IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK

APPELLANT

v. Case No: 79,143

STATE OF FLORIDA

APPELLEE

_____/

ON APPEAL FROM CIRCUIT COURT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant, Samuel Jason Derrick, was convicted of Murder In The First Degree in the Circuit Court for the Sixth Judicial Circuit, Pasco County, before the Honorable Edward H. Bergstrom, Jr. Appellant was sentenced to death and appealed to the Florida Supreme Court. The Florida Supreme Court affirmed his conviction, but vacated the sentence and remanded the case for a new sentencing hearing before a new jury. See Derrick v. State, 581 So. 2d 31 (Fla. 1991).

On November 5, 1991, a new sentencing hearing was held before the Honorable Stanley Mills, Circuit Judge. The jury listened to the testimony of numerous witnesses for the state and defense, saw the physical evidence presented by the state and heard the argument of counsel. The court instructed the jury that they could consider the following aggravating factors:

> 1. The crime for which Mr. Derrick is to be sentenced was committed while he was engaged in the commission of the crime of robbery.
>
> 2. The crime for which Mr. Derrick is to be sentenced was committed for the purpose of avoiding or preventing a lawful

arrest.

3. The crime for which Mr. Derrick is to be sentenced was committed for financial gain.

4. The crime for which the defendant is to be sentenced was especially heinous, atrocious, and cruel.

The court also instructed the jury they could consider the following mitigating factors:

1. The age of Mr. Derrick at the time of the crime.

2. Any other aspect of the defendant's character or background and any other circumstance of the offense.

After a period of deliberation, the jury sent the court a written note stating:

"Upon voting on such case, the jury has ended with a vote count of equal amount, six votes for death and six votes for life." (R382)

In response to the jury's inquiry, the court re-instructed the jury thusly:

"The advisory verdict need not be unanimous. The recommendation or imposition of the death penalty must be by a majority of the jury. A recommendation of incarceration for life with no eligibility of parole for twenty-five years may be made either by a majority of you or an even division of the jury, that is, a tie vote of six to six." [1] (R385)

After further deliberation, the jury returned a seven to five recommendation of death on November 7th. (R425)

On December 10, 1991, sentencing was held before Judge Mills. The judge imposed the death penalty, (R456-459) finding in aggravation that:

1. The capital felony of which the defendant was

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[1] The judge read the same instruction a second time in response to a juror's request to do so.

convicted was committed while the defendant was engaged in the commission of a robbery.

2. The capital felony of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest.

3. The capital felony of which the defendant was convicted was especially heinous, atrocious or cruel.

The only mitigating factor the judge found was that:

1. The defendant had established some potential for rehabilitation. (R452-455)

On December 18, 1991, appellant filed a Notice of Appeal. (R460) That appeal is now before this court pursuant to Florida Rule of Appellate Procedure 9.030(1)(A)(i) and Art. V, § (b)(1), Fla. Const.

STATEMENT OF THE FACTS

A new penalty phase proceeding was ordered by the Florida Supreme Court pursuant to appellant's conviction for first degree murder. At the hearing the following testimony was presented:

Mr. Harry Lee, a schoolteacher, was a frequent customer at the Moon Lake General Store owned and operated by Mr. Ram Sharma. It was common knowledge that after the store closed at 10:00 p.m., Mr. Sharma would carry home the day's receipts to his house located approximately one hundred yards from the store. On June 25, 1987, at approximately 6:30 a.m., Mr. Lee went to the store to pick up a newspaper. On the way back, Mr. Lee cut through the woods and came across a person lying just off the path. (R22-23) At first, Mr. Lee thought it was someone from the Boon Docks Bar who fallen asleep, but as he got closer, he noticed blood "all over the place." Mr. Lee then saw the person was Mr. Sharma and that he was dead. (R24)

Deputy James St. Pierre responded to Mr. Lee's call to the authorities. He too observed the body of a man, covered with blood,lying almost face down on his left side. (R27)

Laurie Atwood worked at the Moon Lake General Store and spoke with Mr. Sharma on June 24th. (R30) She had asked to borrow Mr. Sharma's car to use the next morning. It was agreed they would meet the next morning at Mr. Sharma's house where she would get his keys and open the store for him. Ms. Atwood also stated it was common knowledge among those who knew Mr. Sharma or worked at the store, that he would take the money from the store

in the evening and bring it back the next morning. (R31) When she got to Mr. Sharma's house the next morning, he was not there. Assuming he had already gone and opened the store himself, she walked to the store. The store was still locked and the police were there. (R32)

At this point in the proceedings, various photographs taken at the scene, as well as, photos of the shirt Mr. Sharma had been wearing were put into evidence. The I.D. technician, Ellie Calhoun, testified she noticed blood starting about twenty feet away and leading up to where Mr. Sharma was found. (R46) A presumptive test indicated the substance was indeed blood. (R47)

David Lowry had seen appellant around 4:30 or 5:00 p.m. at his mother's house. Appellant showed Lowry a collection of knives he had. (R62) Appellant asked for a ride to a friend's house. Appellant indicated he wanted to be dropped off by the Boon Docks Bar. (R52) Lowry dropped him off a few streets away around 9:00 p.m. When appellant got out of the car, Lowry noted what appeared to the handle of the double edge knife appellant had shown him earlier, sticking out of the back of appellant's pants. (R63) Lowry stated appellant frequented the Moon Lake General Store and knew Mr. Sharma. (R53) About 1:00 a.m., he heard appellant tapping on his window. Appellant was hot and sweaty and was not wearing a shirt. (R59) He asked Lowry for a ride home. Lowry took appellant to his mother's house. During the ride, appellant offered Lowry twenty dollars for gas. Appellant told Lowry he had obtained the money by robbing the Moon Lake General

