IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,072

JIMMIE LEE CONEY,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

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INTRODUCTION

This is a direct appeal from judgments of conviction and sentences, including a sentence of death, entered following a jury trial. In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "A" will be used to designate the appendix attached to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On April 25, 1990, an indictment was filed charging Jimmie Lee Coney with first degree murder and arson (R. 1-2A). The case was scheduled for arraignment before former Circuit Court Judge Roy T. Gelber on May 8, 1990 (R. 2926). At that hearing, the assistant public defender assigned to represent Mr. Coney certified that a conflict of interest existed which precluded further representation of Mr. Coney by the Public Defender's Office (R. 2926). Judge Gelber stated, "I will get an attorney," and he continued the case to the following day (R. 2926). At a hearing on the following day, attorney Manuel Casabielle accepted Judge Gelber's appointment to represent Mr. Coney (R. 2930).

On January 31, 1992, a lengthy pretrial conference was conducted before the Honorable Fredricka G. Smith, Circuit Court Judge, to whom the case had just been assigned for trial (R. 387-424). Mr. Coney was not present at this pretrial conference, as his counsel purported to waive his right to be present (R. 389).[1]

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[1]The facts relating to this pretrial conference are set forth in detail in Point IIIA of this brief, in which the argument is presented that Jimmie Coney's involuntary absence from the pretrial

Approximately two weeks after the pretrial conference, on February 11, 1992, trial proceedings commenced with a hearing on a defense motion to exclude the dying declarations of the victim, Patrick Southworth (R. 60, 425). At the outset of this hearing, Judge Smith introduced herself to Mr. Coney and explained that she had recently been assigned to preside over his trial (R. 431-32). Judge Smith did not mention anything about the pre-trial conference over which she had previously presided.

The evidence introduced at the pretrial hearing concerning the admissibility of Patrick Southworth's out-of-court statements focused on the time period beginning with the discovery of Southworth at the scene of the fire at approximately 5:00 A.M. on April 6, 1990, and ending when Southworth lost consciousness at Jackson Memorial Hospital (JMH) approximately two hours later (R. 433-601, 844-949). At the conclusion of the hearing, the court found that Southworth was conscious of his immediate and impending death during that period of time (R. 957-61). Based on this ruling the judge admitted, in its entirety, every out-of-court statement made by Patrick Southworth from the time he was found at the scene of the fire until the time he lost consciousness at JMH (R. 957-58).[2] The defense objection to the admission of this evidence was renewed during the trial (R. 1741).

Jury selection commenced with the questioning of prospective

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conference requires reversal.

[2]The evidence adduced at the pretrial hearing concerning Southworth's out-of-court statements is set forth in detail in Point II of this brief, in which the argument is presented that the trial court erred in allowing the state to introduce Southworth's statements concerning his opinion as to Coney's motive.

jurors concerning their ability to recommend the death penalty (R. 642-721). At the conclusion of this questioning, a conference was held outside the presence of Mr. Coney (R. 721-728). During this conference, the first round of challenges for cause were exercised (R. 722-727).[3]

During the general questioning of the prospective jurors concerning their backgrounds, juror Constance Schopperle revealed that her husband was an FBI agent involved in Operation Court Broom (R. 791, 1049). After defense counsel completed his questioning of the prospective jurors, another conference was held outside the presence of Mr. Coney (R. 1081-1085). At this conference, defense counsel disclosed to the court that his name had appeared in the newspapers in association with the Operation Court Broom investigation, and he requested the opportunity to question Ms. Schopperle further outside the presence of the other jurors (R. 1081-84; A. 1-3).[4]

During defense counsel's general questioning of the prospective jurors, he began to question the jurors about their understanding of the concept of reasonable doubt (R. 1061-1062). After defense counsel had only questioned a handful of jurors on this subject, the court sua sponte interrupted and imposed a ban on any further questioning of the jurors concerning reasonable

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[3]The facts relating to this conference are set forth in detail in Point IIIB of this brief, in which the argument is presented that Jimmie Coney's involuntary absence from the conference requires reversal.

[4]The facts relating to this conference are set forth in detail in Point IIIB of this brief, in which the argument is presented that Jimmie Coney's involuntary absence from the conference requires reversal.

doubt (R. 1062).

Toward the end of the trial, defense counsel presented the judge with a proposed jury instruction concerning the weighing of evidence of dying declarations (R. 216-17, 2494-95). The judge refused to give this instruction (R. 2496-98).

The jury retired to begin its deliberations at 10:41 A.M. (R. 2637). At 3:42 P.M., the jury returned its verdict finding Jimmie Coney guilty as charged of first degree murder and first degree arson (R. 241-242, 2642-43). The court entered adjudications of guilt based on the jury verdicts (R. 244-45, 2652-53).

THE GUILT PHASE FACTS

On April 6, 1990, shortly before 5:00 A.M., someone set fire to Patrick Southworth as he lay in his lower bunk in Cell 120 in the B-dorm wing of Dade Correctional Institution (DCI). Southworth died from the burns he suffered in that fire approximately 24 hours later. To establish that Jimmie Coney was responsible for Southworth's death, the state relied primarily on statements made by Southworth in the two hour period after the fire, and on the testimony of three inmates at DCI who implicated Coney in setting that fire. The defense presented a number of witnesses to establish that Jimmie Coney could not have set the fire, and that Southworth's roommate, Byrel Santerfeit, had in fact set the fire.

On April 6, 1990, Corrections Officer Jose Sanchez was the sole officer assigned to supervise approximately one hundred inmates housed in the B-dormitory wing of DCI between midnight and

8:00 A.M. (R. 1527-28). At 4:00 A.M., Officer Sanchez woke up inmates Jimmie Coney and Archie McKnight so that they could pack up their personal property in preparation for a transfer out of DCI (R. 1531-33). After waking up the two inmates, Officer Sanchez returned to the officers' station (R. 1535). A short time later, Coney went to the station and asked Officer Sanchez for a plastic bag to use to pack up his property (R. 1535-36). Officer Sanchez told Coney that he did not have any plastic bags (R. 1536). Officer Sanchez then watched as Coney tried to use a telephone that was not working (R. 1536-37). At about the same time, Officer Sanchez observed Coney's roommate, Hasan Jones, walking down the hallway to get a drink of water (R. 1537). Officer Sanchez told Jones to return to his cell, and then watched as Coney and Jones returned to the cell they shared (R. 1537-39).

At approximately 4:20 A.M., Officer Sanchez conducted a count of the inmates (R. 1539). During this count, Officer Sanchez opened the door to Cell 112 where Coney and Jones lived (R. 1539). He looked inside the cell and saw Coney and Jones (R. 1539-40). He did not smell any flammable liquids inside the cell (R. 1572). During the multiple encounters between Officer Sanchez and Coney that morning, the officer never smelled any flammable liquids on Coney's person (R. 1572-74, 1589).

As Officer Sanchez approached Cell 120, which was occupied by Patrick Southworth and Byrel Santerfeit, Officer Sanchez observed Coney enter the restroom (R. 1541-43). Officer Sanchez walked about four feet into Cell 120 and saw that Southworth was lying in the bottom bunk with the covers pulled over his body (R. 1567-69).

After Officer Sanchez came out of Cell 120 and started walking down the hallway, he saw Coney come out of the restroom and return to his cell (R. 1543-44).

After Officer Sanchez had finished the inmate count and returned to the officers' station, Coney and McKnight approached him and Coney again asked for a plastic bag (R. 1544-46). Officer Sanchez told Coney not to worry and Coney returned to his cell (R. 1546). Officer Sanchez then began an inventory of McKnight's property, assisted by Corrections Officer Steven Barney who had arrived at approximately 4:30 A.M., around the time that McKnight entered the officers' station (R. 1546-47, 1666). Officer Sanchez sat at a desk in the officers' station and did paperwork while Officer Barney sorted through McKnight's property (R. 1547-48). Directly in front of the desk where Officer Sanchez sat were two windows looking out onto B-dormitory (R. 1548-49).

During the time that the officers were conducting the inventory of McKnight's property, Coney returned to the officers' station with his property packed in plastic bags (R. 1549). The officers advised Coney to wait outside the station, and Coney placed the plastic bags on the ground outside the station (R. 1550). Sanchez testified at trial that after Coney placed the bags outside the station, he (Sanchez) returned to the inventory of McKnight's property and did not pay any attention to Coney (R. 1550-51). Officer Barney testified that Coney turned in the direction of B-dorm after leaving the station (R. 1669-70).

As Officer Sanchez continued with the inventory of McKnight's property, Officer Tony Pesante entered the station at 4:57 A.M. to

check the results of the inmate count (R. 1551-52, 1618). Coney had walked out of the officers' station with his property one or two minutes before Officer Pesante arrived (R. 1669-70). Officer Pesante testified at trial that he did not see any inmate outside the officers' station when he entered that station at 4:57 A.M. (R. 1618-19). Officer Sanchez testified at trial that he could not remember where Coney was located when Officer Pesante entered the officers' station (R. 1576-77). In his incident report prepared on April 6, 1990, Officer Sanchez wrote, "Jimmie Coney was standing in front of the officers' station when Officer Pesante walked in" (R. 1577-78). Over defense objection, the state was permitted to elicit testimony at trial from Officer Sanchez concerning statements he gave on April 6 and April 10 in which he told investigating officers that he did not know where Coney was when Officer Pesante entered the station because he was busy with the inventory (R. 1592-1600).

Less than a minute after Officer Pesante entered the station, the officers heard a scream and then heard someone say, "My roommate is on fire." (R. 1552). The officers ran out of the station to see what was happening, and they saw that Byrel Santerfeit was the inmate who was screaming (R. 1552-53, 1556-57, 1621). Officer Sanchez was not paying attention to whether any inmates were near the station when he ran out (R. 1552). Officer Barney, who was the first officer out of the officers' station, looked over a railing and saw smoke coming out of the open door to Cell 120 (R. 1672, 1686).

Officer Sanchez pulled the fire alarm and the control room was

notified of the fire by radio (R. 1553). Officer Barney ran down the stairs to Cell 120 and Officer Pesante grabbed a fire extinguisher and also ran to Cell 120 (R. 1622, 1673). Officer Barney observed two individuals in the common area of the dormitory as he ran toward Cell 120 (R. 1686). He saw a white male in his underwear running by the bathroom under the stairs, and he saw a black male dressed in prison blues standing two doors down (R. 1686-87). Officer Barney told the two individuals to get out of the area, and he continued running toward the fire (R. 1686). Officer Barney could not identify either individual (R. 1688-89).

By the time Officer Barney arrived at Cell 120 the door was closed (R. 1673). All cell doors in the B-dormitory automatically lock from the outside when closed (R. 1674). Officer Sanchez threw the keys to Cell 120 over the railing to Officer Barney (R. 1553-54). Officer Barney opened the door to Cell 120 and the officers saw Patrick Southworth engulfed in flames in the rear of the cell (R. 1623, 1674-75). Officer Pesante immediately put out the flames on Southworth with two short bursts from the fire extinguisher, and then he put out a fire in the back of the cell (R. 1623-26). Southworth stood up by himself and walked out of the cell with Officer Barney (R. 1625, 1678). Southworth was walking very slowly and deliberately (R. 1625).

Officer Barney accompanied Southworth to the prison clinic (R. 1681). Southworth was walking under his own power (R. 1734). On the way to the clinic, Southworth asked him, "Why me? Why me? Why did they do this to me?" (R. 1682). Nurse Nina Mix met them at the elevator and took them to the clinic (R. 1683-84). Inside the

clinic, Nurse Mix also heard Southworth repeatedly say that "he didn't know why they did it to him." (R. 1737, 1747).

