous criminal experience]; Wood v. Clusen, 605 F.Supp. 890 (E.D. Wis. 1985), aff'd, 794 F.2d 293 (7th Cir. 1986) [inexperienced seventeen-year-old subject to coercive arrest, incarceration, and interrogation]. It is undisputed that Jerome

Allen was only fifteen at the time of his arrest. He obviously had some prior juvenile offenses, but his tender age is an important consideration. Additionally, Allen's 77 IQ placed him in the bottom 5% of children his age. (R1993)

The conduct of police is one of the most important factors in determining the voluntariness of a statement. Ashcraft v. Tennessee, 322 U.S. 143 (1944). The rights advisement sheet used by the police had two choices for the police to select. Detective Carter admitted that he failed to check the box indicating that Allen was under arrest, instead marking the box indicating that Allen was merely being interviewed. (R2437-39) Detective Carter also admitted that he failed to inform Allen that the victim had died. Instead, Carter referred to a "robbery and shooting." (R2439) A statement should be excluded if the interrogators attempt to delude a prisoner as to his true position or if they attempt to exert an improper influence over his mind. Frazier v. State, 107 So.2d 16 (Fla. 1958). Additionally, Detective Warren also admitted that, in an attempt to provoke a confession, he raised the specter of the electric chair. (R2488)

The act of the police in refusing to allow Allen's mother to see him is also evidence of the involuntariness of the statement. Although it is not crystal clear from the record, it appears that Jerome's mother arrived at the police station shortly after Jerome did. "Actually from the time he was arrested, it was only like thirty minutes or so. She was there shortly thereafter. It

wasn't very long." (R2441) Several times during the interrogation, Jerome attempted to telephone his mother but was unable to make contact. (R2461) Undoubtedly, this was due to the fact that she was in the waiting room at the police station. (R2461-62) Shirley Allen requested an opportunity to speak to her son immediately upon arriving at the police station. Police told her that he was being questioned and that she could talk to him when they finished. Over the next forty-five minutes to an hour, Mrs. Allen made three other requests to speak to her son. After an hour of repeated requests, police finally allowed her to talk to Jerome. (R2502-5) Jerome first became aware that his mother was at the station when she was finally allowed to see him in the interrogation room. (R2491)

The exclusion of Jerome's mother from the process should have resulted in suppression of Allen's statements. In K.L.C. v. State, 379 So.2d 455 (Fla. 1st DCA 1980), the juvenile's parents saw the police come to their home and arrest their son. The arresting officers had an obligation, if requested, to grant the parents and the child a reasonable opportunity to confer before in-custody questioning began. In Stokes v. State, 371 So.2d 131 (Fla. 1st DCA 1979), it was error to question a juvenile where the parent requested to be present during the questioning and made himself readily accessible. The court held that the parent had to be given a reasonable opportunity to confer with the juvenile. In J.E.S. v. State, 366 So.2d 538 (Fla. 1st DCA 1979), the child's father was detained by a receptionist at the juvenile

justice center after he had previously expressed a desire to be present during his child's questioning. The confession of the child obtained under these circumstances was inadmissible. In Sublette v. State, 365 So.2d 775 (Fla. 3rd DCA 1978), a minor's request for his father to be contacted after his arrest constituted a continuous assertion of his privilege against self-incrimination. Subsequent statements given prior to the arrival of his father were therefore inadmissible.

In effect, the police denied Jerome Allen access to his mother and vice versa. Mrs. Allen repeated requested an opportunity to speak to her son, but the police refused. Jerome Allen was allowed to attempt to telephone his mother several times. These attempts were unsuccessful because she was present at the police station also expressing a desire to confer with Jerome. The police conduct shows a blatant disregard for Allen's constitutional rights.

Another indication of involuntariness was exhibited by Detective Warren's blatant disregard of Allen's repeated request for a lawyer. Detective Warren admitted that on two occasions Jerome stated, "I need an attorney." (R2463) Detective Warren admitted that he did nothing in response to Allen's statement and continued with the interrogation. Detective Warren attempted to distinguish Allen's statement that he "needed an attorney" by pointing out that Allen never "asked" for a lawyer. (R2463-64)

Jerome Allen's statement that he "needed an attorney" was not an equivocal request for a lawyer. The detective simply

ignored the request and continued the interrogation. This was a clear violation of Edwards v. Arizona, 451 U.S. 477 (1981). This blatant disregard of the law by the police is another circumstance revealing the unlawful overwhelming of Allen's will by the police. The resulting statement was involuntary.

B. Suppression of the Surreptitiously Taped Conversation in the Holding Cell

Allen contends that the police conduct in deliberately placing Jerome Allen and Eugene Roberson in adjoining holding cells in order to electronically surveil their conversation violates Allen's constitutional rights. Appellant recognizes that a defendant loses much of his expectation of privacy once he is incarcerated. See e.g. State v. McAdams, 559 So.2d 601 (Fla. 5th DCA 1990). However, the facts of Jerome Allen's case deserve closer scrutiny. During the interrogation, the police had deliberately ignored Allen's invocation of his right to counsel. On two occasions, Allen stated that he "needed" a lawyer. Detective Warren did not ask Allen what he meant by the statement. Detective Warren did not provide access to a lawyer. Detective Warren ignored the request and continued the interrogation. (R2463-64)

The invocation of the defendant's constitutional right to silence and to an attorney is an important consideration in State v. Calhoun, 479 So.2d 241 (Fla. 4th DCA 1985). Calhoun was in jail on an unrelated charge when he became a suspect in another case. When police took Calhoun from his cell to an interview room in another building, they informed him of his Miranda rights

ostensibly preparatory to discussing a pending unrelated robbery charge. Police did not inform Calhoun that he was a suspect in the instant charges. Calhoun asked to speak with his brother (who was also confined in the county jail on unrelated charges), before making a statement. The police complied with his request but monitored the "private" conversation from outside the interview room. After talking with his brother, Calhoun invoked his right to remain silent and asked to see his Public Defender. The police then devised a new strategy, returned the brother to the interview room, and monitored their conversation for investigative purposes. This conversation was taped without the brothers' knowledge or consent.

The Fourth District Court of Appeal pointed out that Calhoun had a justified expectation of privacy.

> Furthermore, and perhaps even more significantly, after the first conversation the defendant specifically exercised his right to remain silent and his right to counsel. Not only were these rights totally ignored by the police but the officers circumvented them by bringing the brother back into the room and then taping the conversation which is the subject of the motion to suppress. To rule that under these circumstances the defendant's statements to his brother are admissible is to make a mockery of the Miranda rights.

State v. Calhoun, 479 So.2d at 243. The Calhoun opinion also based its affirmance of the trial court's order suppressing the conversation on the unlawfulness of the interception of the oral communication contrary to Section 934.03, Florida Statutes. Id.

Allen's defense counsel based his attempt to suppress the holding cell conversation on this particular statute and the Florida Constitution. (R2604)

Perhaps most importantly, the detectives admitted that they placed Allen and Roberson in adjoining holding cells with the deliberate strategy of obtaining incriminating statements. (R2443-44,2447-52) The fact that the police chose this deliberate strategy after Allen had invoked his right to counsel (which the police blatantly ignored), is further evidence of the outrageous conduct of the police in this case. The strategy displays further blatant disregard of Allen's constitutional rights. Allen's resulting admissions were a product of a "'stratagem deliberately designed to elicit an incriminating statement.'" Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982) (quoting Malone v. State, 390 So.2d 338, 339 (Fla. 1990).

The police also engaged in unlawful conduct by detaining Allen in a holding cell prior to transference to the juvenile detention center. (R2443) Police admitted that, other than the fact that the press was outside, there was no reason not to transport Allen and Roberson immediately to the juvenile shelter. (R2447-48) Police admitted that the pair could have been transported more quickly. (R2449) The placement of Allen in a holding cell arguably violated Section 39.038(4), Florida Statutes. Appellant concedes that this particular ground was not argued at trial, but it is further evidence that the police would go to any lengths [ignore wire tapping laws; violate statute

relating to incarceration of juveniles; ignore a defendant's unequivocal request for a lawyer; etc.] to obtain whatever evidence they needed. The police's conduct cannot be condoned. The statements in the holding cell should have been suppressed.

POINT VI

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION, BY EXCUSING FOR CAUSE TWO QUALIFIED JURORS OVER DEFENSE OBJECTION.

Introduction

The law is clear that prospective jurors may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Lockhart v. McCree, 476 U.S. 162, 176 (1986). This principle was reaffirmed by the Unites States Supreme Court in Gray v. Mississippi, 481 U.S. 648 (1987). There, the Court reiterated that the constitutional standard to be used to determine if a juror may be excused for cause is not whether the juror would have a difficult time imposing the death penalty; rather "the relevant inquiry is whether the juror's views would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Gray v. Mississippi, 481 U.S. at 658, **quoting** Adams v. Texas, 448 U.S. 38, 45 (1987). See also Wainwright v. Witt, 469 U.S. 412, 424 (1985).

The constitutional basis of that standard was emphasized in Gray:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and

Fourteenth Amendments.

Justice Rehnquist, in writing for the Court, recently explained:

> "It is important to remember that **not all who oppose the death penalty are subject to removal for cause in capital cases;** those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986).
>
> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 U.S. at 423. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 U.S. at 523.

Gray v. Mississippi, 481 U.S. at 658-659 (emphasis added).

In Adams v. Texas, 448 U.S. at 49, the Court ruled that jurors could not be excluded if they stated that they would be "affected" by the possibility of the death penalty since such indication could mean "only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them

emotionally."

> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

448 U.S. at 50. This standard for limiting the exclusion of jurors was specifically approved by the Court in Wainwright v. Witt, 469 U.S. at 423-424, which also reiterated that the burden of demonstrating that the challenged juror will not follow the law in accordance with his oath and the instructions of the court is on the party seeking exclusion of the juror, i.e., the state. Id. In the present case, it is clear that the prosecution did not meet its burden to establish exclusion.

Juror Mintern

It is clear that Juror Mintern had never considered the issue of capital punishment prior to voir dire. When the court questioned whether his views on the death penalty would substantially impair his ability to try the issues and render a verdict based on the law and evidence, Mintern answered:

> I think I do. I've been trying to think about this today.
> I think the best way for me to answer would be to say that I wouldn't have any trouble returning a guilty verdict if I felt that the party was guilty. But as I understand the way you explain things going, the next decision becomes the punishment and if the punishment is -- if --

> Going the next step and asking for the death penalty, I guess I'd have to say I'm very uncertain about how I would make that decision. But I would be inclined to say that I would have a difficult time doing that.

(R3131-32) Mintern subsequently reiterated that his views on the death penalty would not be a problem at the guilt phase. (R3133-34) When asked if he would follow the law and consider all penalties before voting on a recommended sentence, Mintern expressed honest uncertainty and admitted that he had never thought about it before that day. (R3135) Under questioning by the prosecutor, Mintern again expressed uncertainty about his ability to decide the defendant's punishment. (R3138) When the prosecutor asked Mintern if he were irrevocably committed to vote against the death penalty regardless of the evidence, Mintern testified, "To say that it's irrevocable -- I wouldn't be certain enough about by own thoughts to say it's irrevocable...I guess I stay short of that." (R3139) When asked directly if he could "see" himself recommending a death sentence, Mintern stated:

> See, that's the part. I'm not sure if I can go the distance on that. I'm just not certain. I wouldn't say it's irrevocably. I couldn't --
> Sitting here at this moment, I'm not sure I could go that far.