Store. (R54) Lowry dropped appellant off and returned home. The next morning Lowry went to work. When he returned home, his wife informed him that Mr. Sharma had been murdered. (R55)

When Lowry saw appellant again, appellant was in possession of an older model Buick he said he just bought. Appellant offered to take him for a drive. (R56) While he was driving, appellant confided that he had murdered Mr. Sharma by stabbing him thirteen times. Lowry inquired why appellant had stabbed Mr. Sharma so many times. Appellant replied because Mr. Sharma had kept screaming. (R58) After a pause, appellant kind of laughed and said the scary part about the whole thing was that it was easy for him to do it. (R59)

Three or four days later, Lowry contacted Detective Vaughn of the Sheriff's Department. He related what appellant had told him. (R60) After appellant was arrested, Lowry was brought in. He and appellant were put into the same room. Appellant whispered to him the room was probably bugged, and they didn't have any proof. (R61)

Sergeant Clinton Vaughn arrested appellant on June 29, 1987, based upon what he had been told by David Lowry. Post-Miranda, appellant denied any involvement and professed to knowing nothing about Mr. Sharma's murder. (R70) Vaughn brought in David Lowry who looked at appellant and said, "I can't stand it anymore." At that point, appellant broke down and admitted to the killing. Appellant stated he had stabbed Mr. Sharma in the back thirteen times. Appellant seemed genuinely surprised when Vaughn informed

him it was in excess of thirty times. (R71) Appellant stated he jumped out and grabbed at Mr. Sharma as he walked on the pathway to his home. Mr. Sharma turned and tried to run, whereupon appellant grabbed him and he started screaming. Appellant stated he had to stab Mr. Sharma to shut him up. Appellant further stated he took three hundred or so dollars from Mr. Sharma and left the area. (R72) Appellant claimed he lost the money when he was running away. The bloody knife had brushed against his tee-shirt, so he ripped it off and disposed of it. (R73) Appellant also disposed of the knife and his shoes.

When appellant's wife came in to say good-bye, appellant looked at her and said, "My aunt always said I was an animal and I guess I proved her right." Appellant then asked his wife, "Is it true I stabbed him over thirty times?" When Vaughn said it was true, appellant broke down and cried. (R73-74)

[At this point, a videotape of the crime scene was played for the jury.]

Dr. Edward Corcoran, associate Medical Examiner, testified he had conducted an autopsy on Mr. Sharma's body the day following the homicide. He described Mr. Sharma as being 5' 6", about one hundred fifty-six pounds and about fifty-five years of age. (R143) Dr. Corcoran counted thirty-one separate stab wounds, two puncture wounds, and one cut on the body. There were six stab wounds to the front of the body, twenty to the back, with the remainder in the extremities. (R160) There were wounds on the hands and wrists which he characterized as defensive

wounds. (R155) Mr. Sharma's death was caused by a combination of blood loss and the collapse of his lungs. (R156) Dr. Corcoran identified six of the wounds as major, four into the chest and two into right kidney. The wounds were consistent with use of a relatively small knife as the depth of the wounds was approximately three inches. Because there were wounds in both the front and the back of the body, there had to have been a change in the position of either the victim or his assailant. The wounds in the front indicated someone approached from the front or reached around from behind and stabbed the victim. The wounds in the back were consistent with someone being on top of the victim and stabbing him while he was on the ground. (R157) The trail of blood at the scene, indicated that the victim wasn't bleeding in just one place. Because stab wounds are painful, the doctor made the assumption the victim was in pain. After his assailant left, the pain would have been less, but breathing would have been painful due to the perforation of the pleural surface. He estimated Mr. Sharma died ten to fifteen minutes after being stabbed, but admitted this was only a guess. (R158) He stated that none of the wounds would have caused rapid death. (R159)

On cross-examination Dr. Corcoran stated that there were four wounds that penetrated the chest cavity, one of which hit the lung. He admitted that once a lung collapsed, one would pass out or lose consciousness. He conceded he could not determine whether the wounds to this area were the first inflicted or the

last, so he could not say at what point the victim lost consciousness. It was also possible the victim lived less than the ten to fifteen minutes he estimated previously. He agreed that the time the victim might have been conscious would not necessarily coincide with the time it took him to die. (R161-163)

David Derrick, appellant's brother, testified for the defense. He explained that although appellant was his younger brother, he had always been physically bigger. When the children at school would pick on David, appellant would come to his rescue. Appellant, never resorted to violence, instead he would talk to the other kids or at most shove them away. (R171) David explained he was a poor student and a slow learner, and appellant would help him with his schoolwork, reading in particular. (R172)

Deputy Robert D'Antonio stated he conducted various educational programs at the jail for the inmates. His contact with appellant was from appellant's representation of his jail pod at monthly meetings. (R184) While some of the pod representatives caused trouble, appellant did not. (R185) Appellant had also volunteered to assist other inmates in learning to read through a literacy program at the jail. (R186)

Nancy Denaman, the coordinator for the Literacy Program in Pasco County, met appellant when she conducted the training program for tutors at the jail. (R197) Although she met him only on that occasion, she specifically recalled he seemed genuinely interested in helping other inmates learn to read. (R198)

Sethia Hardesty stated she'd known appellant since 1978.