Major John Thompson, chief of security at DCI, entered the clinic a few minutes after Nurse Mix began treating Southworth (R. 1738). Thompson began questioning Southworth while Nurse Mix was treating him (R. 1739, 1766). Nurse Mix testified at trial that at one point in the questioning she heard Thompson ask Southworth if he knew who did it, and Southworth said something that sounded like "Cooney" (R. 1739).

Thompson testified at trial that he asked Southworth, "Who did this to you?", and Southworth said, "James Coney" (R. 1766). Thompson asked him, "Why?", and Southworth replied, "Because I'm a homosexual." (R. 1766). Thompson asked him what happened, and Southworth said he felt something wet on him, he looked up and he saw James Coney (R. 1767). Southworth then said, "I think my roommate was involved in this . . . Because my lock can't be picked." (R. 1767). Nurse Mix, who was standing next to Southworth at the time, did not hear him make any such statements (R. 1748).

Armando Gonzalez of the Metro-Dade Fire Department, along with two other paramedics, arrived at the clinic and determined that Southworth had to be airlifted to JMH (R. 1782-84). Gonzalez testified that while the paramedics were getting Southworth ready to be airlifted, he asked Southworth what happened and Southworth said, "My lover threw liquid on me. Lit me on fire" (R. 1787). Gonzalez asked him, "Why?" and he said either "I left him", or "I'm leaving him." (R. 1787).

Lieutenant Robin Pomerantz of the Dade County Fire Department

was the flight medic assigned to care for Southworth on the helicopter flight to JMH (R. 2354-55). He testified that when Southworth was first loaded onto the helicopter, he had stated that someone had poured liquid or fluid on him and then set him on fire (R. 2355). In deposition testimony, Pomerantz had stated that Southworth might have said that he was burned because he was an informant (R. 2356). At trial, Pomerantz could not be specific as to whether Southworth had used the word "informant" (R. 2356-57).

Officer Darrell Huffman was the security officer assigned to travel with Southworth from DCI to JMH (R. 1796). He departed DCI with Southworth at 5:47 A.M. and arrived at JMH at 6:10 A.M. (R. 1799). Officer Huffman testified that Southworth was taken from the trauma room to the X-ray room at 6:30 A.M. (R. 1800). Huffman claimed that while Southworth was being X-rayed, he answered a number of Huffman's questions about what had happened to him (R. 1800). Huffman testified that he asked Southworth how he had received the burns, and Southworth stated, "This guy threw gasoline on me and set me on fire." (R. 1800). Huffman asked Southworth if he knew who the guy was and he stated, "Yeah, Cooney, Jimmie Coney." (R. 1800). Huffman then asked why he had done that, and Southworth stated, "I'm a homosexual and I told him I wouldn't fuck him anymore." (R. 1800). Huffman testified that Southworth lost consciousness at 7:00 A.M. (R. 1805). Southworth died the following day as a result of second and third degree burns covering approximately 55-60 percent of his skin area (R. 1301-02, 1309).

The arson investigation inside Cell 120 uncovered a quart-size "butt can" underneath the bottom bunk in the cell (R. 1342).

In the bedding, investigators found a newspaper twisted to form a wick (R. 1343). Further investigation determined that a flammable accelerant had been thrown toward the bunk bed two times (R. 1343). Investigators theorized that the bulk of the liquid had been thrown out of the "butt can" toward the bunk first, then the can itself had been thrown toward the bunk, and finally the twisted wick was used to apply the flame after it was lit (R. 1343, 1421). The investigators further theorized that when the fire started, Southworth was lying in bed with his head on the pillow and the blanket pulled over him (R. 1450-51). No evidence of the accelerant remained in the room by the time that the arson investigators arrived (R. 1346-47).

During the arson investigation conducted in the general vicinity of the fire, a strong lacquer/thinner-type odor was discovered emanating from a garbage pail at the bottom of a stairway (R. 1333). Inside the garbage pail, investigators found a shoe box which had contained sneakers, five soda cans, pieces of whole wheat bread which had the odor of thinner, tissue paper which had the odor of thinner, and a key to the room where the fire was started (R. 1352). Three of the soda cans had the brand name White Rock Cola, and the remaining two cans had the brand name Pina (R. 1351). A strong presence of flammable vapors left by a flammable liquid was discovered on each of the soda cans (R. 1350-51).

Arson investigators used a highly sensitive piece of equipment known as a hydrocarbon sniffer to detect the presence of flammable vapors on the items taken from the garbage pail (R. 1423, 1427-28). The hydrocarbon sniffer was also used to test for the

presence of flammable vapors in Jimmie Coney's cell (R. 1428). The sniffer was run through the lockers, the bedding, under the beds, and throughout all areas of Coney's room (R. 1428). This testing did not uncover any trace of flammable vapors in Coney's cell (R. 1428). An arson investigator testified at trial that the vapors of the lacquer thinner found in the garbage pail were so strong that anyone passing by something containing that lacquer thinner would have to be able to smell the thinner (R. 1434).

Prison records established that a routine cell search of Coney's cell had been conducted on March 31, 1990, and again on April 4, 1990 (R. 169, 173, 2288-90). A routine cell search would involve a check of the bedding and the lockers with a keen eye for observation of anything out of the ordinary (R. 2287). The search of Coney's cell on April 4, 1990 was specifically directed at the area around Coney's bunk (R. 2288-89). Neither the search on March 31 nor the search on April 4 uncovered the presence of any flammable liquids in Coney's cell (R. 169, 173).

A few days after the fire, an arson investigator withdrew a small sample of lacquer thinner from a 55-gallon drum of lacquer thinner at the prison body shop (R. 1490-94). A criminalist at the Metro-Dade Police Department compared that sample of lacquer thinner to the traces of flammable liquids found on the shoebox and the soda cans retrieved from the trash can at DCI (R. 1894-95). The criminalist concluded that the flammable liquid found on the shoebox and the soda cans was not the same substance withdrawn from the 55-gallon drum of lacquer thinner at the prison body shop (R. 1928-29). The soda cans, the shoebox and the newspaper used to

light the fire were submitted to the crime lab in an attempt to develop latent fingerprints on those items (R. 1935-39). No useful prints could be developed on those items (R. 1942-49).

James Franklin Young was an inmate at DCI at the time of the fire (R. 1830). Young had been released from custody prior to his testimony at the trial in this case (R. 1830). Young testified that Coney and Southworth were always "hanging around together" at DCI (R. 1833). Coney would ask Young about Southworth, and these inquiries increased after Coney returned to DCI after being temporarily transferred to another institution for a period of time (R. 1834). Young testified that there seemed to be friction between Coney and Southworth (R. 1834).

Young testified that a week before the fire he had a conversation with Coney at the prison auto body shop where Young worked (R. 1835-36). During this conversation, Coney asked Young to get him some lacquer thinner (R. 1836). Young testified that he was able to get some lacquer thinner and he filled up a soda can that Coney had given to him with the lacquer thinner (R. 1839). At trial, Young identified the White Rock soda cans taken from the trash can at DCI as appearing to be the same brand as the soda can he filled up for Coney (R. 1841). Young testified that he told Coney to seal up the can to prevent evaporation (R. 1843).

Young had two prior felony convictions at the time of his testimony (R. 1847). He claimed that he was not promised anything by the authorities in exchange for his testimony (R. 1846). He did admit that he was hoping that Prison Inspector Callahan would get him transferred to a correctional facility closer to his wife in

exchange for his information and cooperation in this case (R. 1846-47). Young claimed that his sentence was not shortened as a result of the information he gave concerning this case (R. 1847). Young did admit that he kept his job at the body shop after the fire while the person in charge of the shop lost his job right after the fire (R. 1848). Young was never charged with any disciplinary violation as a result of giving lacquer thinner to another inmate (R. 1858).

Gregory Hoover was another inmate at DCI at the time of the fire (R. 1981). Hoover testified at trial that he usually saw Coney and Southworth together at the prison and that he frequently observed Coney with his arm around Southworth (R. 1984). Hoover stated that he had heard Coney refer to Southworth as his boy, and that the term was used at DCI to refer to the person who plays an inferior role in a homosexual relationship (R. 1984-85).

Hoover testified that he had a conversation with Coney the day before the fire concerning a job at the prison which Hoover had applied for, but Southworth had gotten (R. 1987). Hoover claimed that Coney had asked him if he was still interested in the job (R. 1987). According to Hoover, when he asked Coney, "What about Pat?", Coney replied, "I'm going to get that motherfucker." (R. 1986-87). Hoover claimed that he asked Coney what he meant and that Coney stated, "I'm going to burn his ass." (R. 1988). Hoover stated that Coney gave him a "bizarre dramatic look" after making that statement (R. 1988).

Hoover testified that he told the prison authorities about the statements Coney made to him because, "I would be remiss of any

kind of obligations to the people that I live around and the society that I will attempt to rejoin if I didn't step forward to say something." (R. 1990). At the time of his testimony, Hoover had been previously convicted of a felony four times (R. 1981). Hoover claimed that he had not received any favors or any special treatment as a result of his testimony (R. 1992). He did admit that one month after he gave his statement to the authorities, he was given a clerical position in the jail library which he had been denied a number of times in the past (R. 1993-1995).

Hason Jones testified at trial that he was Coney's roommate during the two week period between the day Coney returned to DCI and the day of the fire (R. 2014-15). Jones stated that although he and Coney were roommates, they "never spoke or anything." (R. 2015). Jones testified that prior to the time that Coney was temporarily transferred out of DCI, Coney and Southworth were always together (R. 2016). Based upon his observations during the period that Coney was away from DCI, Jones had concluded that Southworth and inmate Daries Barnes had become lovers (R. 2039). Jones claimed that Southworth had returned some property to Coney upon Coney's return to DCI, and that he never saw Coney and Southworth together after the property was returned (R. 2017-18).

Jones testified that after Coney was awakened and told about being transferred at 4:00 a.m. on April 6, 1990, Coney walked to the bathroom area and came back muttering to himself, "I knew this cracker was going to do this to me, you know. I just wish I wasn't getting transferred now. I wish instead of Friday, I wish it could have been Monday for I could have got some gas." (R. 2018-21).

Jones then saw Coney pull a shoebox out from under his bunk (R. 2021). Inside the shoebox, according to Jones, were two soda cans inside some plastic bags (R. 2021). Jones testified that he watched as Coney poured the contents of the two soda cans into a large can known as a "butt can" (R. 2022). Jones testified that the liquid smelled like paint thinner (R. 2022).

Jones testified that he did not observe any flammable liquids in his cell until Coney pulled out the shoebox on the morning of April 6 (R. 2040). Jones did not see any tissue paper or anything else used to seal the top of the soda cans in the shoebox (R. 2058). Jones identified the shoebox taken from the trash can by the arson investigators as the shoebox he had seen Coney take out from under the bed (R. 2041). Jones could not positively identify any of the soda cans taken from that trash can as the soda cans he had seen inside the shoebox (R. 2048). The plastic bags which Jones claimed to have inside seen inside the shoebox were not introduced into evidence at trial (R. 2041-45).

Jones testified that when Officer Sanchez entered the cell during the inmate count, Coney had kicked the butt can from the middle of the floor to a space in between the lockers in the cell (R. 2023-24). Jones testified that there was a strong odor in the cell from the flammable liquid when Sanchez entered the cell for the inmate count (R. 2068). When Officer Sanchez left the cell after the count, Coney followed him (R. 2026). When Coney returned to the cell, he had a key which he showed to Jones (R. 2027). Jones testified that at this point he grabbed his Koran and walked to the card room across from the officers' station (R. 2028). He

claimed that he remained inside the card room until the time that he heard Byrel Santerfeit screaming that his roommate was on fire (R. 2029-31). After the screaming, and as the officers were on their way to Cell 120, Jones claimed to have seen Coney walking from Cell 112 to the stairway (R. 2077-78). Jones testified that the next time he saw Coney was after the dormitory had been evacuated (R. 2032). Jones claimed that when the inmates were moved to the dining hall, Coney sat beside him at a table and told him, "Take that with you to the grave." (R. 2033).