(R3140-41) Mintern admitted a "certain lack of clarity or a certain conflict almost in the statement." (R3142) He admitted "ambiguity" and a lack of clarity on the issue. (R3142,3144) Defense counsel was obviously satisfied with Juror Mintern's answers regarding the death penalty, as counsel did not ask him

any further questions. (R3145-48) The prosecutor asked Mintern if he would have difficulty following the court's instructions at the penalty phase.

> I would have to say -- At this point, I would have to say that it's possible just to be consistent with -- just to be consistent with my lack of clarity. Just trying to work this all through today, trying to think this all through, I could see where I could have --
> I'm still wrestling with it is the best way to put it.
>
> * * * *
>
> Q: Do you think you're going to have a problem in doing it [following the court's instructions]?
>
> A: Well, I'm trying to think about it. I have to say maybe I might have a problem with that.

(R3149) Defense counsel asked Juror Mintern if he could follow the judge's instructions and Mintern replied:

> A: Well, following up on what I've been saying is that -- because I'm not certain if I could come to the decision to recommend that somebody be put to death. That's the point which I'm not certain. I can go up to that point.
> If the judge's instructions were maybe beyond the -- exactly what the judge's instructions mean in other words. Does it --
> There's a deliberation of some kind?
>
> Q: Yes.
>
> A: I guess I'm not familiar enough with how a judge instructs a jury based upon these circumstances.
> Is it implied you should arrive at this kind of decision? In other words, I'm not sure --

> Q: The judge will tell you there are various things for you to consider and weigh in making a decision on whether to recommend life or death.
>
> If the judge did that, would you consider and weigh those various circumstances and then arrive at your own decision?
>
> A: Right, I could. I think I could follow a judge's instructions to function under the law.
>
> But I have to tell you, as I've been trying to state, I'm not sure I could go the distance recommending that somebody be put to death.

(R3151) The trial court granted the State's motion challenging Juror Mintern for cause stating:

> All things considered, as much as Mr. Mintern would like to satisfy us that he can be fair and impartial, I'm concerned that everything he's said has indicated to me; that he cannot reach the level of death penalty imposition recommendation.
>
> And being unable to do that, I'll grant the motion.

(R3153-54)

It is clear from Juror Mintern's answers that, until the day of trial, he had never considered the issue of capital punishment. He wrestled with the issue throughout voir dire. His answers made it abundantly clear that he did not know the procedure or the law, but was willing to learn and apply the law in an appropriate case. As would any reasonable person, Juror Mintern recognized that passing judgment that a fellow human being should die is a momentous decision, not to be taken lightly. The state seemed to read Juror Mintern's hesitancy to kill an individual as an inability to recommend death in the

appropriate case. Mintern's answers reveal the contrary. Although a decision to impose the death penalty was a weighty one for Juror Mintern (as it should be), he never expressed an irrevocable commitment to vote for a life sentence regardless of the evidence. Rather, he concluded that he could follow the judge's instructions and could obviously consider a death recommendation if warranted by the evidence and the law. (R3151)

Juror Patricia Marshall

Once Patricia Marshall understood the question, she denied that her views on the death penalty would substantially impair her ability to try the issues and render a verdict based upon the law and evidence. (R3032) Marshall admitted that the fact that the case involved a potential death penalty made "a little" difference to her. (R3032-33) She admitted that the death penalty would concern her (as it should any reasonable person). (R3033) Once the court explained the bifurcated nature of the proceedings, Marshall testified that she was willing to follow the law and consider all penalties. (R3033-34) When asked about the death penalty in particular, Marshall said, "I just don't believe in it at all." (R3034) However, she indicated that she could put her personal feelings aside and could recommend a death penalty in the appropriate case. (R3035)

Under questioning by the prosecutor, Marshall reiterated that her personal feelings would not affect her ability to sit as a juror. (R3036) The prosecutor then asked Marshall if her beliefs would preclude a vote for death under any circumstances.

Marshall replied, "It might would. I'm not sure. It might would." (R3038)

Defense counsel asked Marshall about her prior knowledge of the case. (R3038)[9] Perhaps of greatest concern to the State was Marshall's admission that she felt sorry for the defendant. "I felt sorry for him. He's so young." (R3038) The most damaging (from the defense point of view) portion of Marshall's voir dire occurred under questioning by defense counsel:

> ... [W]ould you be committed absolutely to voting against the death penalty under those circumstances regardless of the facts and circumstances that are shown to you ?
>
> A: I probably would.
>
> Q: You say "probably"?
>
> A: Yes.
>
> Q: Can you conceive of any circumstances under which you would vote in favor of the death penalty?
>
> A: Not at this point.
>
> Q: Would you need to listen to the evidence and the facts of the case?
>
> A: Probably.
>
> Q: Do you think if you -- it would depend on the evidence and the facts of the case before you can make that kind of determination?
>
> A: Yes, I guess so.
>
> * * * *

[9] Marshall had read about the case in the paper and saw some television coverage, but testified that she could completely disregard her extrajudicial knowledge. (R3031,3039)

Q: Do you think there could be a case that depending upon the facts, which you haven't heard yet, that would justify death penalty?

A: I guess so.

Q: You would listen to the judge's instructions and listen to the evidence; would that be a fair statement?

A: Yes.

(R3039-41) The prosecutor re-examined Marshall on the "sympathy" angle, and she conceded that the fact that she already felt sorry for Allen, might impact on her ability to be fair and impartial. (R3041)[10] Marshall could not say if thoughts of her own children would weigh very heavily on her during deliberations. (R3041) Marshall maintained that she could listen to the evidence and follow the judge's instructions. (R3042) The trial court concluded the questioning of Marshall:

Q: Ms. Marshall, let me be sure that I understand what you're telling us. You're telling us that you don't have any problem sitting on the jury and deciding whether Mr. Allen is guilty or not guilty. You could do that because you could follow the law and listen to the evidence.

Assuming that the jury finds him guilty of first-degree murder, then the jury has to consider again what recommendation to make to the Court. That recommendation would be either life in prison with no possibility of release or parole for twenty-five years; or the death penalty, the electric chair.

And having to make that decision, could you decide that he should go to the electric chair?

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[10] Marshall pointed out that she had children, and she would probably think of that fact while deliberating. (R3041)

A: Yes, if the evidence is there.

Q: If the evidence is there and it's sufficient, you could do that?

A: Uh-huh.

(R3043)

The state challenged Marshall for cause based upon her statement that she did not believe in the death penalty. The State contended that Marshall vacillated on her ability to recommend the ultimate sanction in this case or in any case. The prosecutor also pointed out that Marshall had read about the case in the media and felt sorry for the defendant. (R3044) Defense counsel initially pointed out that Marshall was one of only two potential black jurors in the entire panel. Counsel noted that the defendant was also black. (R3045) Defense counsel correctly pointed out that Marshall had concerns about the death penalty but insisted that she could put them aside and recommend the death penalty in the appropriate case. (R3045) Counsel also pointed out that her exposure to the media was minimal. Defense counsel also argued that Marshall's sympathy for a fifteen-year-old defendant facing the death penalty was simply normal compassion. (R3046) The trial court granted the State's motion challenging Marshall for cause stating:

> Considering all things, not only what she said but the way she said those things and the conflict in her answers, my concern is real as to her ability to sit fairly and impartially.

(R3047)

The state failed the Adams and Witt test; it did not show

that the juror could not follow the law and the court's instructions and put her personal feelings aside. Juror Marshall was admittedly concerned about the gravity of a situation which could ultimately result in the electrocution of a fifteen-year-old boy. Marshall's views come close to those expressed in Adams, 448 U.S. at 50. Marshall maintained that she could be fair in deciding guilt or innocence, and that she could vote in favor of death in an appropriate case. (R3031-43) As in Chandler v. State, 442 So.2d 171, 174 (Fla. 1983), examination of the record indicates that Juror Marshall never came close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty which would allow her excusal for cause.

As concluded in Adams v. Texas:

> to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their view about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law. ... [T]hese individuals were [not] so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

448 U.S. at 50-51.

Conclusion

The erroneous exclusion of even one juror in violation of the Adams-Witt-Gray standard is constitutional error which goes to the very integrity of the legal system, and can never be written off as "harmless error." Gray v. Mississippi, supra; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So.2d 171 at 174-175. "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." Witherspoon, 391 U.S. at 519-23.

The state is not permitted to so stack the deck against a defendant and thus deprive him of due process of law. Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for a new trial before a fair and impartial jury.

POINT VII

THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL EVIDENCE WHICH THE STATE COULD NOT TIE TO THE CRIME DENIED JEROME ALLEN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The indictment alleged, inter alia, that Eugene Roberson, Brian Kennedy, and Jerome Allen, robbed Stephen DuMont of money and cigarettes. (R3650) When police arrested Brian Kennedy in Maggie Sanders' stolen Pontiac, police recovered several items of evidence from the car. Several packages of Marlboro Red cigarettes were among the items recovered. (R640-43) Kennedy's fingerprints were found on several of these cigarette packages. (R643) When the State sought to introduce the cigarette packs into evidence, defense counsel interposed a relevance objection, correctly pointing out that the State failed to show any connection between the cigarettes and Jerome Allen. The trial court denied the objection and the cigarettes were introduced into evidence. (R640-41)

The State also attempted to prove their case against Jerome Allen by eliciting testimony that Jerome Allen had approximately sixty dollars (three $20's) in cash when he was arrested, and that Kennedy and Roberson each had a fifty-dollar bill in his possession when they were arrested. Prior to the introduction of any evidence of currency found on the suspects, defense counsel argued that such evidence should be excluded based on relevance. (R922-26) Defense counsel pointed out that the prejudice would

outweigh any slight probative value.[11] The trial court overruled Appellant's objection and allowed witnesses to testify about the money. The court also overruled Appellant's renewed objection and allowed the State to introduce the three twenty-dollar bills seized from Jerome Allen at the time of his arrest. (R929-31) Detective Carter subsequently testified that he seized the fifty dollar bill from Brian Kennedy at the time Kennedy was arrested. (R932-33)

The State also attempted to prove their case against Allen through the introduction of a shotgun seized from the attic of his home and numerous shotgun shells also found in the house. Defense counsel objected on relevance grounds, pointing out that the State failed to prove that this physical evidence had any connection to the crimes charged. (R15-20,1534-35) The trial court overruled Appellant's objections and allowed the evidence.

The robbery occurred on December 10, 1990, at approximately 11:15 p.m. (R245,259-62) Police arrested Jerome Allen the next day during the middle of the afternoon. (R2435-38) Brian Kennedy was arrested earlier that same day with a fifty-dollar bill in his pocket and several packs of Marlboro Red cigarettes in the car with him. (R432-55,640-42,932-33) Roberson was arrested at approximately the same time as Allen and had a fifty-dollar bill seized from him. (R927-28)]

In Barrett v. State, 17 FLW D2209 (Fla. 4th DCA September

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[11] Counsel pointed out that unfortunately, a fifteen-year-old black boy from Mims with sixty dollars in his pocket would be presumed to have engaged in some sort of illegal activity.

