IN THE SUPREME COURT OF FLORIDA

ROBERT E. HENDRIX,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,048

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On September 18, 1990, the Grand Jury in and for Lake County, returned an Indictment charging Appellant with two counts of conspiracy to commit first degree murder in violation of Sections 777.04 and 782.04(1)(a), Florida Statutes (1989), two counts of first degree murder, in violation of Section 782.04(1)(a), Florida Statutes (1989), and one count of burglary of a dwelling while armed, in violation of Section 810.02(1) and 810.02(2)(b), Florida Statutes (1989). (R 3249-3250) Appellant filed five separate motions to declare the death penalty statute unconstitutional. (R 3335-3357, 3358-3361, 3367-3371, 3382-3395, 3397-3417) These motions were all denied. (R 3552-3554) Appellant also filed a suggestion of disqualification of the presiding judge pursuant to Section 38.02, Florida Statutes

(1989). (R 3448-3449) The trial court denied this motion as being legally insufficient. (R 2797, 3552-3554) Appellant filed a motion to strike the jury panel on the grounds that it was selected in a racially discriminatory manner. (R 3467-3487) This motion was also denied. (R 3552-3554)

Appellant proceeded to jury trial on September 9 - 23, 1991, with the Honorable Jerry Lockett, Circuit Judge, presiding. (R 1-2537) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all five counts. (R 2532-2534, 3721-3725) Shortly thereafter, the penalty phase portion of Appellant's trial was conducted. (R 2601-2747) Following deliberations, the jury returned verdicts unanimously recommending death on each of the murder counts. (R 2747, 3737-3738) Appellant filed a timely motion for new trial. (R 3777-3779) This motion was denied. (R 3150)

On November 4, 1991, Appellant again appeared before Judge Lockett for sentencing. (R 3147-3237) Judge Lockett sentenced Appellant to death for each of the murder convictions, thirty years in prison on each of the conspiracy convictions and life imprisonment on the burglary conviction. (R 3226-3235, 3833-3849) Judge Lockett then filed his written findings of fact in support of the imposition of the death penalty. (R 3851-3858) The record also reflects two orders requiring Appellant to make restitution in the amount of $13,267. (R 3859-3860)

Appellant filed a timely notice of appeal on November 30, 1991. (R 3884-3885) Appellant was adjudged insolvent and

the Office of the Public Defender was appointed to represent him on appeal. (R 3881-3883)

STATEMENT OF THE FACTS

A: GUILT PHASE

In November 1988, Elmer Scott was prosecuted for armed burglary and petit theft in Lake County. (R 1131) A plea bargain was reached whereby Scott was allowed to plead no contest to a reduced charge of simple burglary, adjudication was withheld and he was placed on community control for two years. (R 1133) As a condition of the plea agreement, Scott had to truthfully testify against his co-defendant. (R 1133) After the plea agreement was reached, Scott gave a deposition to the Assistant State Attorney. (R 1136) Prior to this, the Assistant State Attorney did not have sufficient evidence to charge Scott's accomplice. (R 1136) However, after Scott's statement was completed, the State Attorney's Office filed an information charging Appellant with armed burglary. (R 1137, 1142) In the opinion of the prosecutors, the case against Appellant rested solely on the testimony of Elmer Scott. (R 1138, 1144-1145) The prosecutor made a formal plea offer to Appellant that in return for a plea the State would agree to a four year prison sentence followed by five years probation. (R 1146) This plea offer was still pending on August 28, 1990. (R 1146)

In the summer of 1990, Appellant lived with his girlfriend, Denise Turbyville at her mother's house. (R 1501, 1402) Denise knew about the pending burglary charge and also knew that Appellant had been offered a plea bargain of four years in prison followed by five years probation. (R 1501-1502)

Appellant told her that Elmer Scott was the only evidence that the State had against him. (R 1503) In early June 1990, Appellant told Denise that he would do whatever it took to keep Elmer from testifying against him, so that he would not have to go back to prison. (R 1503-1504) Throughout that summer, Appellant told Denise he was willing to kill Scott. (R 1504) Appellant discussed with Denise several possible ways of killing Scott. (R 1511-1513) Appellant once told Denise he could stop Scott on his way home from work by pretending that his car was broken down. (R 1511) When Scott stopped, Appellant would shoot him. (R 1511) However, Appellant rejected this option because Scott's wife, Michelle would probably be in the car with him. (R 1511) Another time, Appellant told Denise that she could drop him off down the road from Scott's house and Appellant would act like his car broke down and ask to use the phone. (R 1512) Appellant would then go into the bathroom, put on a mask and gloves and come out and kill Scott. (R 1512) Appellant said that if Michelle was there, he would have to kill her too. (R 1512-1513) Still another time Appellant mentioned cutting the brake line to Scott's truck, but declined this option since Michelle drove the truck most of the time. (R 1513) At Appellant's request, Denise made several phone calls to friends in an attempt to obtain a throw away gun. (R 1514-1515)

In the weeks leading up the murder, Appellant told several friends that he was going to prevent Elmer from testifying against him by killing him. (R 1364-1367, 1386)

Appellant attempted to secure a gun from several friends. (R 1229, 1888, 1991) Denise told two of her friends that she was going to drive the car to assist Appellant in killing Elmer Scott. (R 1868-1871, 1893-1895)

On the morning of August 27, 1990, Appellant got up and left the house alone. (R 1523) Appellant was gone all day until about 4:30 p.m. (R 1523) When Appellant arrived home, he had a gun with him. (R 1523) Appellant took some empty toilet paper rolls with tissue stuffed inside and used black electrical tape to wrap this around the gun. (R 1524-1525) Appellant left and returned about a half an hour later, and told Denise he had test fired the gun. (R 1525) Appellant said the gun was too loud so he tried to silence it. (R 1526) Appellant seemed resigned to the fact that he would be going to jail the next day when he went to court. (R 1425-1529) That evening, some friends called Appellant and asked him to go out, but Appellant said no that he was just going to stay in with Denise since he was going to jail the next day. (R 1529) A few friends did come over and sat around with Appellant and Denise and smoked some marijuana. (R 1530) Appellant and Denise went into their bedroom about 10:00 p.m. (R 1531) About a half an hour later, they heard Denise's mother's car pull into the driveway. (R 1531, 1406) Denise's mother went to bed immediately. (R 1406, 1531) At about 11:00 p.m., Appellant told Denise to get ready that they were going to the Scott's. (R 1537) Although Appellant had talked about killing Elmer for some time, Denise really did not take him

seriously until that day, when he started to get ready. (R 1535, 1537)

Denise drove Appellant's car across the county line and dropped him off near Elmer's house. (R 1540) Appellant had fixed up a mask to wear, wire gloves and a baseball cap. (R 1536-1537) After she dropped Appellant off, Denise drove to the county line and pulled off to the side of the road. (R 1544) While she waited in the car, Denise heard approximately six gun shots. (R 1544) Several minutes later, Appellant came up to the car and got in and told her, "Don't look, just go." (R 1545) Denise never looked at Appellant but drove straight home. (R 1547) When they arrived home, they did not turn on any lights. (R 1547) Appellant took a shower and afterwards went out back and burned his clothes. (R 1547) When they came back inside the bedroom, Appellant told Denise what happened at the trailer. (R 1548)

Appellant said he knocked on the door and Michelle invited him in. (R 1549) Elmer was in the bathroom, shaving, and Michelle said he would be out in a few minutes. (R 1549) When Elmer came out, Appellant asked to use the bathroom. (R 1549) When Appellant returned, Elmer was sitting in the chair in the living room. (R 1549) Appellant shot Elmer in the head. (R 1549) Michelle came at Appellant and tried to fight him. (R 1549) Appellant saw a knife, grabbed it and cut Michelle's neck. (R 1550) After Elmer was shot, Appellant hit him in the head with the gun and shattered the handle. (R 1550) To make sure

that Elmer was dead, Appellant stabbed him. (R 1550) When Appellant shot Elmer, he allegedly told him, "I'll see you in hell." (R 1550)