(R209) Appellant spent time with her oldest son taking him fishing, teaching him to ride a bike, etc. She also recalled an incident where her son had been involved in a fight at school and appellant had counseled him that fighting was not the way to handle things. (R212) He also advised her son that he should not take steroids, but eat right, and lift weights. (R214) Appellant also assisted her around the house with various mechanical or maintenance type problems. (R213)

Cherie Derrick, appellant's wife, stated she had married appellant in January of 1987 and they had a son, age four. (R221) Appellant was always willing to help everyone, and couldn't seem to say no. (R223) Appellant would help with the cooking and housework, (R222) and helped take care of their son when he was an infant. (R224)

Evelyn Deal stated she had known appellant for fifteen years. (R239) Appellant spent a lot of time at her daughter's house. Appellant treated Mrs. Deal as if she were his own grandmother, and she thought of him as one of her grandchildren. (R241) During the time she had known appellant, she had never seen him act aggressively in any way. (R247)

Charlotte Wise, Mrs. Deal's daughter, had met appellant when he was ten or eleven years old. Her oldest daughter was approximately appellant's age. (R254-5) She thought of appellant like one of her own children. Appellant spent a lot of time at her house, and he would run errands and do favors for the family. (R256) Whatever money they were able to pay appellant for work

he would do, he would use to buy groceries for his family. (R258)

She recalled an incident where she, appellant, and her daughter Christina had all been in her daughter, Debbie's car. Debbie was driving, Mrs. Wise was in the front seat and appellant and Christina were in the back seat. (R259) A man had taken a shovel and started pounding on the windshield of the car. Mrs. Wise had gotten out of the car to stop the man, and he had stopped beating on the car, but he hit her instead. (R260) Appellant got out of the car and knocked the man off balance and he fell to the ground. Mrs. Wise picked up the shovel and was going to beat the man with it, however, appellant prevented her from doing so. (R260-1) Mrs. Wise could not recall seeing appellant ever act in anger. (R262)

Christina Wise stated appellant had been like her older brother. Not only did he help out her parents, he would also help her if she had a problem. (R276) She also recalled the incident of the man with the shovel who had hit the windshield of their car. When the man went to hit the window next to her, appellant told her to get down and had put his body over hers. (R279) The man hit appellant on the back with the shovel so hard she could feel it. When her mother and sister pulled the man away from the car, appellant told her to get out and run. (R280) She saw her mother beating the man with the shovel and saw appellant take it away from her when she attempted to poke him with the pointed end of the shovel. (R282) She never saw appellant threaten or hit

the man. In fact she had never seen appellant threaten anyone with violence or beat anyone up. (R283)

SUMMARY OF THE ARGUMENT

I. Based upon this court's holdings in Patten v. State, 467 So. 2d 975 (Fla. 1985) and Rose v. State, 425 So. 2d 521 (Fla. 1983), the trial court erred in re-instructing the jury when they announced a tie vote, rather than directing them to sign the recommendation for life imprisonment.

II. Based upon this court's holding in Castro v. State, 597 So. 2d 259 (Fla. 1992) this trial court erred in instructing the jury on both aggravating factors of commission during the course of a robbery and commission for pecuniary gain, without giving a limiting instruction that the jury could only consider it as one aggravating factor, even if they found both.

III. Based upon this court's holdings in Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Campbell v. State, 571 So. 2d 415 (Fla. 1990); Niebert v. State, 574 So. 2d 1059 (Fla. 1990) and Rogers v. State, 511 So. 2d 526 (Fla. 1987), the trial court erred by failing to adequately consider all non-statutory mitigating factors for which evidence was presented when it imposed the sentence of death.

IV. Based upon this court's holdings in Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Scull v. State, 533 So. 2d 1137 (Fla. 1988) and Cook v. State, 542 So. 2d 964 (Fla. 1989), the trial court erred in finding that the offense was committed for the purpose of avoiding or preventing a lawful arrest when the evidence did not establish that factor beyond a reasonable doubt.

V. Based upon this court's holdings in Cochran v. State, 547 So. 2d 928 (Fla. 1989); Scull v. State, 533 So. 2d 1137 (Fla. 1988) and Cook v. State, 542 So. 2d 964 (Fla. 1989), the trial court erred in finding and instructing the jury on the aggravating factor that the offense was heinous, atrocious and cruel, as the evidence did not establish this factor beyond a reasonable doubt.

VI. The court's use of robbery as an aggravating factor was improper in light of the recent case of Tennessee v. Middlebrooks, 840 SW 2d 317 (Tenn. S. Ct. 1992) cert. accepted by the United States Supreme Court 53 Cr. L Rep 3013 (Case No. 92-6281.) An analogy can be made to this court's previous holdings that the premeditation to establish cold, calculated and premeditated as an aggravating factor must be more than just the premeditation necessary to establish first degree murder and "must genuinely narrow the class of persons eligible for the death penalty". Robbery or any enumerated felony used to find felony murder must be distinguishable in some way from the ordinary underlying felony in order for it to be considered an aggravating factor.