23, 1992), the Fourth District Court of Appeal held that evidence of the cash seized at the time of Barrett's arrest, which occurred two days after the drug transaction, was irrelevant and admitted erroneously. The Court also concluded that, even if the evidence had been found relevant, the testimony would still be inadmissible based on Section 90.403, Florida Statutes (1991):

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, [and] misleading the jury ....

The Court pointed out that there is nothing unlawful about having cash in one's pocket. As in Allen's case, the State could prove no direct connection between the specific cash seized and the crime to which Barrett was charged.

> Therefore, the evidence and testimony objected to only supports an inference that because appellant testified that he did not have a job, the cash seized in the arrest was acquired from the sale of cocaine.

Barrett v. State, 17 FLW at D2210.

Likewise, Allen's jury undoubtedly assumed that a fifteen-year-old boy did not have a job and acquired the money through some nefarious scheme, probably felony murder[12]. The testimony and evidence had no relevance, since the State could not connect the cash, the cigarettes, the gun, or the ammunition to the

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[12] The fact that sixty dollars was seized from Jerome Allen at the time of his arrest was a major issue at trial. Defense counsel felt compelled to call three witnesses during Allen's case-in-chief. (R1011-47) Two of the three witnesses explained why Allen had sixty dollars in his pocket.

robbery of Stephen DuMont. The introduction of the evidence and the testimony about that irrelevant evidence over defense counsel's timely and specific objection denied Jerome Allen his constitutional right to a fair trial. Amends. V and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT VIII

THE TRIAL COURT'S DENIAL OF ALLEN'S MOTION FOR MISTRIAL AFTER DETECTIVE CARTER TESTIFIED THAT "I'VE DEALT WITH [ALLEN] BEFORE," RESULTED IN AN UNFAIR TRIAL.

Dan Carter, a detective with the Titusville Police Department and lead investigator in the case, testified at the guilt phase. (R881-926) Carter testified that he could identify the voices of Eugene Roberson and Jerome Allen from the audio tape made in the holding cell. (R887-89) Carter testified that he spoke to Roberson for approximately thirty minutes on the day that the tape was made. (R887-89) On cross-examination, Detective Carter revealed that the lower-pitched voice on the tape (Roberson's) admits to pulling the trigger. (R912) Carter testified that Jerome Allen was the more talkative individual on the tape.

> Q: So you're saying the lower pitched voice through all this never says very much?
>
> A: Doesn't say as much as Mr. Allen. Mr. Allen wants to get things -- wants to know what everybody has said and what they're saying about him.
>
> Q: Uh-huh.
>
> A: He wants to know what was told about him. He needs to get his story together straight.
>
> Q: Well, that's an interpretation that you're making; is that correct?
>
> A: I've dealt with him before. Yes, okay that's an interpretation, yes.

(R913) (emphasis added) Defense counsel immediately approached the bench and, before even hearing the objection, the trial court acknowledged the objectionable nature of the testimony. The court then solicited argument from the State. (R913) The State also recognized the implication of the testimony, but contended that any error was harmless. The trial court pointed out that Detective Carter's unresponsive answer was not solicited by defense counsel. (R915) The State proposed a curative instruction which defense counsel contended would draw further attention to the objectionable testimony. (R915) Defense counsel persisted in his request for a mistrial, pointing out the strong inference caused by Carter's choice of words, i.e., that he had "dealt with him [Allen] before." (R916) The trial court initially reserved ruling on the motion for mistrial. The court instructed the jury to disregard the last portion of the witness' answer as not being responsive. (R918-919) The trial court heard further argument on the motion at the conclusion of the State's case-in-chief. (R996-99) The trial court ultimately denied the motion for mistrial. (R999)

Section 90.404(1), Florida Statutes, clearly states that the prosecution may not offer testimony during its case-in-chief of the accused's past character to prove that the accused committed the crime in question. The reason for this rule is the great danger that a jury will convict a defendant for his prior activity, instead of focusing on the issue before them, i.e., whether the particular crime in question was committed by the

defendant. Ehrhardt, Florida Evidence §404.4 (1992 Edition).

This Court is well aware of the prevailing attitude of Florida's citizenry that criminals are being coddled by the court system. When the jury heard that Detective Carter had "dealt with [Allen] before," they undoubtedly assumed the worst. The curative instruction was a classic, though futile, attempt to "unring the bell." The State will undoubtedly set forth its usual harmless error contentions in its answer brief, but a review of the record reveals that Allen's case is a fairly close one.

"[A] defendant's character may not be assailed by the State in a criminal prosecution unless good character of the accused has first been introduced." Young v. State, 141 Fla. 529, 195 So. 569 (1939). This Court has reversed a case where the prosecution was permitted to show that the prior jury had convicted the defendant of the same crime for which he was being tried. See Jackson v. State, 545 So.2d 260 (Fla. 1989).

Hardie v. State, 513 So.2d 791 (Fla. 4th DCA 1987) appears precisely on point. Five Metro-Dade police officers were allowed to express their opinions as to the identity of the persons depicted in a videotape recording of the commission of the crime. Although the Fourth District Court of Appeal rejected Hardie's argument that the officers' testimony constituted inadmissible opinion evidence, the court reversed because the officers' testimony created the impression that Hardie had been involved in other criminal activities or had a prior record. The officers

based their identification of Hardie on their prior knowledge and contacts with him. Hardie v. State, 513 So.2d at 792. The district court concluded that the officers' testimony that they were acquainted with Hardie, as well as direct references to "other investigations", made it inconceivable that the jury would not have concluded that Hardie had been involved in prior criminal conduct. The same conclusion can be reached in Allen's case. The prosecutor's contention that the jury might conclude (from the comment) that Detective Carter and Jerome Allen might have "gone to church together," stretches the bounds of credibility. The jury undoubtedly concluded that the only "prior dealings" that this fifteen-year-old black boy had with Detective Carter involved prior criminal activity. See also Wilding v. State, 427 So.2d 1069 (Fla. 2nd DCA 1983) [error to admit testimony concerning defendant's arrest for unrelated crimes].

Even a reference to "mug shots" can be grounds for a new trial. See e.g. Russell v. State, 445 So.2d 1091 (Fla. 3rd DCA 1984). The First District Court of Appeal acknowledged that a police officer's statement that he had had other occasions to "run across [the defendant]" arguably did carry an inference of prior criminal conduct. Coit v. State, 440 So.2d 409 (Fla. 5th DCA 1983). This Court has held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity of the crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 396 So.2d 903, 908 (Fla.

1981). Accord Peek v. State, 488 So.2d 52, 56 (Fla. 1986).

Even if this Court finds the error harmless at the guilt phase, substantially different issues arise during the penalty phase of a capital trial that require an analysis *de novo*. Castro v. State, 547 So.2d 111 (Fla. 1989). The State cannot demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error below affected the jury verdict of guilt and the resulting death recommendation. See State v. Lee, 531 So.2d 133 (Fla. 1988).

POINT IX

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY UPON THE LAW OF THE CASE.

Rule 3.390(a), Florida Rules of Criminal Procedure, states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. . . .

The trial court denied Appellant's requested instruction on third-degree murder as well as Appellant's special jury instructions as to circumstantial evidence and the independent act of another. Additionally, the trial court improperly commented on the evidence by instructing the jury on the legal presumption relating to recently stolen property. Furthermore, the evidence was insufficient to support this particular instruction.

A. Granting State's Requested Instruction on Recently Stolen Property

Defense counsel objected to the trial court's decision to instruct the jury on the legal presumption regarding the possession of recently stolen property. The State contended that the evidence was sufficient to establish that Jerome Allen had been in possession of the stolen cigarettes and the stolen motor vehicle. Defense counsel contended that there was no proof of possession of recently stolen property. (R1078-80) The trial court instructed the jury:

> Proof of possession of recently stolen property, unless satisfactorily explained, gives rise to an inference

> that the person in possession of the property knew or should have known that the property had been stolen.

(R1254)

The giving of the aforementioned instruction is proper if there is appropriate factual basis in the record to support the instruction. Griffin v. State, 370 So.2d 860 (Fla. 1st DCA 1979). The rule which allows the jury consideration of the presumption arising from possession of stolen property has been limited by further requirements that possession be personal, that it involve a distinct and conscious assertion of possession by the accused, and that possession must be exclusive. Id. In Allen's case the State cannot even establish that the money and cigarettes seized from Allen and his codefendants was the same property taken from DuMont in the robbery. See, Point VII.

In Griffin, the district court found reversible error where the trial court gave the instruction even though the evidence did not disclose that Griffin was ever in possession of the property. Griffin and Marshall burglarized Fraser's apartment and, in the process, struggled with the victim somewhat. Police found Marshall a short time later lying in a field. Marshall had in his possession various jewelry as well as a gun belonging to the victim, Fraser. The district court found reversible error in the trial court's jury charge at issue.[13]

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[13] The district court's opinion hinged in part on the fact that, although he apparently identified Griffin as one of his assailants, Fraser only observed the second assailant for a few brief seconds.

King v. State, 431 So.2d 272 (Fla. 5th DCA 1983) also found reversible error in the giving of this particular instruction. The record did not support King's "personal and exclusive" possession of the property. King v. State, 431 So.2d at 273. In fact, the evidence did not show that King ever really possessed the goods to the extent that he exercised any dominion in control, let alone exclusive dominion and control.

Likewise, the record in Jerome Allen's trial fails to support the trial court's instruction. Brian Kennedy was found sleeping in the stolen car with the stolen cigarettes. Although Jerome Allen's palm print was found on the rearview mirror, there was no evidence as to when it was placed there. The State failed to present sufficient evidence to establish that Allen possessed the car at all, much less having exclusive dominion and control. Additionally, although the automobile in Kennedy's possession was clearly identified as stolen, the cigarettes as well as the cash seized from Allen, Roberson, and Kennedy upon their arrest, could not be identified as the particular cigarettes or cash stolen from the Exxon station. In order to justify the instruction, the particular property must be identifiable as the same property that was stolen. See, e.g., Grant v. State, 561 So.2d 11 (Fla. 3rd DCA 1990) and Jones v. State, 495 So.2d 856 (Fla. 4th DCA 1986).

Aside from the fact that the evidence did not support the instruction, the instruction constitutes an impermissible comment on the evidence by the trial judge. This Court held recently in

Fenelon v. State, 594 So.2d 292 (Fla. 1992), that the previously approved "flight" instruction (allowing the jury to consider flight as a circumstance inferring guilt) should not be given in future cases. In considering the flight instruction, this Court could think of no valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence introduced at trial. This Court was troubled by the inconsistencies among the cases as well as the lack of a meaningful standard for assessing what type of evidence merits the instruction.