Juan Perez lived with his parents in the home next to Elmer and Michelle Scott. (R 2047-2048) On the evening of August 27, 1990, Perez was at home watching the late news. (R 2049) At some point, Perez turned off the TV and went into the bedroom to get ready for bed. (R 2050) The windows and the back door were opened and Perez was the only one in the house that was awake. (R 2051) While in the bathroom, Perez heard a commotion going on next door at the Scott's. (R 2052) Perez heard several loud bangs like someone hitting the wall. (R 2053) Perez got dressed and walked out the back door towards the Scott's trailer. (R 2053) When Perez got to the fence which separated his yard from the Scott's trailer, he heard loud voices arguing. (R 2055) Perez heard Michelle yell, "No" several times and also heard a voice yell, "Shut up." (R 2055-2056) The voice was a man's voice but not Elmer's and Perez did not recognize it. (R 2057) The shades to the windows of the Scott trailer were drawn and the lights were on so Perez could only see shadows. (R 2060) Perez got scared and went back inside the house and went to his bedroom window. (R 2060) Perez could hear an argument but could not see anything going on. (R 2061) Perez then went to his mother's bedroom window to see if he could see anything from there. (R 2062) While there, Perez saw the door to the Scott's trailer open and a man walked out. (R 2063-2064) The man was heavy-set

with blonde hair and a beard wearing pants and a button shirt and a baseball cap. (R 2064) The man had shoulder-length hair. (R 2065) The man walked down the driveway, got to the gate, exited and closed the gate behind him. (R 2068)

The bodies of Elmer and Michelle Scott were discovered on August 28, 1990, at approximately 6:00 p.m. (R 948-949) There were no signs of forced entry at their trailer. (R 953) An autopsy was performed on each of the bodies on the following day. (R 1044) Elmer Scott had one bullet wound to his cheek which entered his mouth and was retrieved from the back of his throat. (R 1046-1049) This shot was not fatal and would not have rendered him unconscious. (R 1049) Scott also suffered multiple lacerations to the scalp and multiple fractures to the skull beneath these lacerations. (R 1049-1050) It is possible that Scott was rendered unconscious from these blows. (R 1050) A piece of metal was found within the muscles in the scalp area. (R 1049) Scott also had three stab wounds to the left side of his neck. (R 1057) Both carotid arteries were severed. (R 1057) These wounds would have caused almost immediate unconsciousness. (R 1058) There were no defensive wounds on Elmer's body. (R 1085) The autopsy performed on Michelle Scott revealed a laceration to the top of her head. (R 1067) There was a bullet wound behind her left ear and one to the left side of her eye and one to her right leg. (R 1067) She also suffered multiple knife wounds to the back of the neck, chest, left breast, left arm, left side of the back and on her hands wrists and forearms. (R

1067) Neither bullet wound to the head would have rendered Michelle immediately unconscious. (R 1070) Michelle received approximately thirty-one stab wounds. (R 1073) While no one wound could be termed fatal, the cause of death for Michelle was that she bled to death from a combination of all her wounds. (R 1083)

Appellant was arrested at his home, at approximately 4:30 a.m. on August 29, 1990. (R 1411) A few hours after he was arrested, Appellant called Denise and told her to just tell the police that he and Denise were at home in bed. (R 1560) A couple of days later, Denise went to the State Attorney's Office and gave a sworn statement in which she lied. (R 1560) Denise was arrested on September 5, 1990. (R 1559) Denise has given four separate statements under oath. (R1631) Although she claimed that she was telling the truth at trial, she admitted that she lied in each of the previous statements. (R 1634, 1641) When she told Appellant that she was subpoenaed to testify in front of the Grand Jury, Appellant told her to keep her mouth shut. (R 1571) Denise has pled guilty to two counts of second degree murder, two counts of conspiracy to commit murder, one count of armed burglary and one count of perjury and has received a total of 75 years in prison. (R 1568) As part of this plea bargain, she was required to tell the truth. (R 1569)

Roger LaForce was incarcerated in the Lake County Jail in October of 1990. (R 1169) LaForce was placed in a cell with Appellant. (R 1172) Appellant told him that he was in jail for

two counts of murder but that he had made sure the State only had circumstantial evidence. (R 1174) Appellant told LaForce that Elmer had been shot once but did not mention any stabbing. He also said that Elmer's wife was an informant for the Sheriff's office and that she was shot three times and stabbed thirteen times. (R 1177-1178) Appellant told LaForce that Elmer was going to testify against him in a burglary case and that if he had testified Appellant would go to prison and lose his girlfriend. (R 1178) Appellant could not let that happen so he decided to kill him. (R 1178) Appellant also said that he had to make it look like a revenge killing for Elmer's wife being an informant. (R 1178) Appellant told LaForce that he went to the trailer in Sorrento. (R 1179) Appellant said there were apparently two witness, one who said he had a mask on and another who said he had a hat on. (R 1179) However, Appellant said that he didn't wear a hat and didn't need a mask to go into his cousin's house. (R 1179) Appellant told LaForce that Elmer was hit on the back of the head with the gun and a trigger stuck in the back of his head. (R 1180) LaForce approached the State Attorney with the information and asked about making a deal, but the State Attorney refused. (R 1182) LaForce accepted this and gave a statement anyway. (R 1182)

B. PENALTY PHASE

Appellant had prior convictions for petit theft, dealing in stolen property, burglary, and grand theft. (R 2605) Dr. Manuel Leal, performed the autopsies on Michelle and Elmer Scott. (R 2606) Elmer Scott was first shot, then hit over the head and finally stabbed. (R 2610) He suffered approximately ten lacerations to his head and was likely unconscious very soon after the blows to his head. (R 2611) Elmer would have died even if his throat had not been cut. (R 2611) Michelle Scott was killed after Elmer was killed and was alert and awake at the time she was stabbed. (R 2613-2614) Michelle Scott had thirty-one stab wounds and could have lost consciousness before her death. (R 2615, 2618) The entire episode probably took from three to five minutes. (R 2626) Many of the superficial stab wounds could have occurred after Michelle lost consciousness. (R 2627)

Dr. Philip M. Tell, a licensed psychologist and an associate professor of psychiatry at the University of Central Florida testified that he conducted an evaluation of Appellant in August of 1983 when Appellant was sixteen years old. (R 2634, 2637-2639) Appellant had been charged with theft of a gun and referred to him for a psychological evaluation. (R 2640) Dr. Tell administered a battery of tests which revealed that Appellant was in the middle range of intellectual functioning. (R 2643) There was no evidence of any learning disability. (R

2643) Dr. Tell determined that Appellant saw himself as a child who felt abused. (R 2644) He was angry and hostile and did not trust people. (R 2644) Appellant saw his environment as threatening and punishing and was afraid he was going to be hurt. (R 2644) Dr. Tell diagnosed Appellant as having a passive-aggressive personality disorder characterized by lots of anger and aggression which is expressed only indirectly. (R 2645) Appellant was impulsive and acts out and tries to get people angry. (R 2645) Appellant had poor self image and a real strong feeling of inferiority. (R 2645) Dr. Tell determined that the death of Appellant's older brother, several years prior, was a very traumatic experience in Appellant's life. (R 2645) Appellant was very close to his brother and after his brother died, Appellant could not talk to his father about this. (R 2646) Appellant was afraid of his father and Appellant's father acknowledged that he tended to take out his frustrations on Appellant. (R 2646) Appellant was not psychotic. (R 2649) However, Appellant felt an enormous amount of guilt and continued to get into trouble in an effort to destroy himself. (R 2648) Dr. Tell recommended Appellant and his family get involved in intensive family psychotherapy. (R 2650) Dr. Tell had two sessions with the family and felt that they were making progress. (R 2651)

Dr. Charles Paskewicz, a psychologist, testified that he read through Dr. Tell's records and interviewed Appellant. (R 2659) For three years after Appellant's brother's death,

Appellant was in a learning disability class and did better than expected. (R 2661) However, for the next three years, Appellant did much worse and his schooling was marked by poor attendance, hostility to teachers, swearing, name calling, and conduct and attitude problems. (R 2661) After talking with Appellant, Dr. Paskewicz learned that during these three years Appellant's father had been severely beating him. (R 2662) This probably caused Appellant's anger and hostility. (R 2663) Dr. Paskewicz discussed with Appellant his brother's death. This did not seem to be much of a problem for him. (R 2663) However, Appellant was very angry with his father. (R 2663) Appellant told Dr. Paskewicz that there was no follow up counseling after his interview with Dr. Tell. (R 2664) In Dr. Paskewicz opinion, without counseling, there could be a problem acting out behavior. (R 2664)