VII. Assuming there exists only one valid aggravating factor [commission during the course of a robbery] and one statutory mitigating factor [potential for rehabilitation] plus numerous non-statutory mitigating factors, appellant's sentence of death must be reduced to life imprisonment because death is a

disproportional punishment when compared to other cases decided by this court.

ISSUE I

THE TRIAL COURT ERRED IN RESPONDING TO THE JURY'S INQUIRY REGARDING A SIX TO SIX VOTE.

In the instant case, the jury was instructed and sent out to deliberate. The court then informed counsel for both the state and defense:

> *"Okay. I don't know, Tony and I were just debating on what we should call it. I don't know that it is directly a question. It's more or a comment. I think that it indicates a misunderstanding of the instructions or just not recalling the instructions. I'll read it word for word and anybody who wishes to examine it may. It will be given to the clerk. It says: 'Upon voting on such case, the jury has ended with a vote count of equal amount, six votes for death and six votes for life.'*
>
> *Now they are back there, of course, asking Tony which form they should sign and Tony, rather wisely, understanding that is not his province, has brought it to my attention. The only thing that we can do as far as I can see, is read over that portion of the instruction which specifically spells out to them-- and I think once they hear the instruction, they will know that a tie vote goes to the defendant." (R382-383)*

The court then re-instructed the jury as follows:

> *"... Folks, I have been given the comment that was sent out and I have gone over that with the attorneys and, of course, I obviously cannot tell you what you should do. That's not my role and I hope you will disregard anything that I might have said that made you think that I preferred one thing over another. But, we have agreed on a particular portion of the instructions which I think might clear things up.*
>
> *The advisory verdict need not be unanimous. The recommendation or imposition of the death penalty must be by a majority of the jury. A recommendation of incarceration for life with no eligibility of parole for twenty-five years may be made either by a majority of you or an even division of the jury. That is, a tie vote of six to six.*

Now, that is the section of the law that I think applies to the comment you have made here. Is there anybody who would like to me to repeat that? Just get your hand high enough for me to see it and I will be happy to repeat it for you. Okay. Seeing a hand in the back row, I'll be happy to go over it again. The advisory verdict need not be unanimous. The recommendation for imposition of the death penalty must be by a majority of the jury. A recommendation of incarceration for life with no eligibility for parole for twenty-five years may be made by either a majority of you or by an even division of the jury. That is, a tie vote of six to six." (R385-386)

The jury subsequently returned with a seven to five recommendation for death. (R389)

Appellant contends that it was reversible error for the trial judge to instruct the jury as it did after the jury had announced that it had a tie vote. In Rose v. State, 425 So. 2d 521 (Fla. 1983) and Patten v. State, 467 So. 2d 975 (Fla. 1985) this court was faced with similar circumstances.

The record indicates that the charge was given after the jury advised the court by a note which read, "We are tied six to six, and no one will change their mind at the moment. Please instruct us." At that point, the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. Rose, id.

This court then went on to vacate Rose's death sentence and order a new sentencing proceeding. This court also did so in Patten, id. There is no logical distinction between the instant case and either Rose or Patten, id.

Re-instruction of any kind in the instant case was improper, because the jury was not deadlocked, rather they had reached a six to six decision. Under the applicable law a tie vote goes in

the defendant's favor and life is the recommended sentence. There is no reason to give any type of re-instruction, instead the trial judge should have directed the jury foreman to sign the life sentence recommendation. Any re-instruction which tends to coerce the jury into reaching a certain verdict or to coerce an individual juror into changing his position is impermissible and can under certain circumstances constitute fundamental error. Webb v. State, 519 So. 2d 748 (Fla. 4th DCA 1988). That the re-instruction in the instant case was in effect coercive is evidenced by the jury's subsequent seven to five recommendation of death. That the error was egregious is obvious and certainly no other corrective instruction would have or could have erased its effect, therefore, reversal is mandated.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON BOTH AGGRAVATING FACTORS OF COMMISSION DURING THE COURSE OF A ROBBERY AND COMMISSION FOR PECUNIARY GAIN.

Appellant, Samuel Derrick, appeals the imposition of the death penalty upon resentencing. Derrick argues that his death sentence is unconstitutional because the jury was permitted to consider duplicative aggravating circumstances, specifically, that the murder took place during the commission of a robbery and that the murder was committed for pecuniary gain. The jury was instructed it could consider both aggravating factors, despite the court's realization that a finding of both these circumstances constituted improper doubling of aggravating circumstances.

Defense counsel objected to the court instructing the jury on both factors, at several points during the trial.

> *The Court: Number six, that the crime with which the defendant is to be sentenced was committed for financial gain. Once again, I think that pretty clearly is called for.*
>
> *Defense Counsel: Judge, my concern, my objection would be that is doubling up. After we get rid of all the other things we're going to talk about, I would like to talk about that.*
>
> *The Court: Well, doesn't that have more to do with my sentencing than it does---*
>
> *Prosecutor: That's correct judge. (R114)*
>
> .....
>
> *The Court: ... And number six, for financial gain, seems to be pretty clear. Any problems with those? Defense counsel: Judge, really I'm-- this double up that I've mentioned, my concern is that you've already told the jury that only in rare instances will you not impose a sentence that they have recommended. Now, in*

effect, they are being told that they can consider both of these things even though the court, I don't feel, is allowed to consider both, either one, but not both. And it would be very difficult for the court to override whatever sentence the jury may have, considering if they have considered both factors. And the court should not consider both, just one or the other because these are overlapping and doubling up to the extent that one set of circumstances, that is the commission of a robbery includes two aggravating circumstances instead of one.