The same problems are inherent in the jury instruction at issue in Jerome Allen's case. The instruction is a direct comment on the evidence by the trial court. There is no meaningful standard to determine when the evidence merits the instruction. Appellant cannot articulate any distinctions between the now disapproved flight instruction and the instruction allowing the jury to presume guilt based on possession of recently stolen property.

B. Circumstantial Evidence Instruction

At the charge conference, defense counsel requested, in writing, a special jury instruction on circumstantial evidence:

> Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue. Circumstantial evidence is proof of certain facts and circumstances from which the jury may infer that the ultimate facts in dispute existed or did not exist.
>
> Where the only proof of guilt is circumstantial no matter how strongly

> the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

(R1130-33,3795) The State argued that the case was not a circumstantial one, but the court apparently disagreed stating:

> There are in fact numerous portions of this case which are circumstantial, maybe not as they relate to one charge but as they relate to others. It doesn't make any difference.
>
> Until such time that the Supreme Court says that there is a circumstantial evidence charge and that it should be given again, I'm not in a position to argue with those people. And I'll refuse to give the charge.

(R1133)

Although the judge agreed that at least portions of the State's case were circumstantial in nature, he was under the erroneous impression that he had no discretion to instruct the jury on the standard to use in judging circumstantial evidence. "While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case." Steele v. State, 561 So.2d 638, 645 (Fla. 1st DCA 1990). The standard instruction should be amplified or modified to the extent required by the facts of a particular case. Cruse v. State, 588 So.2d 983 (Fla. 1991); Yohn v. State, 476 So.2d 123 (Fla. 1985). See also Foster v. State, 17 FLW D1864 (Fla. 1st DCA 1992).

Appellant recognizes that the standard jury instructions

have deleted the specific instruction on circumstantial evidence. This Court, however, stated when it published the new jury instructions that the circumstantial evidence instruction could still be given in an appropriate situation:

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case.

In the matter of Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Jerome Allen's trial judge clearly believed that the State's case, at least as to certain charges, was totally circumstantial. He said as much on the record. (R1133) Undoubtedly, the trial court was referring to the grand theft of the automobile charge. The evidence as to that particular offense was totally circumstantial. The State's case against Jerome Allen as to the murder, robbery, and possession of a short barreled shotgun was also almost entirely circumstantial in nature.

Circumstances that create nothing more than a strong suspicion that the defendant committed the crime charged are not sufficient to support a conviction. Cox v. State, 555 So.2d 352 (Fla. 1989); Williams v. State, 143 So.2d 484 (Fla. 1962); Mayo v. State, 71 So.2d 899 (Fla. 1954). This legal principle is well known to lawyers practicing criminal law in Florida; and it is periodically reaffirmed by our appellate courts. Why, then, not tell the jury? To well and truly try the issues in this case,

the jury needed to know that the circumstantial evidence, however strongly it may suggest Appellant's guilt, is insufficient if it has not excluded every reasonable hypothesis of innocence. A jury is admonished to take the law from the court's instructions, not from argument of counsel. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981).

Denying the requested jury instruction on circumstantial evidence deprived Jerome Allen of his legal and factual defense. It deprived him of due process of law. Amends. V, XIV, U.S. Const.; Art. I, §9, Fla. Const. The failure to deliver the requested instruction requires reversal.

C. Independent Act of Another

Defense counsel filed a written request for the following instruction:

> If you find that any robbery or attempted robbery was completed or over, and that the death of Stephen DuMont was subsequently caused solely by an independent act of another person with no prior involvement or knowledge of Jerome Allen, Jerome Allen is not guilty of first degree felony murder.

(R3794) At the charge conference the State argued that the standard instruction on felony murder was sufficient. (R1108-9) Defense counsel pointed out that Eugene Roberson was the actual triggerman. The evidence supported a theory that although Allen may have known that a robbery would be attempted, Roberson's act in shooting DuMont was an independent one without Jerome Allen's prior knowledge. (R1109-10) The trial court refused to give the requested instruction. (R1110-11)

A defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction. Laythe v. State, 330 So.2d 113 (Fla. 3rd DCA 1976). If evidence exists from which a jury could determine that the acts of a co-felon resulting in murder were independent of the joint felony, a defendant is entitled to an instruction on that theory of defense. Rodriguez v. State, 571 So.2d 1356 (Fla. 2nd DCA 1991). In Rodriguez, the trial court refused to instruct the jury that if the murder was an independent act, not committed in furtherance of or in the course of a joint felony, the jury should find Rodriguez not guilty of felony murder. The district court reversed even though counsel focused on this defense in closing argument. See also Lewis v. State, 591 So.2d 1046 (Fla. 1st DCA 1991). The requested instruction correctly stated the law and was critical to Allen's case. See Savino v. State, 555 So.2d 1237, 1239 (Fla. 4th DCA 1989). The instruction went directly to Allen's theory of defense. The trial court's refusal to adequately instruct the jury deprived Allen to his constitutional right to a fair trial.

D. Denial of Third-Degree Murder Instruction

At the charge conference, defense counsel requested that the trial court instruct the jury on third-degree murder. When asked to justify his request, defense counsel pointed out that the timing of any threat, violence, or force could be critical in the jury's determination as to whether or not a robbery or a grand theft occurred. (R1084-85) Without the requisite force, the

evidence supported a conviction for grand theft, a felony not enumerated in the first-degree felony murder statute. Defense counsel pointed out that the State attempted to prove the theft of money totalling up to $300.00 and several packs of cigarettes. The trial court denied counsel's requested instruction. (R1085)

First-degree felony murder is committed when the killing of a human being occurs while the accused is engaged in the perpetration of, or in the attempt to perpetrate any of a list of enumerated felonies, including robbery. §782.04(1)(a)2, Fla.Stat. (1989). Third-degree murder occurs when the killing is committed during the perpetration of any felony other than those underlying first-degree felony murder. §782.04(4), Fla.Stat. (1989). Felonies underlying a charge of first-degree felony murder include robbery, and Appellant's jury was instructed on the elements of this crime. (R3816-18) A felony not enumerated in the first-degree felony murder statute, and thus an appropriate underlying felony for a charge of third-degree murder, is grand theft. §782.04, Fla.Stat.

In Green v. State, 475 So.2d 235 (Fla. 1985), this Court held that a defendant charged with a first-degree premeditated murder is entitled to an instruction on the lesser included offense of third-degree felony murder if there is evidence to support such a charge. This Court has also held that in the case of "degree crimes," such as murder, requested instructions on all lesser degrees that are supported by the evidence must be given regardless of the allegations of the charging document.

Herrington v. State, 538 So.2d 850 (Fla. 1989). The jury in this case should have been instructed on third-degree felony murder.

Appellant recognizes that this Court has held that the error in failing to give a requested instruction on third-degree murder at a trial for first-degree murder is harmless, where the trial court did instruct the jury on second-degree murder, which is only one step removed from the crime of which the defendants were convicted. See, e.g., Jackson v. State, 575 So.2d 181 (Fla. 1991), and Perry v. State, 522 So.2d 817 (Fla. 1988). Appellant maintains, however, that the inclusion of a jury instruction on the lesser-included offense of second-degree murder did not cure the error of failing to instruct on the more appropriately included crime of third-degree murder.

Juries are allowed to convict of lesser offenses under Florida's recognition of the jury's right to exercise its "pardon power." See State v. Wimberly, 498 So.2d 929 (Fla. 1986). A jury should not be required, however, to implement this power in a logical vacuum. If a jury is considering a "partial pardon" for a defendant, it should be afforded an appropriate alternative to the main charge, not merely a next-step-removed offense whose elements may not be fulfilled by the facts. In fact, defense counsel argued that an instruction on third-degree felony murder was appropriate while a second-degree murder instruction was not supported by the evidence. (R1081-86)

Proof of second-degree murder requires proof either that a killing was committed by someone else while the defendant was

engaged in the commission of an enumerated felony, or that the defendant perpetrated an act imminently dangerous to another and evincing a depraved mind regardless of human life. §§782.04(2) and 782.04(3), Fla.Stat. (1989). A finding that someone other than Allen or his codefendants killed Stephen DuMont while Appellant was committing robbery would not be reasonable. Likewise, a finding that a defendant "evincing a depraved mind" committed acts imminently dangerous to another "from ill will, hatred, spite, or an evil intent," is inconsistent with the strict-liability doctrine underlying the concept of felony murder, i.e., that the mens rea underlying the enumerated felony furnishes the criminal intent for the crime of felony murder and substitutes for the necessity of proving premeditation. See, e.g., Fleming v. State, 374 So.2d 954, 956 n.1 (Fla. 1979) ["Any homicide committed during the perpetration or attempted perpetration of a felony constitutes first-degree murder. State of mind is immaterial for the felony is said to supply the intent."]

On the other hand, if jurors should find that a felony not enumerated under the first-degree murder statute was being committed when the death occurred, they would be correct to choose third-degree felony murder for their verdict, but they would only be able to settle on this legally appropriate disposition of the cause before them if they were instructed on that lesser included offense. Appellant maintains, therefore, that it should not be ruled dispositive of the error that

occurred here that his jury did not convict him of second-degree murder, when such a verdict would have been inconsistent with the jurors' apparent conclusion that the killing occurred during the commission of a felony. Under this rationale, the failure to give an instruction on third-degree murder cannot be harmless error.

POINT X

THE TRIAL COURT ERRED IN DENYING ALLEN'S MOTION FOR NEW TRIAL AND MOTION FOR CONTINUANCE OF THE PENALTY PHASE AFTER EXCULPATORY EVIDENCE WITHHELD BY THE STATE WAS DISCOVERED.

On August 8, 1991, the day before penalty phase began, defense counsel announced that the State had recently revealed that codefendant Brian Kennedy was involved in an attempted robbery of a gas station three days before the robbery of Stephen DuMont. (R263-74) On December 7, 1991, three days before the DuMont robbery, Brian Kennedy stole a neighbor's car, loaded it with two shotguns and a rifle, and drove to a gas station. When he discovered that the clerk was not alone that night, Kennedy simply stole some gas and drove away. (R2663-66) Counsel pointed out that he had filed numerous Brady demands prior to the commencement of trial. (R3659-60,3729-33,3847) The trial court denied Allen's pretrial motions, calling them a "fishing expedition." (R3729,3477-83) Defense counsel's attempts to discover this evidence sooner were thwarted by the trial court's refusal to allow certain questions of Kennedy at his deposition. (R2263-74)

When the discovery violation was called to the trial court's attention prior to the commencement of the penalty phase, the court concluded that the evidence might be grounds for a new trial, but ruled that the evidence was irrelevant at the penalty phase. The trial court also denied Allen's request for a continuance to further investigate the newly discovered evidence.