Appellant's father testified that while Appellant was growing up, he worked long hours, sometimes sixteen hours per day. (R 2683-2684) He acknowledged that he, his wife and Appellant went to counseling with Dr. Tell. (R 2687) Although further counseling was recommended, they did not go. (R 2687) Appellant's sister, Doris, testified that Appellant was eight years old when his older brother, Gary, died. (R 2672) Appellant was very close to his brother. (R 2674) Doris testified that her father was very tough on the boys in the family and beat them with belts. (R 2675) She acknowledged that her father had a short temper and that all the children were

afraid of their father. (R 2675-2676) Doris recalls an incident wherein her father severely beat Appellant. (R 2677) As recent as two years ago, her father pulled a knife on Appellant and threatened to cut him into little pieces. (R 2679-2680) Linda Lavoie, Appellant's sister, testified that Appellant was a good brother and a wonderful uncle to her daughter. (R 2690)

SUMMARY OF ARGUMENTS

POINT I: Section 38.02, Florida Statutes (1989) provides grounds for disqualification of a judge when such judge has previously been associated with in any capacity with the case or controversy at issue. This rule is not dependent upon a judge actually having an interest in the outcome of the case. In the instant case Judge Lockett was previously associated by counsel for the codefendant in an advisory capacity. This occurred before Judge Lockett assumed the bench. Because of the codefendant's status as the primary State witness in the case against Appellant, Judge Lockett's previous close association with the codefendant's case was ample grounds for disqualification.

POINT II: The selection process used in Lake County for summoning jurors is racially discriminatory. By using the voter registration rolls, African Americans are underrepresented in the potential jury pools. Based on the available statistical information, African Americans are underrepresented from forty to fifty-five percent in the jury selection process. This racially discriminatory process violated Appellant's right to a fair trial.

POINT III: The trial court erred in overruling Appellant's motions for mistrial based on improper prosecutorial comments during opening statements and closing statements. The objectionable remarks included the prosecutor's continual and persistent use of the word "we" in describing what the police did

in the investigatory process, statements of personal belief in the credibility of witnesses, improper insinuations that the Supreme Court has already concluded that based on a factual situation as the state presented the defendant was guilty, and prejudicial comments on the defense and defendant's lawyer implying that if the jury returned a verdict other than guilty that Appellant would be getting away with murder.

POINT IV: Appellant was prejudiced when the alleged victim's father broke down in tears in the stand and then engaged in an angry exchange of words with Appellant in front of the jury. The error was compounded when the trial court refused to inquire of the jury whether they had heard this exchange.

POINT V: The trial court erred in admitting into evidence various photographs and color slides which graphically and gruesomely showed the victims' wounds. These photographs had no relevance to any issue of fact and even if marginally relevant were so prejudicial as to outweigh the probative value they may have had. Few if any of these exhibits were even utilized by the medical examiner and thus the asserted relevance is even more questionable.

POINT VI: The evidence below fails to prove that any conspiracy to commit murder was ever established beyond a reasonable doubt. The alleged coconspirator simply had no agreement or intent to commit any crime and therefore the essential elements of conspiracy are missing. Even if the evidence is sufficient to support a conspiracy, it is

insufficient to support dual convictions for conspiracy since a conspiracy can have as its ultimate object multiple violations of criminal laws.

POINT VII: The trial court erred in refusing to give Appellant's requested jury instructions on heinous, atrocious and cruel and cold, calculated and premeditated. The United States Supreme Court has determined that the jury instructions are insufficient to adequately define these aggravating circumstances and thus render the statute unconstitutional.

POINTS VIII & IX: Sections 921.141(5)(h) and (i), Florida Statutes (1989) are unconstitutionally vague. The circumstances fail to adequately inform juries what they must find in order to impose the death penalty and thus allows for the imposition of the death penalty in an arbitrary and capricious manner. Further, this Court's application of these aggravating circumstances has been inconsistent and thus arbitrary.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SUGGESTION OF DISQUALIFICATION PURSUANT TO SECTION 38.02, FLORIDA STATUTES (1989).

On July 15, 1991, Appellant filed a suggestion of disqualification asserting that Judge Lockett who was assigned to try the case, had been at least indirectly connected with the case before he was appointed to the bench. (R 3448-3449) In particular, the motion set forth the fact that the attorney for the co-defendant Denise Turbyville had consulted with Judge Lockett regarding her client and he was thus privy to privileged information. The motion then alleged that this situation creates a conflict of interest or at least the appearance of a conflict of interest and therefore Judge Lockett should disqualify himself from any further participation in the case. Judge Lockett held a hearing on this motion and accepted as factually correct the representations in the motion but denied it as being legally insufficient. (R 2797) Subsequently, with the agreement of all parties, Denise Turbyville's attorney, Michelle Morley, testified. (R 2504-2513) Ms. Morley testified that after Denise was arrested, she was subpoenaed to testify before the Grand Jury. (R 2505) Ms. Morley did not know that Denise was going to be the subject of the Grand Jury investigation until after the Grand Jury in fact indicted her. (R 2505) The night before she

was scheduled to go before the Grand Jury, Denise told Ms. Morley quite a bit of information which overwhelmed Ms. Morley. She felt she needed to consult with another attorney, so she chose Jerry Lockett, who was then in private practice. (R 2506) Ms. Morley spoke with Lockett at approximately 1:00 p.m. on September 18, 1990. (R 2507) Although Lockett was not paid, Ms. Morley had established an attorney/client relationship with Lockett and told him everything that Denise had told her. (R 2507-2508) After hearing all the information, Lockett advised Morley that he would not let his client testify. (R 2508) Ms. Morley accepted this advice and so advised Denise. (R 2508-2510) Eventually, Denise did agree to testify before the Grand Jury. (R 2510) When it became apparent that the State was going to seek the death penalty for Denise, Ms. Morley again spoke with Judge Lockett to see if he was interested in associating with her to try the case. (R 2511) Lockett agreed to be associated. (R 2512) At the time the matter came up for appointment of associate counsel, Judge Lockett was up for his judgeship so a different attorney was appointed. (R 2513) Since that time, Ms. Morley never discussed the case with Judge Lockett again. (R 2513)

Section 38.02, Florida Statutes (1989) provides in pertinent part:

> In any cause in any of the courts of this state, any party to said cause or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if

> the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counsel of record in said cause by consanguinity or affinity within the third degree or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. ... If the truth of any suggestion appear from the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds for his disqualification, and declaring himself to be disqualified in said cause. If the truth of any such suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds the suggestion is true he shall forthwith enter an order reciting the ground of his disqualification and declaring himself disqualified in the cause; if he finds that the suggestion is false, he shall forthwith enter his order so reciting and declaring himself to be qualified in the cause. ...

In State ex rel. Ambler v. Hocker, 34 Fla. 25, 15 So. 581 (1894), this Court held that because of prior connection with a case before him, a circuit judge was disqualified from presiding. This Court held:

> The law which disqualifies a judge who has been of counsel in the case, intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. The great principle should not have an narrow or technical construction, but should be applied to all classes of cases where a judicial officer is called upon to decide controversies between the people. [citations omitted] Not only is a judge who has been an attorney in a case prohibited from acting in a judicial capacity in the

> identical case in which he has been such an attorney, but he cannot act in any supplemental or other proceedings closely connected with such case.

15 So. at 583 (emphasis added) This rule is not dependent upon a judge actually having an interest in the outcome of a case. Sewell v. Huffstetler, 83 Fla. 629, 93 So. 162, 166 (Fla. 1922).

In the instant case, Denise Turbyville was the main witness for the State against Appellant. Thus, her testimony was absolutely critical. It is clear from the proceedings below that Judge Lockett, before he took the bench, was intimately involved in the case of State v. Turbyville, having been associated by counsel for Ms. Turbyville. Judge Lockett accepted as true the allegations in the motion for disqualification. At the very least, these allegations are sufficient to raise the appearance of a conflict of interest. While it is not suggested either by defense counsel below or by counsel herein, that Judge Lockett had an actual bias, such bias is not a controlling factor for disqualification under Section 38.02, Florida Statutes (1989). Rather, the overriding concern herein is that all citizens in the State of Florida have an interest in assuring that all law suits are tried before an absolutely fair and impartial judicial officer. When fairness and impartiality are compromised, the system is destroyed. The suggestion of disqualification filed below was proper and Judge Lockett erred by ruling it legally insufficient and thus denying it. Appellant is entitled to a new trial before a fair and impartial judge free from any potential conflict of interest.