Jones testified that he had not received any special favors as a result of his testimony (R. 2034-35). At the time of his testimony, Jones had been convicted of a felony three times (R. 2036, 2084).

Alex Severance, another inmate at DCI at the time of the fire, testified at trial that Hason Jones and Jimmie Coney were sitting next to him at the table in the dining hall after the dormitory had been evacuated (R. 2102). Severance testified that he never heard Coney say to Jones, "Take this to the grave with you." (R. 2103). Severance testified that he spoke to Jones on the day after the fire and that during that conversation Jones said that he didn't know who had started the fire (R. 2105-06). During that conversation Jones never mentioned anything about Coney having flammable liquids in their cell (R. 2106). When he was shown a prison card which appeared to indicate that Jones was in administrative confinement from April 6 until April 17, Severance insisted that he had talked to Jones in the canteen area on the day following the fire (R. 2123-25). A confinement card was introduced

into evidence at trial which indicated that Hason Jones was placed into confinement at 7:40 A.M. on April 6, 1990, and released from confinement on April 17, 1990 (R. 2439). A corrections official testified that inmates in confinement were not supposed to be allowed out of confinement to talk to other inmates (R. 2441). The official testified further that he had given special instructions that Jones was not to talk to anyone while he was in confinement (R. 2441).

Severance had been convicted of a felony nine times at the time of trial (R. 2100). On cross-examination by the state, Severance testified that he had never known Hason Jones to lie to anyone, and that he knew Jones to be a religious person (R. 2112). On redirect examination, defense counsel asked Severance if he knew Jones to be a snitch (R. 2131). The state's objection to this question was sustained, and defense counsel's request to make a proffer was denied (R. 2131).

Daries Barnes testified at trial that he was sleeping when the fire started and that he was awakened by the screaming (R. 2136). He went to the railing outside his cell and saw Coney standing in front of the officers' station doorway (R. 2137-38, 2170-71, 2240). He saw Santerfeit running from the area near his cell, and he saw Southworth trying to walk out of that cell (R. 2138-40).

Barnes testified that Santerfeit was the first inmate taken away by the authorities for questioning after the dormitory was evacuated (R. 2141). Santerfeit was taken away as the rest of the inmates were lining up outside the dining hall (R. 2141-42). Coney was taken away after Santerfeit, and then Barnes was taken for

questioning (R. 2141).

Barnes claimed at trial that he was not Patrick Southworth's homosexual lover at the time of the fire (R. 2135-36). He stated that on one occasion he was involved in a "very heated" discussion with Coney and Southworth (R. 2151-52). During that discussion Barnes defended Southworth when Southworth told Coney that he didn't want anything to do with Coney any more (R. 2151). Barnes told Coney to leave his cell, and he heard Coney tell Southworth, "That's fucked up, how you handling me, after I go out of my way for you?" (R. 2152). Barnes testified that Coney also told Southworth, " You treat me like some motherfucker?", and "That's fucked up and I'll get back at you." (R. 2152). After this discussion, Southworth stayed in Barnes' cell as late as he could to avoid Coney (R. 2153). During the course of the days after this incident, Barnes observed Coney following Southworth all over the compound (R. 2153-54). On the night before the fire, Barnes and Southworth watched a movie together until it was time for Southworth to return to his cell for the night (R. 2167).

Byrel Santerfeit had been Patrick Southworth's cellmate for eighteen months prior to the date of the fire (R. 2184). Santerfeit had been convicted of a felony four times at the time of his testimony in this case (R. 2184). At the time of the fire, Santerfeit had been involved in a sexual relationship with an inmate named Samuel Sapp for six or seven months (R. 2189). Santerfeit had given the key to Cell 120 to Sapp so that Sapp could wake him up in the morning (R. 2189-90). At the time of the fire, Santerfeit was working in the prison laundry and he frequently

delivered clothes to B-dorm in a large laundry cart (R. 2186-88).

Santerfeit testified that Southworth always referred to Jimmie Coney as J.C., and that Southworth never referred to Coney as James (R. 2191-92). Santerfeit testified that Southworth and Daries Barnes were homosexual lovers at the time of the fire, and that Southworth had given the key to his cell to Barnes so that he could wake up Southworth in the mornings (R. 2217). Santerfeit stated that Southworth was nagging him to move out of Cell 120 so that Barnes could move in (R. 2220). Santerfeit requested a transfer out of Cell 120 numerous times, and he spent many hours trying to get moved out of that cell (R. 2220-21, 2223). Another factor motivating Santerfeit to get out of Cell 120 was his desire to move in with Samuel Sapp (R. 2221).

An incident report prepared by Corrections Officer Thomas Rodriguez indicated that on the day before the fire, "throughout the entire day", Santerfeit was constantly at the property room asking for a cell change (R. 167). According to this report, Santerfeit stated that he was having problems with Southworth and that Santerfeit also stated that he was going to have a nervous breakdown if he was not moved out of Cell 120 right away (R. 167). Santerfeit went to see the prison psychologist twice on the day before the fire seeking assistance in getting transferred out of Cell 120 (R. 2220-21, 2334-36). When the psychologist told Santerfeit that he could not help him to get transferred, Santerfeit angrily left the psychologist's office (R. 2337).

Santerfeit testified at trial that the night before the fire he had gone to bed at 11:00 P.M., and Southworth had entered the

cell at 11:30 P.M. (R. 2192). Southworth was still awake when Santerfeit fell asleep (R. 2192). Santerfeit was awakened by the feeling of heat in his bed (R. 2193). Santerfeit testified that he opened his eyes and saw flames coming up the side of the bed (R. 2193). Santerfeit claimed that he, "[s]hook it off" and laid his head back down again (R. 2193). When he noticed that the bed was getting even hotter, he realized that he wasn't dreaming and he looked over the edge of the bed (R. 2193). When the flames singed his hair, he jumped off the bunk bed and hurt his ankle when he hit the floor (R. 2193). He looked back and saw that the flames had engulfed the bed to the point that he could not see if Southworth was in the bottom bunk (R. 2194). He pulled open the cell door and ran out yelling that his roommate was on fire (R. 2194). He noticed a shadow when he came out of his cell (R. 2194). The first inmate he noticed after the fire was Daries Barnes (R. 2202).

After Santerfeit had been evacuated from the dormitory and was waiting in line outside the dining hall, he was taken to Prison Inspector Callahan's office (R. 2204). Santerfeit testified that he did not speak freely with Callahan because he "was afraid some of the things that I suspected wouldn't be, how would you say, to my advantage to say to them, since he was running the show there." (R. 2205). Santerfeit testified that he had "snitched" on a prison guard one or two weeks prior to the date of the fire (R. 2209).

Jimmie Lee Coney was the final defense witness at trial (R. 2370). Coney stated that he had five prior felony convictions (R. 2370). He had known Patrick Southworth since 1985 (R. 2370). Coney stated that he and Southworth were very good friends (R.

2371). Coney acknowledged that he and Southworth had been involved in a homosexual relationship for a period of four months (R. 2382-83, 2390, 2394). Coney testified that he cared for Southworth and that Southworth cared for him (R. 2383). Over defense objection, the prosecutor was permitted to establish during his cross-examination of Coney that on March 2, 1990, at 3:00 in the afternoon, prison authorities caught Coney naked under the sheets in his cell with Southworth (R. 2394-95).

Coney testified that when he returned to DCI the week before the fire, Southworth was involved with Daries Barnes (R. 2398). Coney stated that Southworth had been involved with other inmates before Coney had left DCI (R. 2397-98). Coney testified that he and Southworth no longer had sex together after Coney returned to DCI (R. 2398-99).

Coney stated that he and Southworth and several other inmates were playing Bingo the night before the fire and there were no bad feelings between anyone in that group (R. 2371-72). Coney testified that he went to bed at 10:00 that night and was awakened at 4:30 the next morning when the corrections officer told him to pack up his property because he was being transferred (R. 2372). He went to the bathroom on the opposite side of the dormitory because the bathroom closest to his cell was flooded (R. 2373). He returned to his cell after using the bathroom, and then he walked to the officers' station to get a plastic bag in which to put his property (R. 2373). His property was already packed into a plastic bag because he was trying to get transferred out of his cell because of problems with his cellmate (R. 2373-74). However,

the plastic bag he had was torn and therefore he asked at the officers' station for another plastic bag (R. 2374). The officer told him to go back to his cell and they would try to get him another plastic bag (R. 2374).

Coney returned to his cell and then went to the bathroom again during the inmate count (R. 2387, 2389). He returned to his cell and then after some time had passed, he returned to the officers' station and again asked for a plastic bag (R. 2374, 2387-89). The officers again told him that they would try to get him a bag (R. 2374). He then returned to his cell and gathered up his property in the torn plastic bags and carried it to the officers' station (R. 2387-89). He put the bags down in the station and walked outside the station where he decided to wait (R. 2374, 2388).

Coney testified that he was standing at the window directly outside the officers' station when Santerfeit first yelled out that his roommate was on fire (R. 2374). After the officers had run out of the station, he walked to a nearby stairway where he remained until the dormitory was evacuated (R. 2374-76). Coney and the other inmates were taken to the dining hall, and after ten minutes prison officials came into the dining hall and arrested Coney (R. 2376). Coney testified that while he was at the table in the dining hall, he never told Hason Jones, "Take it to the grave with you." (R. 2377).

Coney testified that James Young could have harbored ill feelings towards him because the day before the fire Coney had insisted that Young pay back some money that Coney had loaned him three weeks before (R. 2378-79). Coney stated that Young

grudgingly gave him the money (R. 2379). Coney testified that Gregory Hoover could have harbored ill feelings toward him as the result of a prior incident where Hoover had been locked up for stealing (R. 2380). Hoover believed that he had been locked up as the result of information Coney had given to the authorities (R. 2380-81). Coney testified that Hason Jones could have harbored ill feelings toward him as the result of a prior incident where Coney had spoken to Jones about his attempt to jump on Southworth one night in the bathroom area (R. 2381-82). Coney also testified that he and Jones never got along at all (R. 2382).

Jimmie Coney testified that he did not kill Patrick Southworth (R. 2389).

THE PENALTY PHASE

The state relied on the following aggravating circumstances at the penalty phase: (1) capital felony committed by a person under sentence of imprisonment; (2) defendant previously convicted of another capital felony or felony involving the use or threat of violence to the person; (3) the murder was committed while the defendant was engaged in the commission of an arson; and (4) the murder was especially heinous, atrocious and cruel (R. 299-302, 2854-74). All of the testimony presented by the state at the penalty phase related to Jimmie Coney's prior convictions from 1964 and 1976 (R. 2691-2731).

The defense presented the testimony of eight family members, friends and acquaintances of Jimmie Coney (R. 2734-2813, 2847-53). Those witnesses gave extensive testimony concerning nonstatutory

mitigating circumstances relating to Jimmie Coney's deeply troubled childhood, the help he had given over the years to others, and his religious faith.

At the penalty phase hearing, defense counsel objected to the court allowing the state to call as a witness the mother of the child who was the victim in the 1976 case (R. 2673-2676). Defense counsel argued that the victim's testimony at the penalty phase rendered unnecessary and unduly prejudicial the testimony of the mother concerning the crime that had been committed upon her child (R. 2675-76). The objection was overruled, and the mother was allowed to testify (R. 2724-25).