(R1417-34) Although some of the evidence eventually made its way to the jury at the penalty phase, Allen proffered the testimony of two witnesses (a customer at the store and a policeman who investigated the crime), but the trial court refused to allow the jury to hear this evidence. (R1761-71) Allen subsequently filed a motion to amend his previously filed motion for new trial to include the Brady issue. (R3887-88) The trial court eventually denied Allen's motion for new trial. (R4214)

The evidence withheld by the State was clearly within the parameters set forth in Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976). Defense counsel specifically asked about pending charges against listed State witnesses, any evidence which impeached the credibility of a State witness, and any evidence that "tends to negate guilt, reduce the degree of guilt ... or affect the credibility of any person listed [as a witness by the State]." (R3729-33) The trial court seemed to agree that the newly discovered evidence might be grounds for a new trial, but failed to grant the motion for new trial on that basis. The trial court erroneously concluded that the evidence had no relevance at the penalty phase. The evidence went directly to the relative culpability of each of the codefendants. The State's case painted Jerome Allen as the "ring leader" of the robbery and murder of Stephen DuMont. Brian Kennedy was merely along for the ride. Although he stole some cigarettes and money at the scene, he walked back to the car and listened as Allen urged Roberson to eliminate DuMont as a

witness. The robbery was Allen's idea, and Kennedy merely went along with it. The newly discovered evidence could have been used persuasively to cast doubt on the State's theory of the case. Counsel rightly contended that the evidence would be admissible as "reverse" Williams rule evidence.

In Rivera v. State, 561 So.2d 536 (Fla. 1990) this Court agreed with the Third District Court's decision in Moreno v. State, 418 So.2d 1223 (Fla. 3rd DCA 1982), which permitted such evidence on the basis that an accused may show his or her innocence by proof of guilt of another.

> We agree with the Third District Court in Moreno that where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission.

Rivera, 561 So.2d at 539. The fact that a mere three days before the Exxon robbery, Brian Kennedy attempted a similar robbery [drive a car late at night to a establishment, pump some gas, complete the robbery only if the clerk is alone, shotgun as the weapon of choice] was clearly relevant to the issue of guilt/innocence as well as to the appropriateness of the death penalty. The trial court certainly should have allowed Allen to present this evidence at the penalty phase. The court should have granted Allen's request for a continuance to investigate the facts more closely. Finally, the trial court should have granted a new trial on this basis.

The errors complained of in this point, either alone, in combination with each other, or in combination with other points

contained in this brief, justify a new trial. The cumulative effect denied Jerome Allen a fair trial. Amend. V, VI and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT XI

THE TRIAL COURT ERRED IN DENYING ALLEN'S MOTION TO DISQUALIFY THE PUBLIC DEFENDER PRIOR TO THE PENALTY PHASE, AND DENYING ALLEN'S MOTION TO CONTINUE THE SENTENCING ONCE PRIVATE COUNSEL WAS FINALLY ALLOWED TO APPEAR.

Private counsel filed a notice of appearance prior to the commencement of the penalty phase and sought to disqualify the public defender based on a conflict of interest. (R2630-76,3860-85) Private counsel stated that a continuance would be necessary to adequately prepare the case. The trial court refused to continue the penalty phase or to disqualify the public defender. (R75-76,1410-17) Once the penalty phase ended, the trial court finally allowed private counsel to represent Allen at the sentencing hearing before the trial court. (R2251-80) The trial court granted some additional time for counsel to prepare for sentencing, but denied counsel's final motion to continue the sentencing hearing. (R1935-58,2283-93,2306,4113-17) The basis of Allen's motion to disqualify the Office of the Public Defender was two-fold. Valerie Brown was one of two assistant public defenders representing Allen at trial. At the time of the trial, Brown's husband was employed with, and worked under the supervision of the father of Stephen DuMont, the deceased victim. (R4038) Additionally, the Office of the Public Defender had previously represented Brian Kennedy the codefendant who was the star witness against Allen at the penalty phase. (R4039) Robert Wesley, a lawyer contacted by the NAACP Legal Defense Fund,

investigated the proceedings and discovered the conflicts set forth in the motion. (R2634) Wesley asked the trial court to continue the penalty phase for approximately two months to allow him time to prepare. (R2636)

The conflict regarding the public defender's prior representation of Brian Kennedy was evidently discussed early in the proceedings. (R2638-39) The trial court obviously left the determination of conflict on this issue to the public defender. (R2643) The public defender maintained that no conflict existed citing in part, the fact that Kennedy's cases were already closed. (R2643,2647-48,2659) The public defender assured the court that they used nothing gained during their prior representation of Kennedy in the defense of Allen. (R2643)

Valerie Brown offered to submit to an inquiry of her husband's relationship with the victim's father. Brown stated that her husband does work with the victim's father. At the start of Allen's case, her husband's shifts changed to the afternoons. Brown did not think that DuMont's father works the afternoon shift, but she admitted that she was not sure. Brown assured the court that she did not take her work home. (R2645-46) The trial court stated on the record that it found no conflict in view of the written waiver signed by Allen and his mother. (R2658) The court maintained its ruling, even when counsel pointed out that the waiver was not signed by Allen's mother. (R2658,2675-76)

The next day, penalty phase began. (R1405,2630) The public

defender moved for a continuance of the penalty phase based on the motion to disqualify. Mr. Wesley was seeking a stay and pursuing a writ in this Court. (R1411-13) The public defender renewed the invitation for the court to inquire of Allen and his mother concerning the continued representation by the Office of the Public Defender. (R1411-13) Counsel stated clearly on the record that both Allen and his mother wanted the public defender removed from the case and Mr. Wesley to represent Allen at the penalty phase. (R1415) The trial court reaffirmed its ruling and stated that it would be inappropriate to delay the proceedings.

> We already have an attorney. We're in the stage of having jumped off the building and waiting to hit the ground, and we can't stop now unless there's something else that's going to happen. There are some stages at which you just don't stop. We have reached that stage. I deny your motion.

(R1415-16) The public defender again asked the court to inquire of Allen and his mother, but the court refused saying it would be a useless act. (R1416-17) The court claimed to have no pending motions before it (no objections, no recusals, etc.). The public defender requested a ten minute recess so that he could hand-write a motion and have it signed by Allen and his mother. The trial court chastised counsel for not having done so already, refused to recess the proceedings, and began the penalty phase. (R1417) During a subsequent break in the proceedings, the public defender evidently prepared a written motion for continuance which was signed by Allen. (R1543) The trial court stated that

his ruling would remain the same.

As this Court stated in Foster v. State, 387 So.2d 344 (Fla. 1980), the Sixth Amendment right to the assistance of counsel contemplates legal representation that is effective and unimpaired by the existence of conflicting interest being represented by a single attorney. See also Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942); and Baker v. State, 202 So.2d 563 (Fla. 1967). A conflict exists where counsel has represented a person who is now testifying against a current client, where impeaching information is known to the attorney by the prior representation of the witness. In Olds v. State, 302 So.2d 787 (Fla. 4th DCA 1974), the court stated that a conflict of interest is clearly present where potentially impeaching information had been received by the attorney during the representation of the now adverse witness:

> Finally, on this account, we recognized on the other hand that there may well be instances where matters reach an impasse, leaving no alternative but to relieve the public defender in a trial in order to afford the accused a fair trial and at the same time accord a witness the attorney-client confidentiality. Where the witness had privately given the Public Defender damaging information which he would be required to elicit in the instant trial, it would obviously be a conflict which would not be countenanced.

Olds, 302 So.2d at 792. As this Court stated in Castro v. State, 597 So.2d 259, 260 (Fla. 1992), "A lawyer's ethical obligations to former clients generally requires disqualification of the lawyer's entire law firm where any potential for conflict

arises."

Florida Bar Rule of Professional Conduct 4-1.9 sets forth the guidelines regarding conflict of interest in terms of a former client:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
> (a) Represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interest of the former client unless the former client consents after consultation; or
> (b) Use information relating to the representation to the disadvantage of the former client except as Rule 4-1.6 would permit with respect to a client or when the information has become generally known.

Allen's public defender clearly states on the record that his office used nothing gained in their prior representation of Kennedy in Allen's defense. (R2643)

Rule 4-1.9 requires, at the very minimum, consent by the former client. No waiver of the conflict by Brian Kennedy appears on the record. Under those circumstances, this Court must assume that Kennedy did not consent.

This Court dealt with a similar situation in Bouie v. State, 559 So.2d 1113 (Fla. 1990). At Bouie's trial, the State called Edwards, a former client of the Public Defender's Office (which also represented Bouie). Although this Court relied in part on the fact that the public defender's representation of Edwards had ended when he pleaded guilty, a very important consideration was this Court's observation that Edwards and Bouie were not co-

defendants and their interests were neither hostile nor adverse. That is clearly not the case in Allen's situation. Brian Kennedy was a codefendant awaiting trial. He received a sweet deal from the State in exchange for his testimony against Allen. Kennedy had every reason to minimize his own role in the crime, as well as help the State sentence Jerome Allen to die.

Bouie is distinguishable on even more important grounds. This Court found that Bouie's counsel "cross-examined Edwards extensively and, if anything, zealously guarded Bouie's interests at the expense of Edwards." Bouie, 559 So.2d at 1115. Bouie's lawyer used information that he gleaned from his prior representation of Edwards in an attempt to discredit Edwards on cross-examination. Allen's lawyer clearly states on the record that his office had not used anything gleaned from their prior representation of Kennedy in the defense of Allen. The statement clearly implies that defense counsel recognizes that such action would violate the rules of professional responsibility. (R2643) This Court must assume that Allen's counsel maintained this belief and acted accordingly in his cross-examination of Kennedy.

In Brown v. State, 596 So.2d 1026 (Fla. 1992), this Court concluded that a hearing was warranted in connection with Brown's claims of conflict of interest and ineffective assistance of counsel. One part of the alleged conflict was based on Brown's assertion that one of his trial attorneys that assisted in cross-examining Brown's codefendant and the State's chief witness, George Dudley, had represented Dudley in connection with a plea

of no contest to a charge of aggravated battery prior to trial and, therefore, owed the witness a duty of loyalty that conflicted with the attorney's duty to Brown. Brown, 596 So.2d at 1028.

This Court stated in Castro v. State, 597 So.2d 259, 260 (Fla. 1992):

> ... Our judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate the impropriety, but even the appearance of impropriety as well.

The public defender's prior representation of the key State witness against Allen certainly appears improper. Likewise, the relationship between the public defender and the victim's family certainly appears, at first blush, inappropriate. Allen recognizes that he signed a waiver of conflict relating to the lawyer's relationship with the victim's family. (R3885) However, it is clear from the record that Jerome Allen alone signed the waiver. Allen's mother evidently did not concur or was not consulted in that waiver. This Court should bear in mind that Jerome Allen's tender age is a key issue in this appeal. See Points I and II. A waiver by a fifteen-year-old boy facing the death penalty should be presumptively invalid.

POINT XII

THE INTRODUCTION OF ROBERSON'S CONFESSION VIOLATED ALLEN'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

Eugene Roberson, Allen's triggerman codefendant, refused to testify at the penalty phase. (R1659-61) The State then sought to introduce Roberson's taped confession given to Detective Tom Barry following Roberson's arrest. The trial court overruled Allen's numerous objections [hearsay, not against penal interest, inherently unreliable, collateral inculpatory statement, confrontation, irrelevant to any aggravating circumstance, self-serving], and allowed Detective Barry's taped interview with Roberson to be played to the jury. (R1708-21,1733) Over the same objections, Detective Carter testified that before the taped portion of Roberson's interview, Roberson told police that Jerome Allen ordered him to shoot DuMont to eliminate him as a witness. (R1735-6)

Although hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. §921.141(1), Fla. Stat. (1989). In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), reversible error occurred when the State introduced tape-recorded statements made by a victim of the defendant's prior violent felony conviction. Rhodes did not have the opportunity to confront and cross-examine this witness. The taped statement of the victim described how the defendant tried

to cut her throat with a knife. Under these circumstances if Rhodes wished to deny or explain the testimony, he was left with no choice but to take the witness stand himself. Jerome Allen was left in a similar quandary.