POINT II

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE JURY PANEL ON THE GROUNDS THAT THE SELECTION PROCESS RESULTED IN THE UNDER-REPRESENTATION OF AFRICAN AMERICANS IN THE VENIRE.

Prior to trial, defense counsel filed a motion to strike the jury panel on the grounds that the selection process for jurors was racially discriminatory. (R 3467-3487) Defense counsel presented statistical evidence regarding the racial breakdown of the population of the Lake County and the racial breakdown of the voter registration rolls of Lake County. The latest available statistics showed that in 1989 the estimated population of Lake County was 146,000 of which 17,000 were black. This represented 11.64% of the population. The voter registration polls for the same period showed that of the 63,000 registered voters in Lake County, only 2600 were black voters. This is a percentage of only 4.1%. Based on the huge disparity in the number of black voters, vis á vis their representation among the population as a whole, defense counsel argued that the selection process was inherently discriminatory and thus violated his clients rights under the Federal and Florida Constitutions.

Discriminatory selection of juries may be challenged under the equal protection clause of the Fourteenth Amendment. Alexander v. Louisiana, 405 U.S. 625 (1972) The right to have a

jury venire represent a fair cross section of the community is also protected by the Sixth Amendment guarantee of a trial by an impartial jury. Taylor v. Louisiana, 419 U.S. 522 (1975). In Castaneda v. Partida, 430 U.S. 482, 494 (1977), the Supreme Court summarized the requirements for proving an equal protection violation:

> The first step is to establish that the group is one that is a recognizable, distinct class, ... Next, the degree of under-representation must be proved, by comparing the portion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time ... finally, ... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

In Duren v. Missouri, 439 U.S. 357 (1979), a case involving under-representation of women on jury venire panels, the Supreme Court set out the elements of a prima facie violation of the fair cross section requirements:

> [T]he defendant must show (1) that the group alleged to be secluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process.

The first part of this test has been met in Appellant's case because African-Americans constitute a recognizable distinct class. Strauder v. West Virginia, 100 U.S. 303 (1879). Defense counsel below pointed out that some forty to fifty-five percent

of the black population was systematically excluded from the Lake County jury selection process based on the facts presented in the motion and through the witnesses at the hearing. The United States Supreme Court has been careful not to delineate precise mathematical standards for proving systematic exclusion. Alexander v. Louisiana, supra. However, the Court in Davis v. Zant, 721 F.2d 1478 (11th Cir. 1983) examined precedents from the Supreme Court, the Fifth Circuit, and the Eleventh Circuit in judging whether disparities are significant enough to establish an equal protection or a fair cross-section claim. In Davis, the Eleventh Circuit found that the disparities in the jury pool, (18.1% to 18.4%) were extremely close to the disparities found to be significant in other cases. See e.g. Turner v. Fouche, 396 U.S. 346 (1970) (23% disparity); Hernandez v. Texas, 347 U.S. 475 (1954) (14%); Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) (21% and 38%); Machetti v. Linahan, 670 F.2d 236 (11th Cir. 1982) (36% and 42%); Porter v. Freeman, 577 F.2d 326 (5th Cir. 1978) (20.4%). An important consideration to the Davis Court was that the disparities in the 1973 list were in the same range as those in the 1975 list. 721 F.2d at 1483. The Court concluded that these figures corroborated Davis' claim that the figures were not coincidental but resulted from discrimination. In Duren v. Missouri, the Court said that "systematic" means that the under-representation was "inherent in the particular jury selection process utilized." 439 U.S. at 366. Applying this rationale to the instant case, in Lake County using a pool that under-

represents blacks by forty to fifty-five percent clearly makes such exclusion systematic.

Appellant acknowledges that this Court has rejected a similar argument in Bryant v. State, 386 So.2d 237 (Fla. 1980). However, it is submitted that the statistical evidence presented in the instant case is more compelling than the evidence presented in Bryant. Significantly, since Bryant, the legislature has now passed an amendment to Chapter 40, wherein it provides that juror lists shall be compiled from the driver's license lists. Appellant submits that this legislation is a recognition of the inherent discriminatory practice of limiting juror eligibility to only those who are registered voters.

In summary, Appellant asserts that his rights under the Federal and Florida Constitutions were violated by permitting the juror venire to be selected from the voter registration roles in Lake County. This process was inherently discriminatory and resulted in a less than fair cross section of the community being in the jury venire. Appellant is entitled to a new trial.

POINT III

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL ON THE BASIS OF VARIOUS COMMENTS MADE BY THE PROSECUTOR DURING OPENING AND CLOSING STATEMENT.

Throughout the opening statement, the prosecutor in describing ostensibly what he thought the evidence would show continually used the pronoun "we". Defense counsel on several occasions objected on the grounds that this implied his personal knowledge and since he wasn't going to be a witness in the case, that it was improper. (R 902, 903, 911, 918) Defense counsel also objected to the prosecutor telling the jury that several witnesses gave statements on more than one occasion. the implication being that they must be true since they gave consistent statements each time. (R 903) Still later, in describing one of the witnesses, the prosecutor stated, "I can guarantee you she was reluctant to come in and talk to the police about her friend or her friends ..." (R 916) Although the trial court did note that the prosecutor's use of the word "we" was improper and admonished him, such admonishment had little effect. The trial court further noted that the last noted statement was a statement of the prosecutor's personal belief and was also improper. Despite these findings, the trial court still refused to grant a mistrial. During closing arguments, the prosecutor in discussing whether or not a reasonable doubt had been raised,

stated that "When the Supreme Court wrote this, [the reasonable doubt instruction] they had cases just like this and theoretical defenses just like this in mind." (R 2444) Defense counsel immediately objected and moved for a mistrial. The trial court denied the motion for mistrial but instructed the jury that they were to disregard what the Supreme Court had in mind when they wrote the reasonable doubt instruction. (R 2445) As his last statement to the jury in his closing argument, the prosecutor stated, "The question now for you folks when you go back into the Jury room is whether or not Mr. Hendrix over here and his lawyer and his lawyer's theory is going to get away with murder." (R 2450) Defense counsel, once again, approached the bench, objected to the comment about the defendant getting away with murder, asked that it be stricken and the jury instructed to disregard it. Additionally, defense counsel moved for a mistrial. The trial court simply overruled the objection, refused to instruct the jury and denied the motion for mistrial. (R 2451) Appellant contends that these comments were improper and violated Appellant's right to a fair trial.

It is so clearly established that an accused has a fundamental right to a fair trial, free from improper prosecutorial comments and interrogation that the Supreme Court of Florida, in Stewart v. State, 51 So.2d 494 (Fla. 1951), noted:

> This court has so many times condemned pronouncements of this character that the law against it would seem to be so commonplace that any layman would be familiar with and observe it.

* * *

> It would seem trite to state that the reason the courts throughout the country have condemned this type of abuse is that was are committed to the principle of fair and impartial trial, regardless of the offense one is charged with .... He is entitled to a fair and orderly trial in an environment reflecting the constitutional guarantees which constitute fair trial. Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotion or exhibit punitive or vindictive exhibitions of temperament. Stewart v. State, supra at 494-495.

In Washington v. State, 86 Fla. 533, 98 So. 605 (1923), the Court spoke of the high standards which are expected of a prosecutor. The prosecutor is a sworn officer of the government with the great duty imposed on him of preserving intact all the great sanctions and traditions of law:

> It matters not how guilty a Defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary considerations should be to develop the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state struggling for a verdict. 98 So. at 609.

Similarly, the Fourth District Court of Appeal in Kirk v. State, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969), stated:

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements or conduct by a witness or by a prosecuting attorney during

> the course of a trial. It is also the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. [citation omitted]. The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.