The court: Well, then I guess the Supreme Court never should have put it in there in the first place, right? Defense counsel: No. I think there's a lot of things that could be pecuniary gain that would not necessarily be during the commission of a robbery.

The Court: But robbery always is.

Defense counsel: Right.

The Court: Then maybe they should have said, except for robbery. Doug, if you have some case law that says that doubling up deals with jury instructions rather than the Judge's reasoning, that the Judge is required to put in an order should I enter an order to that effect, then I'll be happy to look at it. But right now that's not what I understand it to be. If I'm wrong, I invite efforts to educate me. (R118-120)

.....

The Court: ... Correct me if I'm wrong, but most of these cases just indicate that I can't do any doubling up as far as the pecuniary gain and the robbery situation and I agree with that; I don't have a problem with that. But my case, State v. Rose Bowden, that came out of the Supreme Court, makes it pretty clear that anything there's evidence on the jury needs to be instructed on it even in the penalty phase. To do otherwise would pretty much do away with the effectiveness of having a jury recommendation at all because the Judge would pass on it first and then they would get to hear what the Judge was already convinced of.

Defense counsel: Judge, I agree that none of the cases I submitted to Your Honor addressed the question of whether the Judge could instruct on the doubling up. The problem is that neither did these cases indicate that-- I recall that nobody raised the question. We can only assume that the jury was, in fact, instructed on both, that is, death during the commission of a

numerated crime and for pecuniary gain. I can only assume that because it doesn't seem logical that a judge could find the existence of both of these aggravating factors, if those factors were not at least announced to the jury as being appropriate. Again, that's only logical. There is nothing in the case law that I recall that says that specifically one way or the other. (R135-136)

.....

The Court: ... I'll also give that the crime was committed--or that the crime for which the defendant is to be sentenced was committed for financial gain although I acknowledge that should I be faced with the decision, I would not be able to count both of those since it would be impermissible.

Defense Counsel: Judge, just for the record, we would renew our objection to instructing the jury both in the course of a robbery and for pecuniary gain. (R311)

Without question, a trial court's finding of both commission for pecuniary gain and commission during the course of a robbery constitutes improper doubling. Provence v. State, 337 So. 2d 783 (Fla. 1976), White v. State, 403 So. 2d 331 (Fla. 1981). It is clear that the trial judge in this case realized he could not make such finding in his sentencing order. However, what appellant objected to was the jury's being instructed on both factors without some limiting instruction advising them even if they found both factors to exist, they could only consider it as a single aggravating factor. Knowing the trial judge in question customarily takes great pains to adhere to proper law and procedure, the undersigned would not go so far as to assume he intentionally misinstructed the jury. Unfortunately, intentional or otherwise, the effect was the same. This court in Castro v. State, 597 So. 2d 259 (Fla. 1992) held that while a jury may be instructed on both aggravating factors where applicable, it was

reversible error to refuse to give a limiting instruction advising the jury that should it find both factors present, it could only consider the two factors as one.

While defense counsel may have been somewhat rambling in formulating his objection, the gist was that without some sort of limiting instruction, the jury and the judge were operating under two different criteria in reaching their determination as to whether appellant should be sentenced to life imprisonment or death. Since the jury's recommendation was to be accorded great weight by the judge, it was illogical for the judge and jury to be operating under two different standards for evaluating the evidence.

The fact the jury does not make written findings of fact which are subject to review on appeal, makes it all the more crucial that they receive proper instructions which direct their decision making so that the verdict they return will be sound. The importance of proper jury instructions was underscored by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976):

> *The idea that a jury should be given guidance in its decision-making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. ... When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.*

Allowing the jury to find both aggravating factors rendered their

recommendation questionable, especially since the factors of pecuniary gain and during the commission of a robbery were virtually uncontestable as far as the facts were concerned. Furthermore, as the jury's recommendation was based upon a seven to five vote, it could not necessarily be concluded that the failure to give a limiting instruction in no way affected their determination or constituted harmless error. see Phillips v. State, 18 Fla. L. Weekly S26 (Fla. 1992); Morgan v. State, 515 So. 2d 975 (Fla. 1987).

Appellant is cognizant of the case of Suarez v. State, 481 So. 2d 1201 (Fla. 1985) which held that it was not reversible error when the jury was instructed on both pecuniary gain and commission during the course of a robbery, as long as, the trial court did not give the factors double weight in its sentencing order. However, Suarez did not deal with a limiting instruction on doubled aggravating factors. More importantly, subsequent decisions of the United States Supreme Court have made the holding in Suarez questionable.

In Sochor v. Florida, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), the United States Supreme Court held that:

> ...there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence.

Because a Florida trial court is required to give great weight to the jury's recommendation of life or death, the Eighth Amendment prohibition applies equally to what the jury is allowed to consider during its penalty deliberations. In Espinosa v.

Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the United States Supreme Court decided that if a weighing state, such as Florida, chose to place capital sentencing authority in two authorities [the judge and jury] rather than just one, neither authority could be permitted to weigh an invalid aggravating factor. The court reasoned that although the trial court did not directly weigh any invalid aggravating circumstance, it had to be presumed the jury did so, because they were so instructed. Furthermore, it had to be presumed the court followed Florida law and gave great weight to the jury's recommendation. By doing so, the trial court indirectly weighed the invalid factor the jury presumably found. see also Johnson v. State, 18 Fla. L. Weekly S90 (Fla. January 29, 1993).

Because appellant's sentence of death was grounded for the most part on the questionable jury recommendation, it cannot stand, as it was imposed in violation of the requirements of due process and contrary to the protections against cruel and unusual punishment. Amendments VIII and XIV, U.S. Constitution; Art. I, §§ 9, 17, Fla. Const. A new sentencing hearing before a new jury is mandated.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO CONSIDER ALL NON-STATUTORY MITIGATING FACTORS FOR WHICH EVIDENCE WAS PRESENTED WHEN IMPOSING SENTENCE.

Appellant contends that the trial court erred by failing to consider all non-statutory mitigating factors for which evidence was presented when imposing its sentence of death. At trial the court instructed the jury as to two statutory mitigating factors: defendant's age at the time of the offense and any other aspect of the defendant's character or background and any other circumstance of the offense. Previously, the defense had presented evidence pertaining to several non-statutory mitigating circumstances, specifically: appellant's potential for rehabilitation [Valle v. State, 502 So. 2d 1225 (Fla. 1987)]; appellant's good jail conduct [Skipper v. So.Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)]; appellant's being a caring husband and father [Holton v. State, 573 So. 2d 284 (Fla. 1991] and appellant's charitable or humanitarian deeds [Campbell v. State, 571 So. 2d 415 (Fla. 1990)]. This evidence was essentially uncontroverted by the state. Upon imposing a sentence of death, the trial court made the following findings:

> *"As to mitigating factors, the Court acknowledges its responsibility to consider all non-statutory mitigating factors as well as the statutory mitigating factors set forth in Florida Statute 921.141(6). The Court specifically finds as follows:*
>
> *(a) Judged by the standard of reasonable certainty, the Court clearly finds that the defendant was quite young at the time of the offense and still appears to be quite young at the time of the sentencing proceedings.*

Even so, the Court has severe doubt that relative youth on the part of the defendant is, standing alone, sufficient to establish this statutory mitigating factor. Even if relative youth were determined to be a mitigating factor by itself, there are no other factors linked with the defendant's relative youth which would permit the Court to accord this mitigating factor any significant weight.

(b) As to non-statutory mitigating factors, the defendant has met the standard of reasonable certainty in establishing that the defendant has some potential for rehabilitation. Although the defendant has only recently been given an opportunity to assist other inmates in their efforts to become literate, the defendant's past assistance of his learning handicapped brother combined with the testimony of Nanci Denamen from the Scwettman Adult Education Center, tends to indicate that the defendant actually is well motivated in this regard and is not simply taking advantage of an opportunity to make himself look somewhat better to the sentencing jury and the court." (R445-455)

Florida Statute 921.141(3) requires "specific written findings of fact based upon [aggravating and mitigating] circumstances." Furthermore, the United States Supreme Court has held in Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982):

...just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

This court has specifically held that when addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant and determine whether the alleged mitigating factor is supported by the greater weight of the evidence. After the

mitigating factor has been found to exist, the court, in the case of non-statutory mitigating factors, must determine whether it is truly of a mitigating nature. Lastly, the court must decide if the mitigating factor or factors are of sufficient weight to counter-balance the aggravating factors found. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Lamb v. State, 532 So. 2d 1051 (Fla. 1988) and Rogers v. State, 511 So. 2d 526 (Fla. 1987).

Appellant argues that the court did not even address the mitigating factors of charitable and humanitarian deeds, appellant's good conduct in jail [2] and the fact he was a caring husband and father. Deputy Robert D'Antonio testified as to appellant's good conduct in jail and his position as representative of his jail pod. Cherie Derrick, appellant's wife testified that he had been a good husband and father. Appellant's brother, David Derrick, testified appellant had helped him with his schoolwork and kept the other children from picking on him at school. Most telling, was the testimony of Charlotte Wise and her daughter, Christina, who recounted an incident where appellant had saved them from death or serious physical harm when they were attacked by a man brandishing a shovel. Not only had appellant subdued the man, but he had also stopped Mrs. Wise from extracting retribution on the man when she tried to hit him on

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[2] Appellant would accept the proposition that appellant's good conduct in jail could be considered part of the mitigating factor of potential for rehabilitation which was addressed by the trial court.

the head with the shovel. Sethia Hardesty, Evelyn Deal, Charlotte Wise and Christina Wise all attested to various acts of kindness or assistance on the part of appellant to them and their families. This testimony was essentially uncontroverted by the state.

When dealing with mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance the defense has alleged and decide whether it has been established by a greater weight of the evidence. A mitigating factor need not have to be proven beyond a reasonable doubt. Next, the court must weigh the aggravating circumstances against the mitigating circumstances and must expressly consider in its written order each established mitigating circumstance. Although the weight to accord the mitigating factors is within the domain of the trial judge, once a mitigating factor is established, it cannot be summarily dismissed as having no weight whatsoever. Campbell, id. A trial court is required to consider any and all relevant mitigating evidence presented to it in its sentencing order. The written sentencing order in the record on appeal does not reflect that the trial court did so. The trial court erred by not finding and weighing these uncontroverted mitigating circumstances.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST WHEN THE EVIDENCE DID NOT ESTABLISH THAT FACTOR BEYOND A REASONABLE DOUBT.