Roberson's statement placed heavy blame on Allen and minimized his own involvement. Although Roberson admitted shooting DuMont, he told Detective Barry he did so at Jerome's insistence. Roberson also told Barry that Jerome stole the car they used in the robbery. Roberson claimed that Allen drove the car to and from the robbery, that Allen provided the gun, that Allen loaded the gun, that Allen told Roberson the gun was ready to shoot, that Allen had previously sawed off the shotgun, that Allen planned the robbery with Kennedy, that Allen told Kennedy to get out of the car, that Allen told Roberson to get out of the car, that Allen instructed Roberson and Kennedy throughout the robbery, that Allen pushed Roberson into the store, that Allen told Kennedy to get the money from the register, that Allen told Roberson to shoot DuMont saying he'd seen their faces, that Allen disposed of the murder weapon, and that Allen divvied up the money. See State's Exhibit #2 at penalty phase.

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court reversed the conviction of an individual when the confession of his codefendant which implicated them both was admitted in their joint trial. Since the codefendant never took the stand, the defendant was denied his right to confront witnesses against him. This Court has previously held that the

fact that defendants are tried separately rather than jointly does not vitiate the constitutional infirmity. Hall v. State, 381 So.2d 683, 687 (Fla. 1979).

> The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant. It is immaterial whether denial of this opportunity occurs because the statements are introduced through the testimony of a third party or because the speaker takes the stand and refuses to answer questions concerning the statements.

Nelson v. State, 490 So.2d 32 (Fla. 1986), appears precisely on point. A police agent secretly taped two conversations with Echols, Nelson's codefendant, wherein Echols discussed his own involvement in the murder and implicated Nelson as the triggerman. Nelson was not present during any of the conversations. At trial, Echols refused to testify claiming his Fifth Amendment privilege. The agent testified as to all three conversations, and the court admitted the two taped conversations into evidence over defense objection.

In reversing Nelson's conviction this Court relied, in part, on the language set forth in Section 90.804(2)(c), Florida Statutes, which sets out the requirements for the statement against interest exception. The statute expressly states that "[a] statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accuser, is not within this exception." This Court also relied on Bruton.

> Moreover, the requirements set out in Bruton v. United States, [citation omitted], make it clear that the admission of this tape would violate Nelson's sixth amendment right to confront witnesses against him. Echols refused to testify, and defense counsel certainly could not cross-examine a tape recording. The admission of a confession of a co-defendant who does not take the stand deprives a defendant of his rights under the sixth amendment confrontation clause.

Nelson, 490 So.2d at 34. (Emphasis added). Likewise, Allen's counsel could not cross-examine the tape recording admitted at his trial. See also Schneble v. Florida, 405 U.S. 427 (1972).

Despite the State's contention below, Roberson's confession is clearly inadmissible under a coconspirator theory. §90.803(18)(e), Fla. Stat. Aside from failing to comply with the procedural requirements to admit the statement under this section, Roberson's confession was clearly not "in furtherance of the conspiracy." Id. See also Romani v. State, 542 So.2d 984 (Fla. 1989). Similarly, this is not a case where Allen also confessed [e.g., Gafford v. State, 427 So.2d 1088 (Fla. 1st DCA 1983)], nor is it a case where the non-testifying codefendant's statement did not expressly incriminate Allen. See, e.g., United States v. Washington, 952 F.2d 1402 (C.A.D.C. 1991).

The introduction of Roberson's confession clearly violated Allen's right to confront witnesses. Amends. V, VI, and XIV, U.S. Const. Nor was the jury given a cautionary instruction as requested by defense counsel. United States v. Perez-Garcia, 904

F.2d 1534 (11th Cir. 1990).

POINT XIII

IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING ALLEN'S MOTION FOR MISTRIAL AFTER A STATE WITNESS COMMENTED ON ALLEN'S PRETRIAL SILENCE.

Detective Dan Carter advised Allen of his rights and witnessed his signing of the Miranda interview sheet. Allen denied any knowledge of the incident, stating that he was home in bed at the time. (R2439-40) When Allen stated that he wanted to telephone Jill Bissett, his HRS counselor, Detectives Carter and Warren left him alone in the interview room so he could talk to his counselor. (R2439-40,2460) Detective Carter then left to attempt to interview Eugene Roberson. Detective Carter conducted the preliminary, unrecorded portion of Roberson's interview. (R1733-35) Prior to interviewing Roberson, Detective Carter had interviewed Brian Kennedy several hours before. (R1737-41)

On cross examination, Detective Carter admitted that, at one point during the interview, Roberson claimed that "the white boy" [Kennedy] ordered the shooting of DuMont. (R1742)

> A: He said it -- Initially he said Jerome.
>
> Q: Uh-huh?
>
> A: Then he said the white boy.
>
> Q: This is all the off-tape interview; right --
>
> A: Yes.
>
> Q: -- where he said the white boy? That really wasn't what you wanted to hear because that wasn't consistent

with Mr. Kennedy's statement, was it?

A: What I wanted to do was to find out whether Mr. Kennedy was telling the truth or not, and I could verify it through Mr. Roberson. Since Mr. Allen did not want to talk --

(R1742) Defense counsel immediately asked to approach the bench, pointed out that the detective's response was unresponsive, and moved for mistrial. Counsel argued that Detective Carter improperly commented on Allen's invocation of his Fifth Amendment and Sixth Amendment rights. (R1743) The prosecutor responded that the cross-examination was beyond the scope of direct examination. (R1743-44) The prosecutor conceded that the witness may have made a misstatement, but declined to accept any responsibility. (R1744) The prosecutor also contended that evidence at the guilt phase established that Allen did give a statement to police denying any involvement in the crime. The parties discussed the continuing animosity of this particular witness. See Point VIII. Defense counsel pointed out that the court cautioned the State to direct the witness not to volunteer any information. (R1746) The State eventually conceded that the comment was an improper one but suggested a curative instruction rather than a mistrial. (R1745) The trial court excused the jury and admonished the witness. (R1748-50) The court reserved ruling on the motion for mistrial. (R1747-48) At the conclusion of all of the evidence, defense counsel urged the court to rule on the motion for mistrial and, if denied, defense counsel wanted a curative instruction. (R1859-60) The trial court declined to

give the jury a curative instruction and reserved ruling on the motion for mistrial until the jury returned with a verdict. (R1862) The trial court implicitly denied the motion for mistrial.

The testimony of Detective Carter was a clear comment on Jerome Allen's exercise of his constitutional right to remain silent. Although the rules of evidence are somewhat relaxed at a capital penalty phase, the statute providing that procedure states, in part:

> ... However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

§921.141(1), Fla. Stat. The evidence was inadmissible. See, e.g., Estelle v. Smith, 451 U.S. 454 (1981). The fact that the trial court refused to give a curative instruction amplifies the error. The error cannot be considered harmless in light of the close (7-5) vote to impose the ultimate sanction. The damage done to Allen's case is especially obvious, when one considers that the jury heard from the other two codefendants, Kennedy and Roberson. The motion for mistrial should have been granted. At the very least, the requested curative instruction should have been given. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9, 16, 17, and 22, Fla. Const.

POINT XIV

IMPROPER PROSECUTORIAL ARGUMENT TAINTED THE JURY'S RECOMMENDATION AT THE PENALTY PHASE IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to the penalty phase, Allen moved in limine to prohibit any evidence that was not applicable to the statutory aggravating circumstances. (R3856) During penalty phase closing argument, the prosecutor engaged in impermissible argument on four occasions. Each time defense counsel objected and moved for mistrial each time. The trial court sometimes sustained the objection, sometimes overruled the objection, but always denied the motion for mistrial.

The first objectionable argument by the prosecutor was:

> And they left him there paralyzed, bleeding to death; and they didn't even know or care whether he was dead.

(R1877) Defense counsel immediately objected on relevant grounds and moved for mistrial. The trial court overruled the objection and denied the motion. (R1877) The above argument was clearly irrelevant. In essence, the prosecutor was arguing that Allen had no remorse. It is abundantly clear that such a consideration is absolutely irrelevant and constitutes argument on a nonstatutory aggravating circumstance, i.e., lack of remorse. Trawick v. State, 473 So.2d 1235 (Fla. 1985). The objection should have been sustained and/or the motion for mistrial should have been granted.

The prosecutor's next impermissible argument occurred when

he discussed the "catch-all" mitigating circumstance dealing with nonstatutory mitigating circumstances.

> -- any other aspect of the defendant's character or record and any other circumstance of the offense. Wide open. You can consider just about anything else that you care to. If you believe that it is a mitigating circumstance and it is a <u>significant</u> mitigating circumstance, you can consider it.

(R1880) Defense counsel objected to the prosecutor's characterization that the mitigating circumstance must be "significant," contending that it was a misstatement of law. The trial court sustained the objection but denied the motion for mistrial. (R1880) The prosecutor's argument was a misstatement of law, as the trial court recognized. The seed was planted in the jury's mind that, in order to consider evidence as mitigating, they must find that it is a <u>significant</u> mitigating circumstance. The trial court should have either granted the motion for mistrial or, in the alternative, immediately given a curative instruction to correct the prosecutor's misstatement of the law. Although not as egregious as the other objectionable arguments in this point, Appellant points it out to demonstrate the continuing thread throughout final summation.

The next area of objectionable argument related to the victim of the crime, Stephen DuMont.

> And you didn't meet him, but here is his picture (indicating). ...
>
> * * * *
>
> You don't know very much about

> Stephen DuMont. The law doesn't really provide for that.

(R1885-86) Defense counsel immediately objected based on relevance and moved for mistrial. At a bench conference outside the hearing on the jury, Appellant pointed out that, although Booth v. Maryland[14] had been overruled, Florida statutes and caselaw still prevent the presentation of victim impact evidence to the jury. (R1886-87) In an attempt to justify his argument, the prosecutor responded:

> I was interrupted in the middle of that. And I was going to tell them that its not appropriate that they hear the evidence about him, but they can think about him and the -- in terms of the murder itself and how it was committed, they can think about him. He's dead.

(R1887) Defense counsel pointed out that the prosecutor's non-comment about the victim was, in reality, a comment. (R1887-88) The trial court overruled the objection, denied the motion, and instructed the prosecutor that he could finish his comment as he intended. Defense counsel expressed amazement at the trial court's ruling and renewed his objection.

> It's just as bad. He's telling them don't think -- you're not allowed to think about the victim. Don't do it. That tells them to think about it. That's the ultimate left-handed comment.