During his closing argument in the penalty phase, the prosecutor repeatedly, and over defense objection, urged the jury to return a recommendation of death so as to send a message to the community that society will not tolerate first degree murder (R. 2867-69, 2871, 2873).

The jury subsequently returned a verdict recommending, by a vote of 7-5, that the court impose the death penalty (R. 296, 2888-89).

THE STATE'S PENALTY PHASE EVIDENCE

The state's first witness at the penalty phase was former prosecutor I. Richard Jacobs (R. 2691). Jacobs testified that in 1965 he and then-prosecutor, now Justice Gerald Kogan, prosecuted Jimmie Coney for the crime of rape (R. 2692-94). Certified copies of the indictment and the judgment of conviction and sentence in

that case were introduced into evidence (R. 259-261, 2692-93).

Jacobs gave the following account of the evidence presented at the 1965 trial, based on a history of the case he had prepared 27 years earlier (R. 2700). Bernie Davis was on her way to work when she got a flat tire (R. 2695). A group of people stopped and helped her change the tire, but when she started to drive to work again she had to stop because the tire was rubbing against the fender (R. 2695). After she pulled over, a man she later identified as Jimmie Coney drove up and blocked her car (R. 2695). Coney pulled her out of her car and into his car (R. 2695). A man Davis later identified as Willie Long was in the car with Coney (R. 2695). Coney drove the car to a location known as Black Creek Dump (R. 2696). When Davis started to cry, Coney told her to shut up and bit her on the face (R. 2696). Photographs showing bite marks on Davis' face and leg after the attack were introduced into evidence at the penalty phase (R. 2697-99).

Coney drove the car into the Black Creek Dump area and then he and Long tried to force Davis' legs apart as she tried to fight them off (R. 2696). When Davis heard Long say, "Hand me the gun", she stopped fighting and Coney was able to achieve penetration (R. 2697). Willie Long then got on top of Davis and unsuccessfully attempted to achieve penetration (R. 2700). Davis was eventually able to get Coney to let her go by leading him to believe that she wanted to see him again a few days later (R. 2700-01). Coney and Long dropped her off near a telephone where she called her parents who came and took her to the police station (R. 2701-02).

Following the testimony of prosecutor Jacobs, Susan Ross Lumas

was called to the witness stand (R. 2709). Lumas was 28 years old at the time of her testimony (R. 2710). Lumas testified that in the morning hours of March 24, 1976, when she was twelve years old, she was home alone preparing to go to school (R. 2710-11). There was a knock on the door and when Lumas opened the door a man standing there asked her if she needed any lawn work done (R. 2711-12). Lumas said she didn't need any lawn work and told the man that her mother wasn't home (R. 2712). The man pushed his way into the house and used the telephone (R. 2712-13). He then dragged Lumas to her mother's room by pulling her long braided hair (R. 2713). The man made her perform oral sex on him, but it was not successful (R. 2713). He then told her to take off her pants and unsuccessfully tried to penetrate her (R. 2713). He grabbed her by the hair and pulled her through different rooms of the house (R. 2713). He eventually took her to her bedroom where he raped her (R. 2713-14). He then tied a macrame cord around her neck which caused her to pass out after a short period of time (R. 2714). The next thing Lumas remembered was the telephone ringing (R. 2714). She picked up the phone and heard her mother on the other end (R. 2714). Lumas said, "Help me", and the next thing she remembered was her mother's scream when she entered the house (R. 2714).

Lumas testified that she was taken to the hospital where she remained for a few days (R. 2714-15). After a few days, she looked in the mirror for the first time and saw the extent of her injuries (R. 2715). Lumas testified that her face was swollen and red and that her eyes were red (R. 2715). There was scabbing around her neck where the macrame cord had cut into her skin (R. 2715). Lumas

testified that she required surgery for the damage done to her vaginal area (R. 2715). Lumas testified that as of the date of her testimony she still had visible scarring on her neck (R. 2715).

At the penalty phase, Lumas identified Jimmie Coney as the man who had attacked her in 1976 (R. 2715-16). Certified copies of the information, judgment of conviction, and sentence in the case were introduced into evidence (R. 2716-17).

After Lumas completed her testimony, Ann Ross Ferre was called to the witness stand to detail for the jury the horrors she experienced when she arrived home and found her daughter (R. 2729-30).[5]

The state rested its case in the penalty phase after introducing two photographs of Patrick Southworth as he appeared in the medical examiner's officer during the preparation for the autopsy (R. 2732-33).

JIMMIE CONEY'S PENALTY PHASE EVIDENCE

Jimmie Lee Coney was born in 1947, in a small rural community in Georgia called Rocky Ford (R. 2735). After he was born, he lived in a two-bedroom house with his mother, five uncles, two aunts, and his mother's parents (R. 2735-36). The family was very poor, and Jimmie's grandfather was the family's sole means of support (R. 2736).

When Jimmie was 18 months old, his mother left him and moved to Sylvania, Georgia to look for work (R. 2737). Jimmie's father was no longer around, and Jimmie was left with his mother's parents

[5]Ferre's testimony is set forth in detail in Point VI of this brief, in which the argument is presented that the trial court erred in allowing her to testify at the penalty phase hearing.

(R. 2737). Jimmie knew who his father was, and that he lived in Philadelphia, but his mother didn't want him to have anything to do with his father (R. 2803). Jimmie developed a close relationship with his grandmother and she tried to treat Jimmie as if he were one of her own children (R. 2756-57). Jimmie's grandfather became his father figure (R. 2805). Even though his grandparents were wonderful people, Jimmie felt he had been abandoned (R. 2802). He always wondered what was wrong with him that had caused his mother to leave him behind (R. 2802).

Jimmie was stricken with polio at the age of three and taken to the hospital in Sylvania (R. 2737-38). When his mother saw him at the hospital, Jimmie "was like a dead person" (R. 2738). Jimmie was in the hospital for six months (R. 2738). When Jimmie got out of the hospital he was again left with his grandparents, who had moved to Dover, Georgia (R. 2739). Jimmie's mother stayed in Sylvania and went back to work, visiting Jimmie two or three times a week (R. 2739-40).

After he got out of the hospital, Jimmie couldn't lift his feet off the ground (R. 2744). He could only get around by letting his feet drag on the ground as other people assisted him from one place to another (R. 2744). It took Jimmie three months to begin walking on his own after he left the hospital, and he still limped even after he had learned to walk (R. 2740, 2744).

When Jimmie began to walk, his mother left him again and moved to Savannah, Georgia (R. 2740). She lived in Savannah for two years, and during that period she would visit Jimmie on the weekends (R. 2740). Jimmie worked on the farm at an early age

picking cotton (R. 2780-81). He would work in the fields picking cotton from the time he came home from school until the sun went down (R. 2782). He managed to work in the fields notwithstanding the lingering effects of his bout with polio (R. 2732).

After two years in Savannah, Jimmie's mother decided to move to Miami to look for work (R. 2741). By this time, Jimmie had two younger stepbrothers who lived with Jimmie and his grandparents (R. 2741). At some point after she moved to Miami, Jimmie's mother returned to Georgia and took Jimmie's stepbrothers back to Miami with her (R. 2741-42). Jimmie's mother left him behind in Georgia because she couldn't take care of all three children in Miami (R. 2742). Jimmie wanted very badly to go with his mother to Miami, and his mother's refusal to take him along with his two stepbrothers disturbed him greatly (R. 2742).

Jimmie's mother lived in Miami for five years before Jimmie was able to move to Miami (R. 2742-43). During that period, Jimmie saw his mother "maybe once a year" (R. 2743). Every time he saw his mother, he told her that he wanted to be with her and his stepbrothers (R. 2743). By the time Jimmie was finally able to move to Miami and live with his mother, she was living with a man named Sanford, and she had a daughter (R. 2743-45). Sanford did not help take care of the children, and he was very mean to Jimmie's mother (R. 2806). Sanford did not accept Jimmie as he had accepted Jimmie's stepbrothers, and the relationship between Sanford and Jimmie was a stormy one (R. 2746). The two argued all the time, and on one occasion Sanford struck Jimmie in the head so hard that he drew blood (R. 2747-49). Sanford treated Jimmie as

an intruder in the family and he didn't want Jimmie living in the same house with his mother (R. 2807-08).

Notwithstanding this troubled relationship with Sanford, Jimmie always did his best to help his mother and his stepbrothers and stepsister (R. 2749). He would do the dishes, the yardwork, the laundry and anything else that needed to be done (R. 2749). He made sure the other children had breakfast in the morning and he helped them off to school (R. 2750). He worked on a farm picking and packing vegetables, and he brought the money he earned home for the family to use to buy food and clothes (R. 2750).

When Jimmie's stepsister had a drug problem, Jimmie kept after her until she got off drugs and became involved with the church (R. 2750-51, 2786, 2792). Even after he was incarcerated, Jimmie acted as a counselor to his stepsister and helped her with her problems (R. 2751, 2786). Jimmie also helped his stepbrother Larry to get off drugs and to get involved in church activities (R. 2751, 2786). On one occasion, Jimmie saved Sanford's life when the house was on fire (R. 2751-52).

When Jimmie was in school, he was constantly ridiculed by the other children because of the funny way he walked as a result of being stricken with polio (R. 2752-53). They called him names such as "Crip" and "Hoppy" (R. 2752). He would come home from school with tears in eyes and suffering from depression, and he would sometimes just go to his room and close the door (R. 2753).

Jimmie's mother testified at the penalty phase that Jimmie had accepted Christ in life about three years ago, and after that a great change could be seen in the way he would teach people and

help children (R. 2753-54, 2761-62). Pastor Bonny Coney, an ordained Pentecostal minister, testified at the penalty phase that he grew up with Jimmie in Rocky Ford and Sylvania (R. 2765-67). Pastor Coney described how Jimmie had come to give his life to the Lord during his incarceration, and had become a spiritual advisor for Pastor Coney's ministry (R. 2771-72). Pastor Coney's wife Virginia testified that she had known Jimmie for 19 years, that she had a great deal of respect for him, and that she often sought his advice when she had a problem (R. 2774-76).

Reverend Wellington Ferguson, an ordained minister, testified that he had visited Jimmie in the Dade County Jail for a period of 12-15 months prior to the trial (R. 2848). Reverend Ferguson testified that during that time he came to realize that Jimmie had accepted Christ, and he believed that Jimmie was sincere when he accepted the Lord Jesus as his personal savior (R. 2849-51).

THE SENTENCING HEARING

Following the jury's 7-5 death recommendation, a date was set for the sentencing hearing, and the court directed that any written submissions be given to the court at least two days before the sentencing hearing, and that any legal arguments concerning the aggravating and mitigating circumstances should be limited to those addressed at the penalty phase (R. 2893-94).

The sentencing hearing was held on March 27, 1992 (R. 2897). No further evidence was presented at that hearing (R. 2899). The state presented a brief argument in support of the court's imposition of the death penalty (R. 2899-2902). The prosecutor did not

argue that the evidence had established the aggravating factor of great risk of death. In his argument to the court, defense counsel argued that the death penalty was not proportionally warranted in this case in light of the state's portrayal of Jimmie Coney as the jilted lover in a lover's triangle who killed his ex-lover (R. 2903-2906).[6] Defense counsel detailed for the court each of the nonstatutory mitigating factors which he felt had been established by the evidence presented at the penalty phase (R. 2906-09).