The Supreme Court of the United States has observed that the average jury has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, the Court noted, improper suggestions and insinuations are apt to carry much weight against the accused when they should properly carry none. Berger v. United States, 295 U.S. 78, 88 (1935).

In Kirk, supra, during closing argument, the prosecutor speculated on the whereabouts of certain possible defense witnesses who would corroborate the defendant's story. There, the appellate court, in reversing the defendant's conviction chastised both the prosecutor for making the prejudicial comments and the trial judge for not controlling the prosecutor's conduct:

> While we quite realize that some latitude must be given to a lawyer's language

> in a hard-fought case, we think the prosecutor's remarks fell short of the degree of propriety required in these matters. It is our judgment that the trial judge failed to uphold his duty to maintain order and decorum, and to exercise that general control over the trial needed to protect the accused from abuse or intimidation. Kirk v. State, supra at 43.

The trial court in the instant case should have, at least, rebuked the prosecutor for his improper remarks:

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection at the time to such improper conduct when objections is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments. Deas v. State, 119 Fla. 839, 161 So. 729, 731 (1935).

See also Oglesby v. State, 156 Fla. 481, 23 So.2d 558, 559 (1945); Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959).

It is well established that it is highly improper for an attorney to express personal opinions or to state facts of his own knowledge which are not in evidence. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978). Statements of personal beliefs by a prosecutor are always improper. Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984); Blackburn v. State, 447 So.2d 424

(Fla. 5th DCA 1984). The prosecutor's persistent use of the pronoun "we" in describing what the evidence was going to show, implied that he had personal knowledge of these facts. While that may be true, it is nevertheless, improper. The prosecutor was not a witness and subject to cross-examination. The statement of personal beliefs was perhaps exemplified most by the prosecutor's statement that he "guaranteed" that a particular witness was somewhat reluctant to testify. The trial court recognized the impropriety yet still declined to grant the mistrial. After the numerous examples of improper argument in the opening statement, the prosecutor's comments in closing are even more offensive. While it may be proper for an attorney to comment on the application of certain jury instructions to the evidence, there was absolutely no basis for the prosecutor to presume to know that the Supreme Court had just this type of case in mind when it created the reasonable doubt instruction. The obvious implication of this statement is that the Supreme Court of Florida has already determined that this defendant was guilty. Perhaps the most offensive comment by the prosecutor was his implication that if the jury did not return a verdict of guilty, that it would in essence allow the defendant and his attorney to get away with murder. In Adams v. State, 192 So.2d 762, 764 (Fla. 1966) this Court reversed a conviction due in part to the prosecutor's abusive closing argument in which he disparaged defense counsel. In Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1983), the Court commented that argument relating to defense

techniques is not only improper but it is unethical. Suggesting that unless the jury returned a verdict of guilty that the defendant would get away with murder is the most blatant appeal to the jury's passions.

In conclusion, the words of Mr. Justice Drew in Grant v. State, 194 So.2d 612, 615-616 (Fla. 1967), are quite appropriate:

> The State has undoubtedly spent thousands of dollars and hundreds of hours have been devoted by state officials and others in the investigation and prosecution of this appellant. Now, as in an increasing number of cases reaching us in recent years, we must undo all of that which has been done and send this case back for a new trial. To some it might appear to be straining at technicalities to reverse this case in which literally thousands of words were spoken for the mere utterance of 30 words, but this result is required not by the whims or individual feelings of the Justices of this Court but because the law which we, and those others who exercised the State's sovereign power in the trial and prosecution, are sworn to uphold has been patently disregarded. The rules which govern the trial of persons accused of crimes in our courts are the result of hundreds of years of experience. With their manifold faults, they have proven to be man's best protection against injustice by man. Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be played. The test in such case is not whether the infraction actually contributed to the success of the play but rather whether it might have. Surely where [the future of one's] life is at stake, the penalty cannot be less severe.

Reversal is mandated.

POINT IV

IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON THE PREJUDICIAL EFFECT OF THE EMOTIONAL OUTBURST BY THE VICTIM'S FATHER.

When the state announced that its next witness was Elmer Scott Sr., defense counsel approached the bench and asked the court to conduct a proffer since it appeared that the witness could offer no relevant testimony. (R 2080) The court denied the request for proffer. (R 2081) The state then proceeded with the direct examination of Mr. Scott asking about a dozen questions before abruptly discontinuing its direct examination. (R 2083-2084) Defense counsel then told the court that he had no questions but asked to approach the bench. The record reflects that as the witness was leaving the stand, he apparently stopped and said, "You done it, didn't you?" to Appellant at which point the judge then told Mr. Scott to leave the room. (R 2085) The jury was escorted from the courtroom and defense counsel then requested that the prosecutor be admonished for his antics of bringing in the witness solely to inflame the jury and moved for a mistrial based on the outburst as well as the statement by the witness as he was leaving the courtroom. From this discussion, it appears that the state attorney cut short his direct examination because the witness broke down in tears. (R 2086) The court then noted that he could not hear what the witness said and neither could the court reporter. (R 2088) Defense counsel

then asked that the jury be polled to see if they heard the court refused to do this. (R 2088) The state attorney proffered the other information that he was going to attempt to elicit from Mr. Scott. Defense counsel refuted the state attorney by pointing out that none of the information that the state attorney was attempting to elicit was relevant to any material issue at trial. Defense counsel further presented evidence from two members of the audience who testified that they also heard the angry exchange between the witness and the defendant. (R 2094, 2101) The trial court did ultimately instruct the jury to disregard the emotional outburst of the witness but refused all other defense requests. (R 2106)

A fair trial is a fundamental right to which all defendants are entitled. Simmons v. Wainwright, 27 So.2d 464, 466 (Fla. 1st DCA 1973). A jury is to decide its verdict based solely on the evidence and not on any extraneous matters. The jury instructions themselves forbid the jury from basing its decision on sympathy. It has been held to be reversible error for a prosecutor to make blatant appeals for sympathy in his argument. Grant v. State, 194 So.2d 612 (Fla. 1967); Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972). In the instant case, defense counsel alerted the court prior to the witness testifying that there was a potential problem. He requested a proffer which the court refused. Counsel's fears were realized when the witness broke down crying on the stand and further exacerbated when the witness exchanged angry words with Appellant. Although

the prosecutor set forth his basis for calling the witness, none of the items which he sought to elicit from the witness were material to any issue at trial. For example, while he may have been able to testify that Michelle Scott was not working at the time and thus be more likely to be home, there was no showing that Appellant knew this fact. The witness certainly would have been able to testify as to the layout of the house yet the layout of the house was in no way material particularly in light of the fact that a video tape of the scene was already in evidence. Appellant's familiarity with the house was certainly not an issue since there was other evidence that he had in fact visited that house on other occasions. Simply put there was no reason for the victim's father to testify other than to inflame the passions of the jury.

In Welty v. State, 402 So.2d 1159 (Fla. 1981), this Court pointed out that in a murder prosecution the identification of a victim by a family member is not permissible, where non-related, credible witnesses are available. The basis of this rule is to assure that the defendant receives as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt. The major function of the corresponding federal rule has been to exclude matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial value. United States v. King, 713 F.2d 627, 631 (11th Cir. 1983) Indeed, "unfair prejudice" within the context of the rule means an undue tendency to suggest decisions

on an improper basis, commonly, though not necessarily, an emotional one. Westley v. State, 416 So.2d 18, 19 (Fla. 1st DCA 1982)

Appellant submits that the crime for which he was charged was prejudicial enough by its very nature. To allow irrelevant and inflammatory evidence by way allowing the victim's father to testify when his questionable emotional state was well known to the prosecutor, resulted in a deprivation of Appellant's constitutional right to a fair trial. Perhaps this problem could have been completely avoided had the trial court simply granted Appellant's request for a proffer of the witness' testimony. Since the trial court refused to take this preventative step, it should have come as no surprise when the actual prejudicial outburst occurred. The trial court further erred when it refused to poll the jury as to whether or not they heard the exchange between the witness and Appellant. The fact that the trial judge did not hear it was totally irrelevant since it is clear that this exchange was picked up on the court reporter's tape recorder and was heard by members of the audience. At the very least the trial court should have granted defense counsel's request to inquire of the jury as to whether or not they heard this exchange. The combined error of allowing this witness to testify and then refusing all curative efforts served to deny Appellant his basic constitutional rights to a fair trial. A new trial is required.