(R1888-89) The court then reversed his ruling and told the prosecutor to proceed without further comment along those lines. (R1889) Appellant requested a curative instruction, but the

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[14] Booth v. Maryland, 482 U.S. 496 (1987).

trial court ruled that it would be covered by the standard instructions. (R1889) The prosecutor then continued his argument:

> The law doesn't make any provision for, and its not appropriate for your deliberations to consider anything relating to the character of the victim.

(R1890) Defense counsel again objected. After the trial court overruled his objection, defense counsel requested a curative instruction which the trial court again maintained was covered by the standards. (R1890-91)

At the penalty phase, the State is limited to evidence and argument on the aggravated circumstances listed in the statutes. §921.141, Fla. Stat. None of these aggravating circumstances related to the character or personal characteristics of the deceased. In Grossman v. State, 525 So.2d 833, 842 (Fla. 1988), this Court held that victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. The prosecutor's argument was improper, Appellant's objections should have been sustained and/or the motion for mistrial should have been granted. At the very least, when the prosecutor continued in this vein, the motion for mistrial should have been granted.

The final incidents of prosecutorial misconduct occurred when the prosecutor began discussing Allen's discussion with Roberson about the seriousness of the charge:

> ... He knew it was a serious charge in his statement he said this ain't no misdemeanor.

> He knows about court's gain time. Six or seven or eight months would be all that a person would serve on a four-year sentence was another comment that he made on that tape.

(R1892) Appellant interposed a relevance objection contending that the State was arguing non-statutory aggravating circumstances. The trial court overruled the objection and allowed the prosecutor to continue. (R1892-93)

> "We'll put it on the white boy," is another comment that he made. "They ain't going to sentence us to like twenty-four, fifty years." and "You shouldn't have told them. You messed it all up, Dee."
> That's the character of the person whose sentence you're here to consider this evening. That's some of it. ...

(R1893)

The prosecutor was obviously planting a seed in the jury's mind that, if they did not sentence Allen to death, he would undoubtedly be free one day. A prosecutor cannot argue that a defendant could be paroled if he gets a life sentence. See, e.g., Norris v. State, 429 So.2d 688 (Fla. 1983). The prosecutor's argument was clearly improper and should not have been permitted to continue.

Appellant contends that each of the objectionable arguments made by counsel for the State required that Appellant's motion for mistrial be granted. If not individually, the cumulative effect of the objectionable arguments should have resulted in a mistrial. The failure of the trial court to mistry the case, sustain the objections, and/or provide the requested curative

instructions, resulted in a tainted jury recommendation for death [albeit a close one (7-5)]. The resulting death sentence is unconstitutional. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17, Fla. Const.

POINT XV

IN CONTRAVENTION OF ALLEN'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON AN APPLICABLE STATUTORY MITIGATING CIRCUMSTANCE.

During the charge conference at the penalty phase, defense counsel requested that the court instruct the jury on the statutory mitigating circumstance dealing with a defendant's minor participation as a mere accomplice.[15] The State contended that no evidence existed to support the instruction. Defense counsel pointed out that Eugene Roberson was the triggerman and Brian Kennedy committed the actual robbery. Allen was guilty under a principal theory. Counsel also pointed out that the jury's decision hinged on Brian Kennedy's credibility. The trial court declined to instruct the jury on this critical mitigating circumstance. (R1847-48,1906-21)

Section 921.141(6)(d), Florida Statutes states:

> The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The evidence established that Eugene Roberson shot Stephen DuMont. Prior to the shooting, Brian Kennedy robbed DuMont of some cigarettes and cash. Jerome Allen drove the car to and from the crime scene. If Eugene Roberson's statement to police is to be believed, Roberson shot DuMont at Allen's urging. Appellant

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[15] §921.141(6)(d), Fla.Stat.

contends that there was sufficient, competent evidence to support an instruction on this important mitigating circumstance.

> The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence in instructions, we encourage trial courts to err on the side of caution and to permit the jury to receive such, rather than being too restrictive. (emphasis added)

Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986).

Robinson, along with Abron Scott, his codefendant, accosted a man in the parking lot of a Tampa bar. After beating him unconscious, they placed the victim in the back seat of his car and drove to an isolated area. After pulling the victim out of the car, Robinson and Scott started fighting. Robinson attempted to run over the victim with the car, but stopped in order to keep from hitting Scott too. Scott then beat and choked the victim and Scott finally ran over him with the car.

This Court held that the trial court committed reversible error in failing to instruct the jury on two statutory mitigating circumstances, one of which is the factor at issue here. If the facts in Robinson support a jury instruction that he was an accomplice and his participation was relatively minor, Jerome Allen is clearly entitled to the same instruction. This Court stated that, "The degree of Robinson's participation is subject to some debate, but there is at least enough evidence to warrant

the giving of this mitigating charge to the jury." Id. It is clear that the evidence does not need to be overwhelming in order to justify a jury instruction. Jerome Allen presented sufficient evidence to justify his request for this instruction. One cannot say with certainty that the error did not contribute to the extremely close (7-5) recommendation for death.

POINT XVI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

In finding this particular aggravating circumstance, the trial court wrote:

> The state has established beyond a reasonable doubt that the Defendant was the master mind of the entire chain of events leading up to and culminating in the murder of Stephen DuMont. The record reflects that the Defendant, ALLEN procured the murder weapon, sawed off the barrel, test fired the weapon, made a special trip to obtain additional ammunition, planned the robbery, planned to deal with the witnesses, made no provision for hiding his or the other Defendants' identification, loaded the shotgun presenting it to his Co-Defendant ROBERSON, with the words, "It's ready to shoot." These preparations were capped by his order to his Co-Defendant ROBERSON to murder Stephen DuMont.
>
> This aggravating element was present. The jury was instructed as to this aggravating circumstance.

(R4177)

The State must prove all aggravating circumstances beyond reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In order for this aggravating circumstance to apply, the State must show "a careful plan or prearranged design." Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This circumstance "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." McCray v. State, 416 So.2d 804, 807

(Fla. 1982). As this Court stated in Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990):

> The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. Heightened premeditation can be demonstrated from the manner of killing, but the evidence must prove beyond a reasonable doubt that the Defendant planned or arranged to commit a murder before the crime began.

The evidence presented by the State fails to prove the requisite heightened premeditation beyond a reasonable doubt. Appellant concedes that the evidence is sufficient to prove that Allen and his codefendants conceived and planned a robbery. All of the "preparations" that the trial court describes in finding this factor are consistent with the planning of a robbery and robbery alone. There is absolutely no evidence that a killing was even contemplated by any of the codefendants prior to the actual robbery. Indeed, the State's evidence establishes the contrary. Brian Kennedy testified at the penalty phase that Jerome Allen pulled the shotgun from underneath his couch and the trio discussed different ways to make money. (R1461-74) One plan involved selling drugs in Titusville. They also discussed committing a robbery. (R1474-75) The gun could be used to "scare" anyone working at the place they decided to rob. (R1476) Jerome Allen suggested that they use the butt of the shotgun to hit their intended victim on the head. (R1477) It is clear that there was no prior intent to murder anyone. Certainly the State

failed to prove beyond a reasonable doubt the heightened premeditation necessary to sustain a finding of this particular factor. Additionally, the court should not have instructed the jury on this invalid circumstance. See, e.g., Omelus v. State, 584 So.2d 563 (Fla. 1991).

POINT XVII

THE IMPOSITION OF THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE WHERE JEROME ALLEN WAS NOT THE TRIGGERMAN, WAS ONLY FIFTEEN YEARS OLD AT THE TIME OF THE OFFENSE, THE AGGRAVATING CIRCUMSTANCES ARE NEITHER NUMEROUS NOR COMPELLING, AND THE MITIGATING CIRCUMSTANCES ARE SUBSTANTIAL.

Introduction

In sentencing Jerome Allen to die, the trial court weighed three aggravating circumstances against one statutory mitigating circumstance and numerous nonstatutory mitigating circumstances. The trial court concluded that the murder was committed while Allen was engaged in the commission of a robbery [§921.141(5)(d), Fla.Stat.]; that the murder was committed to prevent a lawful arrest [§921.41(5)(e), Fla. Stat.]; and that the murder was committed in a cold, calculated and premeditated manner [§921.141(5)(i), Fla. Stat.]. (R4276-77) The trial court found that Jerome Allen's tender age was a mitigating circumstance. [§921.141(6)(g), Fla. Stat.] (R4178) However, the trial court determined that Allen's age "should not be given overwhelming weight." (R4178) The court claimed that Allen was mature, understood the distinction between right and wrong, understood the nature and consequences of his actions, and, despite his tender years, was the mastermind of the crime. (R4178)

Dealing with the evidence presented to the jury, the judge found that the evidence supported five nonstatutory mitigating circumstances:

(1) Allen's father was an alcoholic;
(2) Allen's grandmother was murdered by his grandfather who then committed suicide;
(3) Allen lacked a father-figure;
(4) Allen was an exemplary older brother; and
(5) Allen was a poor student whose psychological evaluations throughout the years disclosed an inability to perform scholastically.

(R4179-80) Although the judge found the above circumstances to be established by a preponderance of the evidence, the court concluded that none of the above mitigating circumstances were substantial in nature, but claimed to weigh their value. (R4179-80)

The trial court considered evidence of an additional nonstatutory mitigating circumstances presented to the court at sentencing and not heard by the jury. The court claimed that all mitigating circumstances were to be given weight and consideration, even though the jury heard no evidence of the circumstances proven at sentencing. (R4180) The testimony of a qualified psychologist established:

(1) Allen's testing indicates that he is younger than his physical age;
(2) Allen's testing indicates he is immature for his age;
(3) Allen's testing indicates that he functions at a borderline level;
(4) Allen's tests indicate the possibility of brain damage;
(5) Allen exhibits psychotic-like symptoms; and
(6) Allen has never been treated for these problems.

(R4181) Despite the above evidence, the court maintained its

opinion that Allen was the "ringleader" and, as such, must take responsibility for his actions. (R4181)

The trial court also considered the following:

> (1) Allen was not the triggerman;
> (2) the crime was not heinous, atrocious, or cruel;
> (3) Allen has no prior violent felony record.

(R4181-82) The court pointed out that the jury heard evidence establishing the above. The court did not consider any of the above to be "substantial" mitigating circumstances, "but, nevertheless, balanced them in the weighing process." (R4182) The court weighed the three aggravating circumstances against the one statutory mitigating circumstance and the nonstatutory mitigating circumstances, and concluded that Allen should die. (R4182)

A. Faulty Weighing and Fact Finding

A trial judge is required by statute and caselaw to make written findings of fact with "unmistakable clarity" to afford meaningful appellate review of a sentence of death. Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Here, the trial judge entered a written order which expressly found the existence of substantial mitigating circumstances. However, the majority of those considerations were not attributed "substantial" weight. For example, the trial court concluded:

> The Defendant established by a preponderance of the evidence that when he was approximately one year old, his grandfather killed his grandmother and then committed suicide with a handgun. There was no evidence presented as to

> the psychological effect of this circumstance on the Defendant. The Court does not consider these facts a substantial mitigating circumstance, but has weighed its value.
>
> * * * *
>
> The Defendant presented his school records for consideration by the jury ... the Defendant was not a good student, ... the records contain one or more psychological evaluation disclosing his inability to perform in class. No evidence was presented as to the psychological effects of his poor performance and psychological evaluations. The Court does not consider these facts a substantial mitigating circumstance, but has weighed its value.