In her written order filed March 27, 1992, the judge imposed a sentence of death (R. 312-316; A. 4-8).[7] The judge found the following aggravating factors: (1) capital felony committed by a person under sentence of imprisonment; (2) defendant previously convicted of another capital felony or felony involving the use or threat of violence to the person; (3) defendant knowingly created a great risk of death to many persons; (4) the murder was committed while the defendant was engaged in the commission of an arson; and (5) the murder was especially heinous, atrocious and cruel (A. 5-7). The court found no mitigating circumstances, and found that the sentence of death was not disproportionate (A. 7-8). A belated notice of appeal was filed on June 17, 1992 (R. 340).

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[6]The prosecutor characterized as "an outrage" this Court's decisions holding that the death penalty is not proportionally warranted in domestic cases (R. 2900).

[7]The court imposed a consecutive sentence of thirty years imprisonment based upon the arson conviction (R. 309-310).

SUMMARY OF ARGUMENT

THE GUILT PHASE

The trial court erred in denying the defense request for a jury instruction on weighing evidence of dying declarations. Many other jurisdictions have approved such an instruction, and the instruction very closely resembles the instruction on weighing evidence of a defendant's out-of-court statements which must be given in criminal cases. The trial court erred in admitting the victim's out-of-court statements giving his opinion as to Jimmie Coney's motive for setting him on fire. Such statements of opinion in dying declarations are strictly inadmissible. Jimmie Coney's involuntary absences from the following proceedings require reversal: (1) the pretrial conference; (2) the exercise of challenges for cause; and (3) his attorney's disclosure to the court that he was under investigation as a part of Operation Court Broom. The trial court erred in imposing a ban on questioning of prospective jurors by defense counsel concerning their ability to accept and apply the court's instructions on the state's burden of proof beyond a reasonable doubt. The trial court also erred in (1) admitting the prior consistent statement of a state witness; (2) excluding evidence concerning the character of a state witness after the state had opened the door to such evidence; (3) admitting evidence of Jimmie Coney's misconduct unrelated to the charges against him; and (4) admitting improper expert testimony.

THE PENALTY PHASE

The trial court erred in allowing the state to call the mother of the victim of Jimmie Coney's prior violent felony offense to

testify concerning the horrors she experienced when she arrived home to find her daughter after she had been brutally raped and strangled. As certified copies of the judgments of conviction were introduced into evidence, and as the victim herself testified concerning the details of those offenses, there was no justification whatsoever for allowing the victim's mother to testify. The trial court erred in allowing the prosecutor in closing argument to repeatedly and strenuously exhort the jury to consider the impact of their sentencing recommendation on the community. The death sentence imposed in this case cannot withstand proportionality review as the murder resulted from an ongoing, heated domestic confrontation. The trial court erred in imposing the death penalty based on the aggravating circumstance that Jimmie Coney knowingly created a great risk of death to many persons because: (1) the defense had no notice that this aggravating circumstance would be considered by the court; (2) the court used the wrong standard to determine whether the aggravating circumstance had been established; and (3) the evidence failed to prove the aggravating circumstance beyond a reasonable doubt. Finally, the trial court erred in failing to find and weigh any nonstatutory mitigating circumstances. The uncontroverted evidence presented at the penalty phase established a substantial number of nonstatutory mitigating circumstances, and each of those circumstances have been found valid by this Court.

GUILT PHASE ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON WEIGHING EVIDENCE OF DYING DECLARATIONS, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

"Of the doctrines that authorize the admission of special classes of out-of-court statements as exceptions to the hearsay rule, the doctrine relating to dying declarations is the most mystical in its theory . . .". McCormick, Evidence § 309 at 324 (4th ed.1992). While it is firmly established, the dying declaration exception has been the target of frequent criticism:

> [T]he lack of inherent reliability of deathbed statements has often been pointed out: experience indicates that the desire for revenge or self-exoneration or to protect one's loved ones may continue until the moment of death. Furthermore, the declarant's physical and mental condition at the time he is awaiting death may have impaired his faculties of perception, memory and communication and may contribute to the unreliability of the statements. There is also the danger that the statement was made in response to the prompting and questioning of interested by-standers such as policemen, insurance agents or investigators, leading to a statement "more convenient than truthful."

4 Weinstein & Berger, Weinstein's Evidence § 804(b)(2)[01] at 110 (1990)(footnotes omitted).

"Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, which is the best method known to bring out the full and exact truth. The fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down. Such

evidence is the mere statement of what was said by a person, not under oath, usually made when the body is in pain, the mind agitated, and the memory shaken by the certainty of impending death. A clear, full, and exact statement of the facts cannot be expected under such circumstances . . ." People v. Falletto, 202 N.Y. 494, 499, 96 N.E. 355, 357 (1911); see also People v. Nieves, 67 N.Y.2d 125, 501 N.Y.S.2d 1, 492 N.E.2d 109 (1986); People v. Bartelini 285 N.Y. 433, 35 N.E.2d 29 (1941).

Based on these concerns about the reliability of dying declarations, many jurisdictions have approved an instruction to the jury that dying declarations are to be received with caution. Armstrong v. United States; 41 F.2d 162 (9th Cir. 1930); Watts v. State, 492 So.2d 1281 (Miss. 1986); People v. Nieves, supra; State v. Winecoff, 280 N.C. 420, 186 S.E.2d 6 (1972); Dowdell v. State, 194 Ga. 578, 22 S.E.2d 310 (1942); Mitchell v. Commonwealth, 178 Va. 407, 17 S.E.2d 370 (1941); Humphreys v. State, 166 Tenn. 523, 64 S.W.2d 5 (1933); Commonwealth v. Meleskie, 278 Pa. 383, 123 A. 310 (1924); State v. Mayo, 42 Wash. 540, 85 P. 251 (1906). See also McCormick, Evidence § 314 at 333 ("Certainly in jurisdictions where the judge retains common law power to comment on the weight of the evidence, the dying declaration is an appropriate subject for individualized comment.").

This Court has long recognized that "the utmost care and caution must be exercised" in the admission of dying declarations. Malone v. State, 72 Fla. 28, 72 So. 415, 416 (1916); Gardner v. State, 55 Fla. 25, 45 So. 1028, 1031 (1908). However, in Soles v. State, 97 Fla. 61, 119 So. 791 (1929), this Court held that the

trial court had correctly refused to give the following jury instruction requested by the defense:

> "The court has admitted in evidence for your consideration an alleged dying declaration of the deceased. In so admitting said dying declaration, the Court has only passed upon its admissibility. In order that a statement of the deceased may properly be considered as a dying declaration it must have been made by the deceased with a consciousness of impending death, and if you find from the evidence that such statement by the deceased, if made, was without consciousness on the part of the deceased of impending death you should not consider it as a dying declaration."

119 So. at 791-92. This Court's holding in Soles was premised on an analogy to the law as it then existed on the subject of instructing the jury regarding the weight to be given to a defendant's confession:

> In Holland v. State, 39 Fla. 178, 22 So. 298, this court held that: "The court determines the admissibility, and the jury the credibility, of confessions. It is not error, therefore, for the court to refuse to charge the jury that if they believe from all the evidence that defendant's confession was procured from fear or terror, or hope of reward, they should disregard the confession in making up their verdict." See also Bates v. State, 78 Fla. 672, 84 So. 373; Roberts v. State, 72 Fla. 132, 72 So. 649. This appears to be the orthodox rule, in regard to confessions. Section 861, Wigmore on Evidence (2d Ed.). The analogy to dying declarations is, in this respect, quite complete.

119 So. at 792.

The analogy to dying declarations from the law regarding instructing the jury on a defendant's confession is, indeed, "quite complete". However, the law regarding instructing the jury on a defendant's confession has shifted 180 degrees since the date of this Court's decision in Soles. The standard jury instructions in

criminal cases now include the following instruction:

> A statement claimed to have been made by the defendant outside of court has been placed before you. Such statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.
>
> Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily and freely made.
>
> In making this determination, you should consider the total circumstances, including but not limited to:
>
> 1. Whether when the defendant made the statement, he had been threatened in order to get him to make it, and
>
> 2. Whether anyone had promised him anything in order to get him to make it.
>
> If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

Fla. Std. Jury Instr. (Crim.) at 20. A defendant is entitled to this instruction whenever his statements are admitted against him at trial. Harrison v. State, 149 Fla. 365, 5 So. 2d 703 (1942); Bunn v. State, 363 So. 2d 16 (Fla. 3d DCA 1978), cert. denied, 368 So. 2d 1373 (1979).

Defense counsel in the present case patterned his requested jury instruction on dying declarations along the exact lines of the standard jury instruction on confessions:

> A statement claimed to have been made by the deceased, Patrick Southworth, has been placed before you. That statement is claimed to have been made while Patrick Southworth was conscious of immediate and impending death. Such a statement should always be considered with caution and be weighed with great care to make certain that Patrick Southworth was

> conscious of immediate and impending death.
>
> Therefore, you must determine from the evidence that Patrick Southworth's statement was made while he was conscious of immediate and impending death.
>
> If you conclude that Patrick Southworth's statements were not made when he was conscious of immediate and impending death, you should disregard it.

(R. 216-17, 2494-95).

The jury needs an instruction on how to weigh dying declarations for the same reasons that it needs an instruction on how to weigh confessions. Just as special considerations of unreliability come into play when an out-of-court statement of the defendant is admitted at trial, special considerations of unreliability come into play when an out-of-court dying declaration is admitted at trial. Notwithstanding a trial court's ruling admitting a confession, the jury needs guidance in determining the weight to be given such statements in light of the historic dangers of such statements being unreliable because they were not freely and voluntarily made. Similarly, notwithstanding a trial court's ruling admitting a dying declaration, the jury needs guidance in determining the weight to be given such statements in light of the dangers of such statements being unreliable because they were not truly made as a result of the declarant's consciousness of immediate and impending death:

> Such evidence is exceptional, and the ordinary citizen, sitting as a juror, cannot be supposed to have knowledge of the reason of necessity underlying its reception, or to be quick to recognize its infirmities; and he may not fully appreciate the importance to a defendant of the usual right of cross-examination, the protection of which is

denied him in such a case.

Armstrong v. United States, supra, 41 F.2d at 163.

The theoretical underpinning of the majority opinion in Soles has now been removed by the requirement that a jury be instructed that a defendant's out-of-court statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made, and that such statement should be disregarded if it was not freely and voluntarily made. Since the date of the decision in Soles, no appellate court in this state has addressed the issue of the propriety of an instruction advising the jury that dying declarations should always be considered with caution and weighed with great care. As Florida is now a jurisdiction that allows the judge to comment on the weight of the evidence in certain circumstances, such as a defendant's out of court statements, dying declarations are an appropriate subject for individualized comment. The following statements of dissenting Justice Ellis in Soles should now carry the day:

> The jury are the judges of the weight of the evidence; the credibility of the witnesses. The jury are not bound to accept the statement shown to have been made as true in point of fact because the court has held it to be admissible. One of the important considerations which affect the value of the declaration as trustworthy evidence is whether the declarant realized his condition to be a serious one and that death was impending. It is a matter which goes to its credibility at that stage of the proceeding, and not to its admissibility.
>
> The reason for the rule admitting dying declarations is that the serious or grave situation of the declarant assures the same degree of credibility to his statements as if they were made under oath at the trial and the

> accused had the opportunity to cross-examine him.
>
> It is very easy to understand that a jury might not be able to draw the distinction between the admissibility and credibility of the evidence, mistaking the order of the court upon its admissibility as tantamount to an opinion that it should be believed. The subject has been very fully discussed by many courts and text-writers, and the conclusion almost invariably reached that the court should instruct the jury under what circumstances it may consider or refuse to consider the testimony so admitted. See Commonwealth v. Brewer, 164 Mass. 577, 42 N. E. 92; State v. Phillips, 118 Iowa, 660, 92 N. W. 876; State v. Reed, 53 Kan. 767, 37 P. 174, 42 Am. St. Rep. 322; State v. Banister, 35 S. C. 290, 14 S. E. 678; North v. People, 139 Ill. 81, 28 N. E. 966; Commonwealth v. Murray, 2 Ashm. (Pa.) 41.