POINT V

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT ADMITTED PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE OVER OBJECTION WHERE SUCH PHOTOGRAPHS HAD NO RELEVANCE TO ANY ISSUE AND WERE UNDULY PREJUDICE.

During the guilt phase of Appellant's trial, the state successfully sought introduction of numerous photographs and color slides as well as a video tape of the scene of the homicide. Defense counsel objected to the admission of these items on the grounds that they were unduly prejudicial, cumulative and irrelevant. (R 956, 978, 1033, 1054-1056) With the exception of Exhibits 17 and 18, none of the exhibits were introduced during the testimony of the medical examiner. In light of the video tape of the scene which clearly showed the bodies in the position which they were found, the pictures served no other purpose except to inflame the jury.

Photographs should be received in evidence with great caution. Thomas v. State, 59 So.2d 517 (Fla. 1952). The test for admissibility of photographs is relevancy. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). A photograph is admissible if it properly depicts factual conditions relating to the crime and if it is relevant in that it aids the court and jury in finding the truth. Booker v. State, 397 So.2d 910 (Fla. 1981). Even if photographs are relevant, courts should still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed. Alford v. State, 307 So.2d 433 (Fla.

1975) cert. denied 427 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). In Adams v. State, 412 So.2d 850 (Fla. 1982), this Court noted with approval the trial judge's reasoned judgment in prohibiting the introduction of "duplicitous photographs." Photographs taken of the victim after the body is removed from the scene should be received with added caution since their relevance is generally lessened. Reddish v. State, 167 So.2d 858 (Fla. 1964). In Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990) review denied 570 So.2d 1306 (Fla. 1990) the Court ruled that the danger of unfair prejudice to the defendant due to the introduction of autopsy photographs of the victim's head which depicted the internal portion of the head after an incision had been made with the scalp pulled away revealing flesh under the hair and overlying skull far outweighed probative value of the photographs and that the state failed to show any necessity for its admission. Thus the Court ruled the admission was erroneous.

Applying the foregoing principles to the instant case, it is clear that the trial court erred in admitting the slides and the pictures into evidence. These were in large part, duplicitious of the video tape and were gruesome and highly prejudicial. What little probative value they may have had, was clearly outweighed by the prejudice which resulted by their admission. Appellant is entitled to a new trial.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WITH REGARD TO THE CONSPIRACY COUNTS OF THE INDICTMENT.

At the conclusion of the state's case, defense counsel moved for a judgment of acquittal with regard to the conspiracy counts of the indictment alleging that there was no evidence to support them. In particular, defense counsel argued that the co-conspirator, Denise Turbyville, never thought she was doing anything wrong and did not intend that any crimes be committed. (R 2246-2251) Appellant asserts that the evidence below utterly fails to show that any conspiracy was proven. Alternatively, Appellant asserts that if this Court is to rule that sufficient evidence to support a conspiracy was presented, two counts of conspiracy were not proven.

In Jiminez v. State, 535 So.2d 343 (Fla. 2d DCA 1988), the court stated:

> The crime of conspiracy involves an express or implied agreement between two or more people to commit a criminal offense. Both an agreement and an intent to commit the offense are necessary elements. It has been well settled that mere presence at the scene of an offense coupled with knowledge of the offense is insufficient to establish a conspiracy.

Accord Baxter v. State, 586 So.2d 1196 (Fla. 2d DCA 1991). A conspiracy may not be inferred from mere aiding and abetting. DeLisi v. State, 585 So.2d 963 (Fla. 2d DCA 1991); Wilder v. State, 587 So.2d 543 (Fla. 1st DCA 1991). As noted by the Court in Baxter, supra, the corpus delicti of a conspiracy is the

agreement to commit the crime.

In the instant case, the evidence shows that Appellant had talked with Denise Turbyville about killing Elmer Scott. He discussed with her ways that he could accomplish this, rejecting some and finally settling on a plan. Although Denise did make a phone call for him to see if a throw-away gun could be obtained, the record is devoid of any evidence that Denise intended that a crime be committed or that she agreed to commit a crime. The evidence further shows that she drove Appellant to an area near the scene, dropped him off, and then waited until he apparently committed the crime. She then drove him home. While this evidence is certainly sufficient to support a conviction for Turbyville as an aider and abettor, as the above-stated law clearly shows, such is not sufficient to show a conspiracy. Simply put, the State failed to prove any conspiracy on the parts of Appellant and Denise Turbyville. A judgment of acquittal should have been granted.

Notwithstanding the argument above, if this Court determines that sufficient evidence was presented to support a conspiracy, the evidence clearly showed only a single conspiracy. In Brown v. State, 130 Fla. 479, 178 So. 153 (1938), this Court held that a conspiracy may have for its object violations of two or more criminal laws and is a single offense no matter how many repeated violations of the law may have been the object thereof. In Epps v. State, 354 So.2d 441 (Fla. 1st DCA 1978), the defendant was convicted of two counts of conspiracy to commit a

felony. Although the evidence showed that the informations for the two counts charged different time periods and sales of different drugs, the Court nevertheless ruled that only a single conspiracy had been proven.

In the instant case, the evidence showed that Appellant discussed with Denise, killing Elmer Scott. While he did allow that he may also be forced to kill Michelle Scott if she was present, the evidence clearly shows that there was never any conspiracy to kill Michelle Scott. In fact, just the opposite. Appellant had come up with several alternative methods of killing Elmer but rejected them because it would have possibly resulted in the death of Michelle. (R 1511-1513) Michelle Scott was never the intended victim of Appellant's plans. Thus, there can be no conspiracy to kill Michelle. Beyond this, any conspiracy that was proven necessarily included all of the offenses which Appellant committed to achieve his purpose. As the cases note, it is clear that a single conspiracy exists regardless of the number of crimes which are contemplated. Therefore, if this Court finds that there was sufficient evidence of a conspiracy, it must still reverse one of the convictions for conspiracy on the grounds that two separate and distinct conspiracies were not proven.

POINT VII

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE LIMITING INSTRUCTIONS WITH REGARD TO THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED AS REQUESTED BY DEFENSE COUNSEL.

Defense counsel requested special limiting jury instructions on the aggravating circumstances of heinous, atrocious and cruel and cold, calculated and premeditated. (R 3647, 3685-3690) The trial court refused to give these instructions:

> The aggravating circumstance that the murder was especially heinous, atrocious and cruel applies only where the actual commission of the murder was accomplished by such additional acts as to set the crime apart from the norm of capital first degree murders.
>
> Premeditation does not make a killing especially heinous, atrocious and cruel.
>
> . . .
>
> ... The evil, wicked, atrocious, or cruel nature of the offense is lessened to the degree it results from an irrational frenzy on the part of the Defendant.
>
> . . .
>
> ... This offense cannot be especially evil, wicked, atrocious, or cruel unless you find that the Defendant acted with the purpose to torture or to commit an aggravated battery on the victim before the victim's death and in fact carried out such a purpose.
>
> . . .

> ... If the victim in this case lost consciousness, any event which occurred after unconsciousness began cannot be considered as evidence of the especially wicked, evil, atrocious, or cruel nature of the crime. Any event after the death of the victim cannot be considered as evidence of the especially wicked, evil, atrocious, or cruel nature of the crime. If you have reason to doubt whether some particular event occurred after unconsciousness or death, you cannot consider that event in deciding whether the State has established this aggravating circumstance.
>
> . . .
>
> "Cold" means totally without emotion or passion.
>
> "Calculated" means that the decision to kill was formed a sufficient time in advance of the killing to plan and contemplate. This aggravating circumstance requires proof of premeditation in a heightened degree, more than that required to convict of first degree murder.
>
> . . .
>
> ... A cold, calculated, and premeditated crime is one in which the Defendant thought out, designed, prepared, or adapted by forethought or careful plan the offense he committed.

Instead, the trial court instructed the jury as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious and cruel;
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is

> one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
>
> 6. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. (R 3730-3731, 2737)

Because these instructions are fatally flawed, Appellant's death sentence cannot be sustained.