Appellant contends the trial court erred in finding the aggravating circumstance that appellant murdered the Mr. Sharma in order to avoid arrest. When the victim is someone other than a member of law enforcement, the state is required to establish beyond and to the exclusion of any reasonable doubt that the defendant's dominant or only motive for committing the murder, was the elimination of a witness. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Scull v. State, 533 So. 2d 1137 (Fla. 1988) and Cook v. State, 542 So. 2d 1137 (Fla. 1988).

The fact the victim knew the perpetrator or could have identified him, is insufficient to sustain a finding that the homicide was committed for the purpose of avoiding or preventing a lawful arrest. Floyd, Caruthers, id., Robertson v. State, 18 Fla. L. Weekly S51 (Fla.January 7, 1993). According to the testimony, appellant confided to a friend, David Lowry, that he had stabbed Mr. Sharma thirteen times. When Lowry inquired why he had stabbed him so many times, appellant had replied because Mr. Sharma kept screaming. Sergeant Vaughn testified that appellant had admitted to stabbing Mr.Sharma thirteen times in the back "to shut him up." However, even Detective Vaughn admitted that appellant seemed genuinely shocked when informed Mr. Sharma had

been stabbed in excess of thirty times.

It is axiomatic that the state must establish the existence of an aggravating factor beyond a reasonable doubt. Consequently, to satisfy the burden of proof, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. Geralds v. State, 601 So. 2d 1157 (Fla. 1992)

Furthermore, the trial court is not permitted to even draw logical inferences to support its finding a particular aggravating circumstance when the state has not met its burden of proof. Clark v. State, 443 So. 2d 973 (Fla. 1983). Appellant's statements to his friend and to Detective Vaughn are subject to different interpretations. The state's contention was that appellant stabbed Mr. Sharma to shut him, in other words, so he could not be a witness. But appellant's statements are equally susceptible to the interpretation that appellant stabbed Mr. Sharma just to stop his screaming. These facts support the conclusion that appellant succumbed to panic and stabbed Mr. Sharma instinctively, as readily as they support the conclusion he did so with the intent to eliminate him as a witness. It is more than likely the robbery simply got out of hand. That appellant was unaware of how many times he had actually stabbed the victim,is indicative of the fact he acted in a state of frenzy. Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987).

The mere fact of death being insufficient to find this factor when the victim is not a law enforcement official and the requirement that proof of the defendant's intent to avoid arrest

and detection must be very strong, the state failed to meet its burden of proof in the instant case. The trial court, consequently, erred in finding the existence of this aggravating factor and utilizing it in the weighing process, thereby rendering appellant's death penalty sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States' Constitution. see Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS OR CRUEL WHEN THE EVIDENCE OF THAT AGGRAVATING FACTOR WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

Appellant argues there were insufficient facts to warrant the trial court instructing the jury on the aggravating factor of heinous, atrocious, and cruel, (R312) and furthermore the trial court erred in finding this factor was established by the evidence and then using it in the weighing process.

The medical examiner, Dr. Corcoran, counted thirty-one separate stab wounds, two puncture wounds and one cut on Mr. Sharma's body. There were six stab wounds to the front of the body, twenty to the back and the remainder in the victim's extremities. Dr. Corcoran testified Mr. Sharma died due to blood loss and the collapse of his lungs. The doctor estimated that Mr. Sharma died anywhere from ten to fifteen minutes after being stabbed, but admitted he was only guessing as to the actual time. Because stab wounds are painful, the doctor assumed the victim had been in pain. However, when cross-examined, Dr. Corcoran conceded that one of the stab wounds had penetrated the victim's chest and struck his lungs which caused their collapse and resulted in unconsciousness. Dr. Corcoran acknowledged he could not determine whether the chest wound was inflicted first or last, so he could not say at what point the victim lost consciousness. Dr. Corcoran agreed with the conclusion that the time the victim was conscious did not necessarily coincide with the time it took him to die.

None of the defendant's acts occurring after the victim is unconscious can support a finding that the offense was heinous, atrocious or cruel. Cochran v. State, 547 So. 2d 928 (Fla. 1989). As there was as much basis for concluding that Mr. Sharma was rendered unconscious almost immediately after the first wound was inflicted as there was for concluding that he suffered pain until he finally expired, the state failed to prove beyond a reasonable doubt that the offense was heinous, atrocious or cruel.

This aggravating factor of heinous, atrocious or cruel is appropriately found "only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or the enjoyment of the suffering of another." Cheshire v.State, 568 So. 2d 908 (Fla. 1990). The evidence herein does not establish that appellant stabbed Mr. Sharma with the intent to torture him or with the desire to inflict a high degree of pain or to enjoy his suffering, if any. Therefore the trial court erred in finding this aggravating factor and then utilizing it in the weighing process. Under the facts of this case, it cannot be reasonably determined whether the trial judge would have imposed the same sentence, absent the two improper aggravating factors. Thus, the court's error in considering them mandates appellant's death sentence be reversed and remanded for re-sentencing.

ISSUE VI

THE TRIAL COURT ERRED IN CONSIDERING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN PERPETRATION OF A FELONY.