191 So. at 793.

The trial judge in this case refused to give the defense requested instruction because she felt that such an instruction constituted an improper judicial comment upon the evidence (R. 2496-98). However, an instruction on dying declarations such as the one requested by the defense in this case does not constitute an improper judicial comment upon the evidence; such an instruction closely resembles other instructions concerning weighing the evidence which have long been approved:

> To advise the jury of a general rule of law under which evidence is to be weighed or the credibility of witnesses is to be considered is not to state the facts of the particular case or to instruct upon an issue of fact. A general rule pertaining to evidence is nevertheless a rule of law. It is a common practice to charge that the testimony of an accomplice should be closely scrutinized and weighed with caution. It is still more common to advise them of general considerations which they should bear in mind in weighing the testimony of witnesses of different classes. They are informed that the testimony of one

> having an interest in the issue, not excluding the defendant in a criminal case, should be viewed and weighed in the light of that interest. It would hardly be urged that the statute above referred to is prohibitive of such practice.

Armstrong, supra, 41 F.2d at 163-64. Indeed, the standard instructions given in all criminal cases advising the jury of the standards to be applied in weighing the testimony presented by witnesses at trial made it imperative that the jury be given similar instructions concerning evidence they received in the form of a dying declaration:

> Indeed, in this particular case the court instructed the jury that they should take into account the conduct and appearance of the witness on the stand, the interest he had, if any, in the result of the trial, the motive he had in testifying, his relation to and feeling for or against any of the parties in the case; and, further, that there is a legal but rebuttable presumption that witnesses speak the truth, and, still further, that if they found that any witness had wilfully testified falsely in any particular they might distrust his testimony in other respects. It would seem to be highly inconsistent to hold that such a statute permits the court thus to advise the jurors of the considerations and rules under which they are to weigh testimony given by witnesses who are under oath and whom the defendant has the opportunity to cross-examine (all of which considerations and rules are presumably more or less familiar to a layman), and at the same time prohibits a statement of like character touching evidence not having the sanction of an oath, and emanating from a source not subject to cross-examination -- a branch of evidence probably unfamiliar to most of the jurors. The instructions here touching the testimony of the living witnesses may very well have contributed to the prejudicial effect of the court's silence respecting the dying declaration. For example, the jurors were informed that they were to consider the motives of a witness in giving his testimony and his relation to and feeling for or against

> a party; but it was not pointed out that like considerations were to be borne in mind in weighing the dying declaration.

Armstrong, 41 F.2d at 164.

The jury in this case was given extensive instruction on how they should evaluate the testimony of the witnesses who actually testified at trial (R. 233-235). Yet the jury was given no instruction whatsoever on how they should evaluate what undoubtedly constituted the most important evidence admitted at the trial -- the dying declarations of the victim. As the instruction requested by defense counsel in this case accurately advised the jury of how it was to weigh the dying declaration evidence, and as without such an instruction the jury could have no idea how it was to weigh that evidence, the trial court erred in refusing to give the defense-requested instruction on dying declarations.

The state cannot prove beyond a reasonable doubt that this error did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction, and therefore reversal is required. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Without question, the dying declaration evidence introduced at the trial in this case formed the foundation of the state's case. The dying declaration evidence and the testimony of several state penitentiary inmates was the only evidence implicating Jimmie Coney in the death of Patrick Southworth. Setting aside the inherent credibility problems generally associated with inmate testimony, none of the inmates testified that they actually saw Jimmie Coney set the fire which killed Patrick Southworth. The only such testimony came in the

form of Southworth's dying declarations. The dying declarations were the first pieces of evidence discussed by the state in its opening statement to the jury (R. 1268), and the prosecutor both began and concluded his closing argument to the jury by referring to those dying declarations (R. 2526, 2566). Moreover, in his closing argument, the prosecutor repeatedly referred to those dying declarations as if they were the equivalent of the decedent's in-court testimony:

> Ladies and gentlemen, in essence, these are the things that the victim in this case, Patrick Southworth, has told you about how it was he came to die.
>
> * * * * * * *
>
> Ladies and gentlemen, when the victim told you that . . .

(R. 2526, 2566).

Under these circumstances, the trial court's erroneous refusal to give the jury an instruction advising them of the proper standard to use in weighing the dying declaration evidence requires reversal of Jimmie Coney's judgments of conviction and sentences.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE OVER DEFENSE OBJECTION STATEMENTS MADE BY THE DECEDENT CONCERNING HIS OPINION AS TO THE MOTIVE OF JIMMIE CONEY, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

"[D]ying declarations are substitutes for sworn testimony, and must yield to the general rules governing the admissibility of evidence, and . . . nothing can be admitted as evidence in such a declaration to which the declarant would not be permitted to

testify on the witness stand had he survived." Gardner v. State, 55 Fla. 25, 45 So. 1028, 1031 (1908). A necessary corollary to this rule is that in proving dying declarations, only such statements should be received as evidence as relate to what actually transpired, who were the actors, the position of the persons, what was said by the parties, what were the instruments used, who used them and how, and similar matters, excluding, if possible, everything except what relates to the res gestae. Morris v. State, 100 Fla. 850, 130 So. 582 (1930); Sealey v. State, 89 Fla. 439, 105 So. 137 (1925); Malone v. State, 72 Fla. 28, 72 So. 415 (1916). Where dying declarations contain statements relating to a state of hostility or bad blood by the accused towards the deceased, such portions of the dying declarations are inadmissible. Sealey v. State, supra.

Prior to the trial in this case, defense counsel moved to exclude from evidence at trial all hearsay testimony concerning out-of-court statements made by the decedent, Patrick Southworth (R. 60). At a pretrial hearing on this motion, the trial judge noted that the state was seeking to introduce evidence which was clearly inadmissible hearsay unless it fit within an exception to the hearsay rule, and the judge ruled that the state had the burden of establishing the admissibility of Patrick Southworth's out-of-court statements (R. 428-29). At that hearing, the state only presented evidence relating to the issue of Southworth's consciousness of immediate and impending death, and the judge ruled at the conclusion of the hearing that the state had in fact met its burden of establishing that Southworth was conscious of his

immediate and impending death at the time he made the out-of-court statements which the state was seeking to introduce (R. 957-958).

Based on this ruling the judge admitted, in its entirety, every out-of-court statement made by Patrick Southworth from the time he was found at the scene of the fire at approximately 5:00 A.M. on April 6, 1990, until the time he lost consciousness at Jackson Memorial Hospital (JMH) roughly two hours later.[8] Included in those statements were the following expressions of Southworth's conjecture as to the motive of the accused in setting the fire:

> Q. [by prosecutor]: What did you ask the victim, Patrick Southworth?
>
> A. [by witness Thompson]: I asked him, "Who did this to you?"
>
> Q. What was his response?
>
> A. "James Cooney."
>
> Q. What else did he ask you? [sic]
>
> A. I asked him, "Why?"
>
> Q. How did he respond?
>
> A. He said, "Because I'm a homosexual."
>
> * * * * * * *
>
> Q. [by prosecutor]: Did there come a point in time where you asked the victim how it was he came to be burned?
>
> A. [by witness Gonzalez]: Yes.
>
> Q. What, if anything, did he tell you about that?
>
> A. Well, I asked him what happened. And he told me, "My lover threw liquid on me. Lit me on fire." And then my response was, well,

[8]The defense objection to the admission of the hearsay testimony was renewed during the trial (R. 1741).

"Why?" And he said -- it was either, "I'm leaving him," or, "I left him." One of the two. I don't know exactly which one of the two it was.

* * * * * * *

Q. [by prosecutor]: What happened when inmate Southworth was transported to the X-ray room?

A. [by witness Huffman]: . . . So in the X-ray room, I asked him, inmate Southworth, what had happened. And what he stated to me was, "This guy threw gasoline on me and set me on fire."

From that, I went ahead and asked him if he saw who the guy was. And he stated, "Yeah, Cooney, Jimmie Coney."

So I asked him, "Why would he do something like that?" And if you'll excuse the language, he stated, "I'm a homosexual, and I told him I wouldn't fuck him anymore."

(R. 1766, 1787, 1800).

The testimony highlighted in the foregoing excerpts was clearly inadmissible under the previously cited authorities. Admission of similar testimony led to reversal in Malone v. State, supra. There, a witness at trial testified concerning a dying declaration made by the victim, and in the course of such testimony stated the following:

"She said that woman shot her on account of a fight they had. * * * She said that Nancy Malone shot her, and that it was on account of a fight they had, and that it was on account of a fight they had that evening that Nancy had shot her. * * * She said she knew it was on account of the fight that afternoon."

72 So. at 416.

This Court assumed that the deceased had made these statements when she considered her death to be imminent, but nevertheless reversed based on the erroneous admission of the above-quoted

testimony:

> These portions related, not to the res gestae, but to a distinct transaction and to the opinion of the decedent as to the motive of the accused; and a motive was material in the trial which was confined to murder in the first degree, all prosecutions for lower offenses under the indictment being barred by the statute of limitations. Such portions of the testimony should have been excluded. 1 R.C.L. 5335, §§ 75-78.
>
> Under the circumstances of this case, there was harmful error in admitting the testimony last above set out.
>
> The judgment is reversed.

72 So. at 416.

It is readily apparent that the highlighted portions of the testimony from the trial in the present case did not relate to the res gestae, but solely to the opinion of the decedent as to the motive of the accused. As such, the testimony was improperly admitted at trial. Furthermore, as in Malone, the improper admission of the testimony was harmful error. This Court commented on the highly prejudicial nature of such testimony in Gardner v. State, supra:

> In the instant case the evidence adduced against the defendant was not so strong and convincing as to preclude harm resulting to the defendant by reason of this expression of the deceased as to the intention of the defendant being permitted to go the jury, to be dwelt on by them during the trial. Such expressions are sometimes difficult to be removed from the mind, and are not always readily effaced or erased by the judge's charge or instruction.

45 So. at 1031-32

The state's closing argument in the present case focused on Jimmie Coney's motive to kill Southworth because of the fact that Southworth had terminated their relationship, as evidenced by the

following:

> Ladies and gentlemen, the defendant is the only one with the motive. Defendant is the jilted, scorned, dumped lover. He's the one with the motive. He's the one who wants to get even.

(R. 2553). With motive playing such a large part in the state's theory of prosecution, it is apparent that the erroneous admission of testimony concerning Southworth's opinion as to the motive of the accused was harmful, and therefore reversal is required.

III.

JIMMIE CONEY'S INVOLUNTARY ABSENCE FROM A NUMBER OF CRUCIAL STAGES OF THE TRIAL REQUIRES REVERSAL OF HIS JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH AS HIS ABSENCE THWARTED THE FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS, IN VIOLATION OF FLA.R.CRIM.P. 3.180 AND THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

An accused has a constitutional right under the Due Process Clause to be present at all crucial stages of his trial where his absence might frustrate the fairness of the proceedings. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Rose v. State, 18 Fla. L. Weekly S152 (Fla. March 11, 1993); Francis v. State, 413 So. 2d 1175 (Fla.1982). Fla.R.Crim.P. 3.180(a) determines that the involuntary absence of the defendant from the stages of the trial designated therein constitutes error, and "when the defendant is involuntarily absent during a crucial stage of adversary proceedings contrary to rule 3.180(a), the burden is on the state to show beyond a reasonable doubt that the error (absence) was not prejudicial." Garcia v. State, 492 So. 2d

360, 364 (Fla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986). A defendant's waiver of the right to be present at essential stages of the trial must be knowing, intelligent and voluntary, and defense counsel cannot waive a defendant's right to be present at crucial stages of his trial without acquiescence or ratification by the defendant. Turner v. State, 530 So. 2d 45 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989); Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); State v. Melendez, 244 So. 2d 137 (Fla.1971). Silence is insufficient to show acquiescence. Turner; Francis.