Recently in Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ____, and 120 L.Ed.2d 854 (1992), the United States Supreme Court held that Florida's instruction with regard to the aggravating circumstance of heinous, atrocious and cruel was unconstitutionally vague so as to leave the jury without sufficient guidance for determining the presence or absence of the factor. In Hodges v. Florida, 52 Cr.L. 3015 (Oct. 5, 1992), the Supreme Court in summary fashion applied the Espinosa rationale to a Petition for Certiorari alleging that the cold, calculated and premeditated instruction was likewise unconstitutionally vague. The same constitutional infirmities recognized by the United States Supreme Court in Espinosa and Hodges are present in the instant case. The instructions given by the trial judge failed to limit the jury's discretion and understanding. Thus, they were left to guess at whether these aggravating circumstances applied. The failure to give the requested instructions which correctly stated the law and which would have served to limit the application of the aggravating

circumstances should have been given. There is no way to know the importance which the jury attached to these particular aggravating circumstances. Certainly, the State argued to the jury that these aggravating circumstances were very important. It cannot be said that the erroneous instructions did not contribute to the jury's recommendation. Appellant is entitled to a new penalty phase.

POINT VIII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE THE FLORIDA SUPREME COURT'S INTERPRETATION AND APPLICATION OF THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION AS SET FORTH IN SECTION 921.141(5)(i), FLORIDA STATUTES (1989), HAS RESULTED IN AN ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY.

Section 921.141(5)(i), Florida Statutes (1989), is vague and overbroad on its face. It is applied in an arbitrary and capricious manner in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. By its terms, this circumstance applies when:

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

This aggravating factor was added to Florida's death penalty statute after the decision in Proffitt v. Florida, 428 U.S. 242 (1976). To date, the United States Supreme Court has not specifically reviewed the constitutionality of this aggravating factor either on its face or as applied.

The function of a statutory aggravating factor has been explained by the United States Supreme Court to be as follows:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of person eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 879 (1983). The court in Zant

went on to state that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." Id. at 877. Thus, it is clear that a statutory aggravating factor can be so broad as to fail to satisfy Eighth and Fourteenth Amendment requirements and that even if it is narrow on its face, it can be so arbitrarily applied that it is rendered unconstitutional.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman to require the severe limits on the sentencing discretion because of the uniqueness of the death penalty.

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

Gregg v. Georgia, 428 U.S. at 188 (1976). This Court then held:

> Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189. It is clear, then, that capital sentencing discretion must be strictly guided and narrowly limited, and that to be constitutional, a death penalty must be consistently applied or rejected upon substantially similar facts.

The manner by which Florida has attempted to guide sentencing discretion is through application of its statutory aggravating factors. It has been stated that the aggravating factors must genuinely channel sentencing discretion by clear and objective standards.

> If the state wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing the sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Godfrey, the Court held that capital sentencing discretion can be suitably directly and limited only if aggravating circumstances are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting constructions must, as a matter of Eighth Amendment law, be both instructed to sentencing juries and consistently applied from case to case. Id. at 429-33. Accord, Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992).

In McCleskey v. Kemp, 481 U.S. 279 (1987), the Court again emphasized the constitutional requirements that a statutory aggravating factor must genuinely narrow the class of persons eligible for the death penalty, according to rational criteria, which are rationally and consistently applied, while at the same time a statutory factor cannot prevent a sentencer from considering valid mitigation.

> In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Id at 305-06.

It is well-established that, although a state's death penalty statute is constitutional, a single aggravating factor may be unconstitutionally vague, arbitrary, or overbroad. State v. Chaplain, 437 A.2d 327 (Bell. Super. Ct. 1981); Arnold v. State, 224 S.E.2d 386 (Ga. 1976); Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987); Collins v. Lockhart, 754 F.2d 958 (8th

Cir. 1985). Appellant contends that Section 921.141(5)(i), Florida Statutes (1989), on its face and as applied, has failed to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance has been applied by the Florida Supreme Court to virtually every type of first-degree murder. This aggravating circumstance has become a "catch-all" aggravating circumstance, thereby violating the teachings of Furman and its progeny. Second, even though principles for applying this aggravating circumstance have been established by the Florida Supreme Court, those principles have not been consistently applied.

Section 921.141(5)(i), Florida Statutes (1989) is unconstitutionally vague on its face. The words of the aggravating circumstances give no real indication as to when it should be applied. This is the same flaw which led to the striking of aggravating circumstances in People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982) and Arnold v. State, 224 S.E.2d 386 (Ga. 1976). It is well-established that a statute, especially a criminal statute, must be definite to be valid and certainly a statutory aggravating factor must be held to this standard.

Definiteness is essential to the constitutionality of the statute. The danger of indefiniteness is not simply lack of notice to the defendant, but also the possibility of arbitrary and discriminatory application of the statute:

> If arbitrary and discriminatory enforcement is to be prevented, laws

> must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 407 U.S. 104, 109 (1972). The Court has recently re-emphasized that the danger of arbitrary enforcement, rather than actual notice, is actually the more important aspect of the vagueness doctrine. Kolender v. Lawson, 461 U.S. 356, 358-59 (1983).

It is recognized that death is different from any other punishment which can be imposed and therefore a capital sentencing procedure calls for a greater degree of reliability due to its severity and finality. Lockett v. Ohio, 438 U.S. 586, 605-06 (1978). The (5)(i) circumstance requires a finding that the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." However, the statute gives no real guidance as to when the factor can exist. Some level of premeditation will exist in all first-degree, premeditated murders and the adjectives cold and calculated are nothing more than vague subjective terms directed to emotions. The terms cold and calculated suffer from the same deficiency as terms held vague in People v. Superior Court (Engert), supra. Here, as in Engert, "The terms address the emotions and subjective idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content." 647 P.2d at 78. Here, as in Arnold v.

State, supra, the terms are "highly subjective." 224 S.E. 2d at 392. The terms cold and calculated are unduly vague and subjective.

The requirement that the homicide be committed "without any pretense of moral or legal justification" is also very vague and subjective. It is clear that no person convicted of first-degree murder has a true legal justification; otherwise, the conviction would be invalid. The essence of this limiting phrase depends on the existence of a "pretense" of moral or legal justification. Thus by its very definition, the phrase requires a sentencer to determine the highly subjective intent of the offender. One person's pretense may be categorically and universally rejected by others. The problem of applying this aggravating circumstance is further compounded where the offender has a psychiatric disturbance either temporary or permanent. It is important to note, that the Florida Standard Jury Instructions in Criminal Cases provide for no limiting definition of the terms used in this aggravating circumstance.

As previously stated, a statute, or a portion of a statute, may be constitutional on its face, but applied in an unconstitutional fashion. McClesky v. Kemp, supra at 1773. The (5)(i) aggravating factor is unconstitutional as applied by juries in recommending penalties, trial courts in imposing sentences and the Florida Supreme Court in reviewing death sentences. It has been applied in such a way as to allow it to be applied to any premeditated manner, and the original limiting

principles developed by the Florida Supreme court have been applied in such an inconsistent manner so as to render the circumstance arbitrary and capricious.

This Court has attempted to limit the application of this aggravating circumstance.

> The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of premeditation aggravating factor -- "cold, calculated . . . and without any pretense of moral or legal justification.

Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982). In McCray v. State, 416 So.2d 804, 807 (Fla. 1982) the court stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are categorized as executions or contract, although that description is not intended to be all-inclusive.

However, this Court has never explicitly defined how much more premeditation. The Florida Supreme Court has also has vacillated in its interpretation of (5)(i) which has resulted in arbitrary and capricious application of the aggravating circumstance.

In Caruthers v. State, 465 So.2d 496 (Fla. 1985), the court disallowed a finding of cold, calculated and premeditation where a robber shot a store clerk three times. The court stated "the cold, calculated, and premeditation factor applies to a manner of killing categorized by heightened premeditation beyond that required to establish premeditated murder." Id at 498

(emphasis added). However, in the next reported decision, this Court approved the same factor, stating "This factor focuses more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So.2d 499, 507 (Fla. 1985) (emphasis added). Then, in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), the court reverted to the prior standard, stating ". . . as the statute indicates, if the murder was committed in a manner that was cold, calculated, the aggravating circumstance of heightened premeditation is applicable." Id. at 1183. More recently, in Banda v. State, 536 So.2d 221 (Fla. 1988), this court again returned to the subjective intent of the murderer in determining whether the aggravating circumstance should apply. It is impossible for trial courts to consistently apply the aggravating circumstance if the reviewing court cannot decide which standard to apply.