In order to pass constitutional muster under the Eighth Amendment to the United States Constitution, a state's capital sentencing scheme must direct and limit the sentencer's discretion so that it **genuinely narrows the class of defendant's eligible for the death penalty.** Zant v. Stephens, 462 U.S. 862 (1983); Arave v. Creech, 52 CrL Rep 2373 U.S. Supreme Court (March 30, 1993) [Case No. 91-1160]; Porter v. State, 564 So. 2d 1060 (Fla. 1990). Appellant argues that the trial court erred by using the fact the murder was committed during the course of a robbery as an aggravating factor when imposing the death penalty, because that factor is duplicative of the underlying conviction which made the death penalty a possibility in the first place. While appellant realizes that this court has rejected the same or similar arguments in previous cases, recent case holdings warrant reconsideration of this issue.

In State v. Middlebrooks, 840 S. W. 2d 317 (Tenn. S. Ct. 1992), the Tennessee Supreme Court held that the defendant's death sentence for felony murder violates the federal and state constitutional prohibitions against cruel and unusual punishment when one of the aggravating factors found by the sentencer [in this case the jury] is that the killing occurred during the commission of a felony. The court found that when the aggravator is duplicative of the conviction that makes the death penalty a

possibility [ie, felony murder] the class of death-eligible murderers was not adequately narrowed. The United States Supreme Court has accepted certiorari jurisdiction of this case in Tennessee v. Middlebrooks, 53 CrL Rep 3013 (April 21, 1993) [Case No. 92-989].

In earlier cases this court has declined to accept the premise that the Eighth Amendment prohibits the sentencer in a capital felony-murder prosecution from considering as an aggravating circumstance the fact the murder was committed during the commission of a felony. However, this court has specifically held in conjunction with the aggravating factor of cold, calculated and premeditated manner without any moral or legal justification:

> *"To avoid arbitrary and capricious punishment, this aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. ... Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder. Therefore, section 921.141(5)(i) must apply to murders more cold-blooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first degree murder. This court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder."*

The purpose of an aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not. If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant, then that aggravator is constitutionally infirm. Arave v. Creech, id.

The aggravating factor of commission of murder during the course of a felony does not narrow the class of persons eligible for the death penalty and does not reasonably justify the imposition of the more severe sentence on the defendant compared to others found guilty of first degree murder, since homicide during the commission of an enumerated felony is already an essential element of capital murder in Florida. The aggravator, in effect, applies to everyone found guilty of first degree felony murder without any selectivity whatsoever. Furthermore, there does not appear to be any type of limiting construction applied to this particular factor in the applicable case law.

For the reasons stated above, the use of this aggravating factor violates the cruel and unusual prohibitions of the Eighth Amendment of the United States Constitution and Art. I, §17 of the Florida Constitution.

ISSUE VII

BASED UPON PROPORTIONALITY, THIS COURT SHOULD REDUCE APPELLANT'S SENTENCE TO ONE OF LIFE IMPRISONMENT.

Assuming this court finds the two aggravating factors of heinous, atrocious and cruel and commission for the purpose of avoiding or preventing lawful arrest to be invalid, this would leave one aggravating factor [3] [offense committed during the commission of a robbery] and one mitigating factor[potential for rehabilitation], as well as, several other non-statutory mitigators for which evidence was adduced, but were not considered by the court in its sentencing order.

Because of the uniqueness of death as a punishment it is necessary to engage in a review of proportionality of the circumstances of the instant case with other capital cases to determine if death is an appropriate penalty. It is not merely a comparison of the number of aggravating versus mitigating factors. Tillman v. State, 591 So. 2d 167 (Fla. 1991). It is an inherent part of this court's review process in capital cases to insure proportionality among death sentences. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Booker v. State, 441 So. 2d 148 (Fla.1983); Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

The trial court should have found additional mitigating circumstances, and in light of those and all the mitigating

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[3] Obviously if this court also found murder during the commission of a felony to be an invalid factor, there would be no aggravating factors and appellant's sentence would have to be reduced to life. see Banda v. State, 536 So. 2d 221 (Fla. 1988)

evidence, the sentence of death was disproportional when compared with other capital cases where this court has vacated the death sentence and imposed life imprisonment. The instant case is not substantially different from the circumstances in Rembert v. State, 445 So. 2d 337 (Fla. 1984), which involved a murder occurring during the commission of a robbery, and wherein this court vacated the defendant's death sentence and imposed a sentence of life imprisonment.

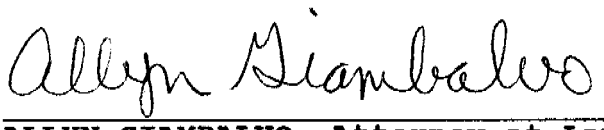
As stated in Songer v. State, 544 So. 2d 1010 (Fla. 1989), this court has affirmed death sentences supported by one aggravating circumstance **only** in cases involving nothing or very little in mitigation. Certainly the mitigation evidence presented herein was much more than that.

CONCLUSION

Appellant, Samuel Jason Derrick, respectfully asks this Honorable Court to reduce his sentence of death to a sentence of life imprisonment or, in the alternative, to grant him a new penalty phase before a new jury or order a new sentencing hearing before the judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 2002 North Lois Avenue North, Tampa, FL 33607 and to Samuel Jason Derrick, Inmate No: 097494, Florida State Prison, P.O. Box 747, Starke, FL 32091 May 12, 1993.



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