A.

JIMMIE CONEY'S INVOLUNTARY ABSENCE FROM THE PRETRIAL CONFERENCE CONTRARY TO RULE 3.180(a)(3) REQUIRES REVERSAL AS HIS ABSENCE FROM THAT PRETRIAL CONFERENCE THWARTED THE FUNDAMENTAL FAIRNESS OF THOSE PROCEEDINGS.

Fla.R.Crim.P. 3.180 provides:

> **(a) Presence of Defendant.** In all prosecutions for crime the defendant shall be present:
>
> * * * * * * *
>
> (3) at any pretrial conference, unless waived by the defendant in writing;

On January 31, 1992, a lengthy pretrial conference was conducted in this case by the Honorable Fredricka G. Smith, Circuit Court Judge (R. 387-424). This pretrial conference marked the first appearance in the case of Judge Smith (R. 431-32). Prior proceedings in the case had been held before former judge Roy T. Gelber and Judge Henry L. Oppenborn, Jr. (R. 347, 351, 359, 363, 367, 371, 376, 2924, 2928). Jimmie Coney was not present at this

pretrial conference, and at the outset of the hearing, defense counsel purported to waive Mr. Coney's right to be present (R. 389). Jimmie Coney never acquiesced in or ratified defense counsel's waiver of his right to be present at the pretrial conference. When Coney next appeared in court on February 11, 1992, Judge Smith introduced herself to Mr. Coney and explained that she had recently been assigned to preside over his trial, but she did not mention anything about the pretrial conference over which she had previously presided (R. 431-32).

Under these circumstances, Jimmie Coney's involuntary absence from the pretrial conference requires reversal unless the state can show beyond a reasonable doubt that the absence was not prejudicial. Garcia v. State, supra. The state can make no such showing.

Numerous matters were discussed at the pretrial conference which required Jimmie Coney's presence. At the judge's request, the prosecutor gave his version of the facts of the case (R. 390-91, 393-94). After hearing the state's version of the facts, the judge asked defense counsel to detail his defense (R. 393). After defense counsel had complied with this request, the judge asked about Mr. Coney's prior record and the prosecutor detailed the evidence he expected to present at a penalty phase (R. 394). Later in the hearing, in the course of a discussion concerning the admissibility of hearsay evidence as dying declarations, the prosecutor detailed for the court the hearsay evidence he would be seeking to introduce (R. 397-98, 402-03).

It was certainly important for Jimmie Coney to be present when

the judge who was going to preside over his trial was, for the first time, presented by the parties with the evidence which each side expected to present at the trial and the penalty phase. Compare Rose v. State, supra, 18 Fla. L. Weekly at S154 (defendant's absence from in camera discussion between trial judge and defense counsel found not to have had an effect on the fairness of the proceedings against the defendant because "[n]o evidence was presented or discussed during the in camera discussion" and "[t]here was no discussion of anything that would bear on the judge's ultimate sentencing decision").

In addition to discussing the evidence to be presented at trial, the judge, the prosecutor and defense counsel also had a lengthy discussion during the pretrial conference concerning problems that defense counsel was experiencing in communicating with his client. When the judge asked defense counsel if he would be prepared to start the penalty phase immediately after a guilty verdict, defense counsel responded that he could not be prepared that quickly due to difficulties he had experienced in communicating with Mr. Coney on that subject (R. 409). Defense counsel then delineated for the judge the nature of these communication problems, and in the course thereof revealed the contents of conversations he had with Mr. Coney (R. 409-10). The judge then noted her concern that Mr. Casabielle had not associated with another attorney so that one lawyer could handle the guilt phase and the other lawyer could handle the penalty phase (R. 410).

Pursuant to further questioning by the court, defense counsel indicated that he planned to have Mr. Coney neurologically examined

should the jury return a guilty verdict, and that he would speak to Mr. Coney's family and try to learn about Mr. Coney's background after the neurological examination (R. 410). The court held a conversation off the record after this statement by defense counsel (R. 411). Back on the record, the court urged defense counsel to immediately try to contact members of Coney's family (R. 413-14).

Defense counsel then noted that Mr. Coney had called him numerous times, "and I'm sure if somebody was going to come forward to speak to me, that would have been done." (R. 414). Counsel once again complained to the court about the problems he was having in communicating with Mr. Coney (R. 418). Defense counsel finally issued the following indictment of his absent client:

> You have to realize the individual I'm dealing with. This is an institutionalized gentleman who has been told what to do, and as Mr. Band [the prosecutor] has indicated, sometimes rebels. He's not the kind of guy who is new to the system. He knows the system. And he can push to some extent.

(R. 418). Attempting to help defense counsel with the problems in his attorney/client relationship, the prosecutor suggested that the judge might bring Mr. Coney into court and attempt to persuade him of the seriousness of the penalty phase (R. 419). The prosecutor even went so far as to suggest that perhaps defense counsel could "go around his client" and attempt to get family background information without letting Mr. Coney know what he was doing (R. 419). Defense counsel picked up on this idea and agreed to get names of family members from prison records and contact those family members directly (R. 419).

Clearly, Jimmie Coney's absence during these discussions

thwarted the fundamental fairness of the proceedings. If defense counsel was going to divulge to the trial judge and to the prosecutor the contents of communications he had with his client and complain about the difficulty he was having in communicating with his client concerning evidence to be presented at a penalty phase, Jimmie Coney had a right to be present during those discussions. Jimmie Coney had a right to know that these matters were being discussed with the trial judge on the first day that she was presiding over the case. Jimmie Coney had a right to know that the trial judge was concerned that defense counsel was planning to be sole defense counsel for Coney at both the guilt phase and the penalty phase. Jimmie Coney certainly had a right to know that defense counsel and the prosecutor were devising ways for defense counsel to gather evidence for a penalty phase without letting Coney know what he was doing.

It is important to distinguish the nature of the discussions which were conducted outside the presence of Jimmie Coney from the in camera discussions which this Court held not to require the defendant's presence in Rose v. State, supra. In Rose, the defendant had a long history of difficulty with three of the four attorneys previously appointed to represent him. On the second day of trial, the defendant complained about the way his present counsel, Rousen, was handling the trial, and asked the court to dismiss Rousen. On the following day, the judge listened to the defendant's complaints about Rousen, and then denied the motion to dismiss Rousen as counsel. Rousen then moved to withdraw and an in camera hearing was conducted outside the defendant's presence

concerning Rousen's reasons for wanting to withdraw. This Court found that conducting the in camera discussion outside the defendant's presence could not have had an effect on the fairness of the proceedings against the defendant based in part on the fact that "[t]he judge was well aware of Rose's complaint about Rousen" and "the judge was fully aware of the history of problems between Rose and his previous attorneys." 18 Fla. L. Weekly at 154.

In the present case, the discussion conducted outside Jimmie Coney's presence concerning defense counsel's difficulties in communicating with Coney were not prompted by any complaint made by Coney, and there was no history of problems between Coney and previous attorneys.[9] Thus, Judge Smith, who was presiding over the case for the first time, could have had no idea concerning what Coney's position might be on these matters, and it was totally inappropriate and fundamentally unfair for these matters to be discussed with Judge Smith and the prosecutor outside the presence of Jimmie Coney, who had never before appeared in front of Judge Smith and could have had no idea that such matters were being discussed before her.

It is also important to distinguish this case from cases such as Roberts v. State, 510 So. 2d 885 (Fla. 1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988), which find harmless a defendant's absence from proceedings where strictly legal matters are discussed toward which the defendant would have

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[9]Manuel Casabielle, Jimmie Coney's attorney at the trial and sentencing phases, was appointed at arraignment by former judge Roy T. Gelber when the Public Defender's Office certified a conflict of interest in representing Coney at trial (R. 2926, 2930).

had no basis for input. At the pretrial conference in this case there were lengthy discussions concerning the evidence to be presented by both sides and strategies to be employed by defense counsel in gathering evidence to present at a penalty phase. These are clearly matters toward which Jimmie Coney would have had a perfectly valid basis for input. Accordingly, Coney's absence from the pretrial conference did thwart the fundamental fairness of those proceedings, and the error in holding those proceedings outside his presence requires reversal.

B.

THE DEFENDANT'S INVOLUNTARY ABSENCES DURING JURY SELECTION CONTRARY TO RULE 3.180(a)(4) REQUIRE REVERSAL AS THOSE ABSENCES THWARTED THE FUNDAMENTAL FAIRNESS OF THOSE PROCEEDINGS.

Fla.R.Crim.P. 3.180 provides:

> **(a) Presence of Defendant.** In all prosecutions for crime the defendant shall be present:
>
> * * * * * * *
>
> (4) at the beginning of trial during the examination, challenging, impanelling, and swearing of the jury;

Jury selection is a critical part of a capital trial at which a defendant has the right to be present. Chandler v. State, 534 So. 2d 701 (Fla. 1988), cert. denied, 490 U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1989); Francis v. State, supra. The defendant's right to be present at jury selection includes the right to be present at the exercise of challenges for cause. Chandler; Harvey v. State, 529 So. 2d 1083 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989).

Jimmie Coney was involuntarily absent from several portions

of the jury selection proceedings at his capital trial (R. 691, 694-96, 721-28, 1081-85). There is no evidence in the record of any knowing, voluntary and intelligent waiver by Coney of his right to be present during those portions of the jury selection process. Accordingly, Jimmie Coney's involuntary absences from those portions of the jury selection process require reversal unless the state can show beyond a reasonable doubt that the absences were not prejudicial. Garcia v. State, supra. The state can make no such showing as to at least two of those absences.

At the conclusion of the questioning of prospective jurors concerning their ability to recommend the death penalty, a conference was held outside the presence of Mr. Coney (R. 721-728). During this conference, nine jurors were challenged for cause. Seven of these challenges were exercised by the state, and defense counsel sought to challenge two of the jurors for cause. Five of the state's challenges for cause were granted with defense counsel stipulating to the jurors being excused (R. 722-724). One of the state's challenges for cause was granted over the objection of defense counsel (R. 723). The remaining state challenge for cause was denied (R. 722). Both challenges for cause exercised by defense counsel were granted (R. 724-25, 727).

Jimmie Coney's absence from the exercise of these challenges for cause thwarted the fundamental fairness of the proceedings because Coney could have provided input to defense counsel concerning the exercise of the challenges.[10] The soundness of this

[10]The record in this case does not indicate that defense counsel conferred with Coney prior to the conference or that Coney was given any opportunity to participate in the decisions made at

proposition was demonstrated later in this very trial. After the general questioning of the prospective jurors was completed, both peremptory challenges and additional challenges for cause were exercised in Jimmie Coney's presence (R. 1094-1121). On a number of occasions during this process, defense counsel identified jurors whom Jimmie Coney wanted to challenge for cause because he did not feel they could be fair and impartial jurors (R. 1100, 1102, 1106-08). At another point in the jury selection process, the state moved to excuse a prospective juror for cause, and the court asked if there was any objection (R. 1103). Defense counsel advised the court that Mr. Coney objected to the state's challenge for cause, and the court denied the state's challenge (R. 1103).