Further, there is a patent inconsistency in application of the second prong of the cold, calculated and premeditated factor. " -- without any pretense of moral or legal justification." In Banda v. State, supra, the court stated "We conclude that, under the capital sentencing law of Florida, a 'pretense' or justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Id. at 225 (emphasis added). In Cannady v. State, 427 So.2d 723 (Fla. 1983), the court disapproved the finding of a cold, calculated or premeditated

murder because, according to the defendant, the victim rushed at him before he was shot five times.

> During his confession Appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that Appellant had at least a pretense of a moral or legal justification, protecting his own life.

Id. at 730. Yet in Provenzano v. State, supra, the court approved the application of this aggravating factor and rejected as a pretense of moral justification the uncontroverted fact that the victim (a courtroom bailiff) was repeatedly firing a pistol at the defendant when the bailiff was shot.

The Florida Supreme Court itself has recognized the inconsistency and arbitrariness of its application of this aggravating circumstance. In Herring v. State, 446 So.2d 1049 (Fla. 1984) the Florida Supreme Court approved a finding of cold, calculated and premeditated murder where the evidence showed that the defendant first shot the convenience store clerk in response to what the defendant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. In a lone dissent, Justice Ehrlich noted that the court had gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated by (5)(i). The loss of that distinction, Justice Ehrlich warned:

> Would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Over three years later, in Rogers v. State, 511 So.2d 526 (Fla. 1987), the unanimous court adopted Justice Ehrlich's view and expressly overruled the application of (5)(i) to the factual circumstances in Herring, supra. In Rogers, the court announced a new principle for application of this aggravating circumstance, that being that "calculation" consists of a careful plan or prearranged design.

This aggravating factor has also been inconsistently applied to felony murder situations. In Harris v. State, 438 So.2d 787 (Fla. 1983) the court struck this circumstance in a burglary/murder of a 73 year old woman who knew the defendant. She died from multiple stab wounds and wounds inflicted by a blunt instrument. The court described the scene as follows:

> . . . a knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was spattered over the walls and furnishings of the bedroom, living room and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten.

Id at 789. Despite the prolonged stabbing and beating of the 73 year-old woman, the (5)(i) was disallowed:

> In this instance the state presented no evidence that this murder was planned, and in fact, the instruments of the death were all from the victim's premises.

Id. at 798. Thus, application of this factor rested on the fact that the weapons were all from the deceased's premises causing

the court to strike this factor. In Mason v. State, 438 So.2d 374 (Fla. 1983), which was decided the same day of Harris, supra, the (5)(i) circumstance was upheld by the Florida Supreme Court in a burglary/murder, where the weapon was taken from the victim's premises, and there was no evidence of prior planning of the homicide. Mason burglarized the victim's home, obtained a knife there, and killed the victim by stabbing her. The fact that Mason did not carry a weapon, but obtained it at the burglary cite, was relied on to negate this factor in Harris, but not in Mason.

This aggravating circumstance has also been arbitrarily applied in cases where the victim was abducted, taken to a remote area, and then killed. In three cases, the Florida Supreme Court has relied upon abduction in upholding the application of this aggravating factor. Hill v. State, 422 So.2d 816 (Fla. 1982); Smith v. State, 424 So.2d 726 (Fla. 1983); Justus v. State, 438 So.2d 358 (Fla. 1983). In three other cases, this aspect of the offense was present yet the aggravating factor was disallowed. Mann v. State, 420 So.2d 578 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983); Preston v. State, 444 So.2d 939 (Fla. 1984). In Preston, the victim had been abducted from a convenience store and money was missing from the store. The victim's nude body was found in a field with multiple stab wounds and her throat slit. Pubic hairs, consistent with the victim, where found on Preston. The Florida Supreme Court held that these facts were insufficient to support this

aggravating circumstance. 444 So.2d at 947. However, in Smith, supra, this circumstance was upheld in a very similar case. Smith also involved the robbery of a convenience store, abduction of the clerk, taking her to a secluded area and killing her. 424 So.2d at 728.

The failure of this aggravating circumstance to genuinely narrow the class of persons eligible for the death penalty, threatens the entire statute. In essence, the vague wording of (5)(i), and its arbitrary application allows for application in all premeditated murders. Thus, the court and jury in the State of Florida have the unbridled and uncontrolled discretion to apply the death penalty in any first degree murder case, where it is based upon a theory of premeditated murder or felony murder.

In summary, Appellant asserts that Section 921.141(5)(i), Florida Statutes (1989) is unconstitutional. It is vague and overbroad in its language. Further, this Court has been arbitrary and capricious in its application of this aggravating circumstance. Appellant's death sentence was imposed on reliance of this aggravating circumstance. Because his death sentence rests upon a totally unconstitutional aggravating circumstance, this Court cannot let the death sentence stand. Appellant is entitled to a new penalty phase.

POINT IX

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

In Smalley v. State, 546 So.2d 720 (Fla.1989), this Court rejected a claim that Florida's especially heinous, atrocious or cruel statutory aggravating factor ("HAC" factor) is unconstitutionally vague under the Eighth and Fourteenth Amendments because application of that factor by the juries and trial courts is subsequently reviewed and limited on appeal:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United states upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989).

Recently, however, the United States Supreme Court decided Shell v. Mississippi, 498 U.S. __, 111 S.Ct. __, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct 1853, 100 L.Ed.2d 372 (1988).

The concurring opinion explained why the limiting constructions being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. __, __, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion))(emphasis added).

Shell v. Mississippi, 112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United states Supreme Court in Shell as being too vague are the precise ones used by this Court to review the HAC statutory aggravating factor.

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating factor is too indefinite to comport with constitutional requirements. The definitions of the terms of the HAC aggravating factor do not provide any guidance to the jury when

the factor is first weighed in issuing a sentencing recommendation, by the sentencer when the factor is next weighed in conjunction with the recommendation when the sentence is imposed, and finally by this Court when the factor is reviewed and the limiting construction is applied. The inconsistent approval of that factor by this Court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application.

For instance, recently in Hitchcock v. State, 578 So.2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, at 692. Compare this statement to the analysis contained in Mills v. State, 476 So.2d 172, 178 (Fla. 1985):

> In making an analysis of whether the homicide was especially heinous, atrocious and cruel, we must of necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." In this case the death instrumentality was a .410 shotgun fired at close range. Whether death is immediate or whether the victim lingers and suffers is pure fortuity. **The intent and method employed by the wrongdoers is what needs to be examined.** The same factual situation was presented in Teffeteller v. State, 439 So.2d 840 where this Court set aside the trial court's finding that the murder was heinous, atrocious and cruel.

Mills, 476 So.2d at 178 (emphasis added).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393, 402 (1977). "What is important . . . is an **individualized** determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235, 251 (1983). It is an arbitrary distinction to say that one murder is especially heinous because, for a matter of minutes while being driven approximately two to three miles, a victim perceived that death may be imminent, yet say that another murder was not heinous because, for hours after the fatal wound was inflicted, a victim suffered and waited impending death.

Even more recently in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992) the United States Supreme Court has held that the Florida jury instructions with regard to HAC are indeed unconstitutionally vague.

Because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this Court both facially and as applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments as set forth in Maynard v. Cartwright, supra, Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct 1759, 64 L.Ed.2d 398 (1980), and Shell v. Mississippi, supra, the instant death sentence imposed in reliance on the HAC

statutory factor must be vacated and the matter remanded for a new penalty phase before a new jury.

CONCLUSION

Based on the foregoing reasons and authorities, Appellant respectfully requests this Honorable Court to grant the following relief:

Points I through V, reverse and remand for a new trial; Point VI, vacate Appellant's judgment and sentences for conspiracy; Points VII, VIII and IX, vacate Appellant's death sentence and remand for a new penalty phase before a newly impaneled jury.

Respectfully submitted,

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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 Robert E. Hendrix, No. A 104721, Florida State Prison, P. O. Box 747, Starke, FL 32091, this 23rd day of October, 1992.

Michael S Becker

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