(R4179-80)

The trial court states that all mitigating circumstances established by the evidence (statutory or nonstatutory; presented to the jury or not), should be given weight and consideration. (R4180) However, it is clear from the court's order that it dismissed the nonstatutory mitigating circumstances that were clearly established by the evidence. The trial court repeatedly states, "the Court does not consider this to be a substantial mitigating circumstance ... ." (R4179-82) In essence, the trial court gives no weight to substantial mitigating circumstances that are clearly established by the evidence. In Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), this Court stated that the trial court "must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature." "Although the relative weight given

each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell, 571 So.2d at 420. The trial court ignores valid mitigating circumstances clearly established by the evidence by considering them "not ... substantial mitigating circumstance[s] ... ." (R4179-82)

The clearest example of the fallacy of the trial court's logic in his treatment of the mitigating evidence is revealed by the second nonstatutory mitigating circumstance contained in the order [murder of grandmother by grandfather who then committed suicide]. (R4179) The trial court writes:

> ... there was no evidence presented as to the psychological effect of this circumstance on the Defendant. ...

(R4179) This Court condemned similar treatment of uncontroverted evidence that a defendant had been physically and psychologically abused in his youth for many years. Nibert v. State, 574 So.2d 1059 (Fla. 1990). Nibert's trial judge found his abused childhood to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." Nibert, 574 So.2d at 1062. This Court correctly pointed out that psychological and physical abuse during a defendant's formative years is *per se* mitigation. Id. Similarly, the murder of one's grandmother by one's grandfather who then commits suicide cannot be dismissed as non-mitigating or unsubstantial mitigation. The trial court's

treatment of all of the nonstatutory mitigating circumstances is similarly flawed.

B. The Death Sentence is Disproportionate in Allen's Case

This case can perhaps best be described as a simple robbery "gone bad." It is a textbook felony murder. Although the trial court found three aggravating circumstances, only two of them are valid. See Point XVI. None of the aggravating circumstances are particularly compelling. In fact, one of the aggravating circumstances is necessarily present in every felony murder case. Additionally, the trial court found one statutory mitigating circumstance, i.e., Jerome Allen's tender age. (R4178-79) Furthermore, the trial court found an additional fifteen nonstatutory mitigating circumstances but gave them little if any weight. (R4179-82) Considering the wide spectrum of murder cases that this Court reviews, this case simply does not qualify as one warranting imposition of the death penalty.

Even where a jury recommends the death penalty, the presence of such uncontroverted, substantial mitigation in the record removes this case from the category of being the most aggravated and the least mitigated of capital murders. Because of the significant mitigation, the death penalty is unwarranted as a matter of law. See Penn v. State, 574 So.2d 1079, 1083-84 (Fla. 1991); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990) [trial court incorrectly weighed substantial mitigation and, based on record, death penalty is disproportionate]; Farinas v. State, 569 So.2d 425, 431 (Fla. 1990); Livingston v. State, 565 So.2d 1288,

1292 (Fla. 1990) [several mitigating factors effectively outweigh the remaining valid aggravating circumstances]; and Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988) [substantial mitigation reveals that case does not warrant harshest penalty].

Despite the trial court's conclusion, Jerome Allen's age should be given overwhelming weight. See Points I and II. Additionally, the trial court incorrectly weighed substantial mitigation. See prior section. Furthermore, the 7-5 death penalty recommendation and resulting sentence are faulty because both are based in significant part on an improper aggravating circumstance. See Point XVI. If the jury had not been instructed on an impermissible aggravating circumstance [heightened premeditation], they very well could have recommended life instead of death. This is especially true in light of the extremely close (7-5) jury vote. In addition to faulty jury instructions, the recommendation was also tainted by improper prosecutorial argument. See Point XIV.

Finally, the disparate treatment of Allen's codefendants is an important consideration. The State's case clearly established that Brian Kennedy was the actual robber in that, he was the one who pulled DuMont's wallet out and removed the cash from it and stole numerous packs of cigarettes for his own personal use. Kennedy accomplished this task while Eugene Roberson pointed the shotgun at Stephen DuMont. All of this occurred while Jerome Allen remained outside. Despite this evidence, the State and the trial court insisted that Jerome was the "ringleader" of the

entire affair. This conclusion defies logic. Although Allen drove the car to and from the gas station, he remained outside while the actual robbery occurred. Although the shotgun belonged to Allen, Roberson was the one wielding it throughout the evening. Although the State's evidence indicated that Allen prompted him, it was Eugene Roberson who pulled the trigger and fired the shot that killed Stephen DuMont. Close scrutiny of the record fails to support the State's theory and the trial court's conclusion that Jerome Allen was the "ringleader." The contrary conclusion is supported further when one compares the relative ages of the culprits. Eugene Roberson was seventeen, Brian Kennedy was sixteen, and Jerome Allen was merely fifteen at the time of the offense. Certainly Roberson and Kennedy are as culpable if not more so.

The disparate treatment of the codefendants is another consideration. In exchange for his testimony against Allen, Brian Kennedy received substantial concessions from the State. The State agreed to drop Kennedy's other pending charges which included grand theft and burglary. The State also agreed to refrain from calling Allen or Roberson as witnesses against Kennedy at his trial. Most importantly, the State agreed to forego their quest to execute Brian Kennedy. (R1454-57) Eugene Roberson also avoided the death penalty and received life imprisonment. See attached appendix.[16] Even if one accepts the

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[16] If this Court determines the attached appendix to be insufficient, Appellant requests that this Court take judicial notice of Roberson's court file [Ninth Circuit Court Case No. 91-

State's evidence in its totality, the disparate treatment of Kennedy and Roberson smacks of unfairness. Considering their relative roles in the crime in conjunction with their ages (particularly in view of Allen's 77 IQ), the inequality in punishment is simply not fair. See McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Slater v. State, 316 So.2d 539 (Fla. 1975).

C. Conclusion

Although the trial court found three aggravating circumstances, only two are valid. One is "automatic" in all felony murders. The trial court ignored substantial mitigation by giving it little or not weight. Allen's tender age should weigh heavily in the decision to execute him. Finally, the disparate treatment of the codefendants who were equally if not more culpable then Allen reveals that Allen's death sentence is disproportionate.

72-CFA, Fifth District Court of Appeal Case No. 92-91], §90.202(6), Fla. Stat.

POINT XVIII

FLORIDA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Allen contended that the aggravating circumstance dealing with felony murder results in the application of an automatic aggravating circumstance in felony murder cases. (R3624-29) Allen objected to the jury instruction on this particular circumstance. (R1814) Appellant recognizes that this Court has previously rejected this contention. See, e.g., Mills v. State, 476 So.2d 172 (Fla. 1985). Appellant urges this Court to reconsider its stand on the issue in light of Tennessee v. Middlebrooks, No. 01-S-01-9102-CR-00008 (Tenn. September 8, 1992), wherein the Supreme Court of Tennessee held that the statute as applied in Middlebrooks' case "does not sufficiently narrow the population of death-eligible felony murder defendants under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution because the aggravating circumstance [,] ... that the defendant was engaged in committing a felony, essentially duplicates the elements of the offense of first-degree felony murder set out in [the statute]." Middlebrooks, slip op. at 3.

Allen contends that the trial court erred in denying his motion to strike adjectives from certain mitigating circumstances contained in Section 921.141(6), Florida Statutes. (R3629-34) These limiting adjectives "extreme" and "substantially" infringe on the rights of the accused to present "any aspect of [his]

character or record." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Such an infringement violates the Eighth and Fourteenth Amendments. Hitchcock v. Dugger, 481 U.S. 393 (1987).

The jury's recommendation was tainted by both instruction and argument that diminished their responsibility contrary to the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985). During the preliminary instructions, the trial court told the jury that their verdict was only a "recommendation." The jury was not told that their verdict would be given "great weight." (R1442-43) The final jury instructions did include some Tedder[17] language ("great weight"). (R1906-7,1909-10) The prosecutor also briefly mentioned the Tedder standard. (R1895) Unfortunately, the State initially told the jury that its deliberations at the penalty phase would be less onerous, since they only had to "recommend" a sentence. The State also pointed out that their verdict did not need to be unanimous. The prosecutor indicated that the jury could simply vote once and that would be their "recommendation." (R1444-46) At that point, defense counsel moved for a mistrial citing Caldwell and requested a curative instruction. The trial court denied both the motion and the curative instruction. (R1444-46) Appellant recognizes that this Court has held that Caldwell is inapplicable to Florida's capital sentencing scheme. See, e.g., Gunsby v. State, 574 So.2d 1085 (Fla. 1991). Nevertheless, Appellant contends that the prosecutor's argument and the trial court's instructions diminished the jury's sense of

[17] Tedder v. State, 322 So.2d 908 (Fla. 1975).

responsibility at the penalty phase. As such, Eighth Amendment error occurred.

The Florida capital sentencing scheme allows the exclusion of otherwise qualified jurors based upon their moral opposition to the death penalty. This unfairly results in a jury which is prosecution prone and denies a defendant the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968). Allen attacked this procedure below. (R3702-3)

Allen asked the State to disclose which aggravating circumstances they sought to prove. (R3708-10) The failure to provide a defendant with a notice of the aggravating circumstances on which the State will attempt to rely in seeking the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972).

The death penalty in Florida is imposed in an arbitrary and capricious manner based on factors which play no part in the consideration of sentence. The State is unable to justify the death penalty as the least restrictive means available to further its goals where a fundamental right, human life, is involved. Roe v. Wade, 410 U.S. 113 (1973). Allen attacked the constitutionality of the statute on these grounds. (R3719-20)

Section 921.141, Florida Statutes, is unconstitutional for the following reasons: (1) the statute provides for cruel and unusual punishment; (2) the statute allows excessive and disproportionate penalties; (3) the statute provides that the

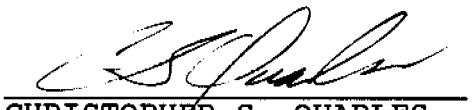
jury recommendation at the penalty phase be by a fair majority with no requirement of unanimity; (4) the charging document does not specifically allege the aggravating circumstances relied on by the State; (5) the jury instructions do not provide any guidance to the jury as to the weighing process of aggravating and mitigating circumstances; (6) the jury is not required to make specific findings concerning the aggravating circumstances that they determined established beyond a reasonable doubt; (7) the statute allows the trial court to consider aggravating circumstances that the jury may not have concluded were established beyond a reasonable doubt; and (8) the jury instructions on the aggravating and mitigating circumstances are unconstitutionally vague and overbroad and fail to provide any guidance or to channel the jury's discretion in any way. (R3721-25) Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17, Fla. Const.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Jerome Allen requests that this Honorable Court vacate his convictions and sentences and remand for a new trial where life is the maximum possible sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Jerome M. Allen, #704007, P.O. Box 747, Starke, FL 32091-0747, this 7th day of June, 1993.

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