Thus, the record in this case clearly demonstrates that when he was given the chance, Jimmie Coney provided substantial input to defense counsel concerning the exercise of the challenges for cause. It therefore stands to reason that had Coney been present at the earlier exercise of challenges for cause, he could have likewise provided input to defense counsel. As a result, the state cannot establish beyond a reasonable doubt that Coney's absence from the earlier exercise of the challenges for cause was not prejudicial.[11]

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the conference from which he was excluded. Compare Jones v. State, 569 So. 2d 1234 (Fla. 1990) and Turner v. State, 530 So. 2d 45 (Fla. 1988) cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989).

[11]Jimmie Coney's ability to provide input concerning the challenges for cause exercised in his absence distinguishes this case from Harvey v. State, 529 So. 2d 1083 (Fla. 1988). There, it became apparent to the judge during voir dire that one of the jurors was giving nonresponsive answers to the questions of counsel. After it was determined that the juror was unable to

Jimmie Coney's absence from another portion of the jury selection process also requires reversal. This portion of the trial involved a discussion outside Coney's presence concerning prospective juror Constance Schopperle. During the court's general questioning of the prospective jurors concerning their backgrounds, juror Schopperle revealed that her husband was an FBI agent (R. 791). Upon further questioning, Ms. Schopperle disclosed that her husband was involved in Operation Court Broom (R. 1003, 1049).

After defense counsel completed his questioning of the prospective jurors, a conference was held outside the presence of Mr. Coney (R. 1081-1085). At this conference, defense counsel requested the opportunity to question Ms. Schopperle further outside the presence of the other jurors (R. 1081). Defense counsel revealed that the subject of such further questioning was "a little more delicate for me personally" (R. 1083). Defense counsel disclosed to the court that his name had appeared in the newspapers in association with the Operation Court Broom investigation (R. 1083-84). Defense counsel requested the

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serve due to a mental infirmity, and at a time when the defendant was not present, the state moved to excuse the juror for cause and the motion was granted without opposition from defense counsel. This Court found that the defendant's absence from the exercise of the challenge for cause was error, but held the error harmless. This holding was based on the fact that the judge had stated on the record that he would have excused the juror on his own motion had neither party made a motion, and therefore there was no basis for input from the defendant concerning the challenge for cause. In the present case, the judge gave no indication that any of the jurors excused for cause in the defendant's absence would have been excused on the court's own motion. All of the challenges were exercised by the parties, and therefore there would have been a basis for Jimmie Coney's input concerning those challenges. Accordingly, Coney's involuntary absence at the time those challenges were exercised requires reversal.

opportunity to question Ms. Schopperle concerning what she had heard about Operation Court Broom and how closely she had been following the investigation (R. 1084). The court agreed to allow defense counsel to question Ms. Schopperle concerning Operation Court Broom (R. 1084).

Ms. Schopperle was thereafter brought into the courtroom and defense counsel asked her a number of vague questions in an attempt to discover if she knew that defense counsel was under investigation as a part of Operation Court Broom, without disclosing that fact to her by the questioning (R. 1087-89). It did not appear from Ms. Schopperle's responses that she was aware of the fact that defense counsel was one of the individuals under investigation.

Clearly, the fact that his attorney was under investigation as a part of Operation Court Broom was not something that should have been kept a secret from Jimmie Coney. Defense counsel had originally been appointed to represent Jimmie Coney by former judge Roy T. Gelber (R. 2928-31). The newspaper articles to which defense counsel referred indicated that his name was listed on a federal search warrant served on Gelber's office and home on June 8, 1991, and that the warrant sought "any and all documents reflecting the appointment of attorneys to represent indigent defendants." (A. 1-3). Under these circumstances, it is clear that Jimmie Coney's absence from the conference where it was disclosed that his attorney was under investigation as a part of Operation Court Broom thwarted the fundamental fairness of the proceedings. Reversal is therefore required.

IV.

THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S QUESTIONING OF PROSPECTIVE JURORS, IN VIOLATION OF JIMMIE CONEY'S RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

In Lavado v. State, 492 So. 2d 1322 (Fla. 1986), this Court adopted the dissent in Lavado v. State, 469 So. 2d 917, 919-20 (Fla. 3d DCA 1985), which stated:

> It is apodictic that a meaningful voir dire is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial jury. . . . What is a meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire therefore "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require ...." Pinder v. State, 27 Fla. 370, 375, 8 So. 837, 838 (1891). See Moody v. State, 418 So. 2d 989, 993 (Fla. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451 (1983); Lewis v. State, 377 So. 2d 640, 642-43 (Fla. 1979). Thus, where a juror's attitude about a particular legal doctrine (in the words of the trial court, "the law") is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine even if stated in the form of hypothetical questions. . . . See Jones v. State, 378 So. 2d 797 (Fla. 1st DCA 1979), cert. denied, 388 So.2d 1114 (Fla. 1980) (error to preclude defense counsel from inquiring about prospective juror's ability to accept the court's charges on the presumption of innocence, the State's burden of proof as to each element of the offense, and the defendant's right not to testify, since defense counsel had a right to ascertain if any prospective juror had a prejudgment that would not yield to the law as charged by the court).

In the present case, after defense counsel began to question

several jurors concerning their ability to accept the court's charges on the state's burden of proof beyond a reasonable doubt, the trial court banned any further discussion about reasonable doubt because it "doesn't lead to any further understanding of the juror's qualifications." (R. 1061-62). This ruling is directly contrary to this Court's decision in Lavado, which approves the decision in Jones v. State, 378 So. 2d 797 (Fla. 1st DCA 1979), cert. denied, 388 So.2d 1114 (Fla. 1980) which held it to be error to preclude defense counsel from inquiring about the prospective jurors' ability to accept the court's charges on the state's burden of proof.[12] The trial court's error in denying Jimmie Coney a meaningful voir dire requires reversal and remand for a new trial.

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[12]The trial judge in this case did not conduct any meaningful examination of the prospective jurors concerning their ability to accept and apply the court's charges on the state's burden of proof beyond a reasonable doubt. Compare Coney v. State, 348 So. 2d 672, 675 (Fla. 3d DCA 1977)(trial court did not err in precluding defense counsel from asking repetitive questions of prospective jurors concerning their understanding of the law upon presumption of innocence and requirement of proof beyond a reasonable doubt where court had "exhaustively explained and asked for an audible answer" as to whether prospective jurors understood those legal principles); Jones v. State, 343 So. 2d 921 (Fla. 3d DCA)(trial court did not err in refusing to allow questions to prospective jurors concerning their ability to apply particular propositions of law where prospective jurors were collectively examined by the trial judge as to the presumption of innocence, burden of proof and reasonable doubt), cert. denied, 352 So. 2d 172 (Fla. 1977). In the present case, the court simply gave a general instruction to the entire panel of prospective jurors on the state's burden of proof beyond a reasonable doubt, and then asked if anyone did not understand or could not follow those instructions (R. 757-759). No juror responded to the inquiry. Prior to this inquiry, a prospective juror who later served on the jury had been excused for the day to attend to personal matters (R. 753-757). The trial court's very limited inquiry did not provide the meaningful voir dire guaranteed to Mr. Coney, and therefore it was error to preclude defense counsel from questioning individual jurors on their ability to accept and apply the court's charges on the state's burden of proof beyond a reasonable doubt.

V.

THE TRIAL COURT ERRED IN VARIOUS OTHER RULINGS MADE DURING THE COURSE OF THE TRIAL.

A.

THE TRIAL COURT ERRED IN ADMITTING THE PRIOR CONSISTENT STATEMENT OF OFFICER SANCHEZ.

Prior consistent statements are inadmissible to corroborate or bolster a witness' trial testimony. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); Van Gallon v. State, 50 So. 2d 882 (Fla. 1951). This well established rule was violated in the present case during the testimony of Officer Jose Sanchez.

Officer Sanchez testified on direct examination that he could not remember where Jimmie Coney was located when Officer Pesante entered the officers' station just before the fire was discovered (R. 1576-77). On cross-examination, Sanchez acknowledged that in his incident report prepared on April 6, 1990, he had written, "Jimmie Coney was standing in front of the officers' station when Officer Pesante walked in" (R. 1577-78). Over defense objection, the state on redirect was permitted to elicit testimony at trial from Officer Sanchez concerning statements he gave on April 6 and April 10 in which he told investigating officers that he did not know where Coney was located when Officer Pesante entered the station because he was busy with the inventory (R. 1592-1600).

The prior consistent statements made by Sanchez on April 6 and April 10 were not admissible under section 90.801(2)(b), Florida Statutes (1989) to rebut an express or implied charge of improper motive to fabricate. While defense counsel was trying to create an inference that Sanchez had changed his trial testimony due to

coercion from other officers, that coercion had been applied prior to the time he made the April 6 and April 10 statements. As those statements were made after the existence of Sanchez's motive to fabricate, they were not admissible under section 90.801(2)(b). As Coney could not have set the fire if he was standing outside the officers' station, the improper admission of Sanchez's prior consistent statement which bolstered his testimony that he did not know whether Coney was outside the station was prejudicial error.

B.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW ALEX SEVERANCE TO ANSWER A QUESTION ABOUT THE CHARACTER OF STATE WITNESS HASON JONES AFTER THE STATE HAD ELICITED TESTIMONY FROM SEVERANCE CONCERNING JONES' CHARACTER, AND THE TRIAL COURT ALSO ERRED IN DENYING DEFENSE COUNSEL'S REQUEST TO PROFFER SEVERANCE'S TESTIMONY.

Upon examination by the state, Alex Severance testified at trial that he had never known state witness Hason Jones to lie to anyone, and that he knew Hason Jones to be a religious person (R. 2112). On redirect examination, defense counsel asked Severance if he knew Jones to be a snitch (R. 2131). The state's objection to this question was sustained, and defense counsel's request to make a proffer was denied (R. 2131).

The trial court erred in refusing to allow defense counsel to question Severance about Jones' character. Once the state is allowed to elicit testimony concerning the good character of one of its witnesses, the defense must be allowed to introduce evidence to contradict that testimony. Lusk v. State, 531 So. 2d 1377, 1382 (Fla. 2d DCA 1988); Murvin v. State, 371 So. 2d 1062 (Fla. 1st DCA 1979). Furthermore, a trial court should not refuse to allow a

proffer of testimony, as such a proffer is necessary to ensure full and effective appellate review. B.F.K. v. State, 18 Fla. L. Weekly D531 (Fla. 2d DCA February 17, 1993).

Hason Jones was an important state witness at trial. Jones claimed in his testimony that he saw Jimmie Coney handling flammable liquids just prior to the time that the fire was started (R. 2018-2022). Taking into consideration the important role that the testimony of Hason Jones played in the state's case, the trial court's refusal to allow the defense to attack Jones' character after the state had built up Jones' character was very prejudicial.

C.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF JIMMIE CONEY'S ASSERTED MISCONDUCT WHICH WAS ONLY RELEVANT TO PROVE HIS BAD CHARACTER OR PROPENSITY FOR MISCONDUCT.

Testimony of other misconduct of the defendant not directly related to the incident in question is inadmissible when the evidence is relevant solely to prove bad character or propensity for misconduct. Section 90.404(2)(a), Florida Statutes (1989); Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1960).

Jimmie Coney testified on his own behalf at the trial in this case (R. 2370). During his testimony, Coney acknowledged that he and Patrick Southworth had been involved in a homosexual relationship for a period of four months prior to the time of Southworth's death (R. 2382-83, 2390, 2394). Notwithstanding Coney's acknowledgment of this relationship, and over defense objection, the prosecutor was permitted to establish during his

cross-examination of Coney that on March 2, 1990, at 3:00 in the afternoon, prison authorities caught Coney naked under the sheets in his cell with Southworth (R. 2394-95).

The existence of a homosexual relationship between Coney and Southworth was relevant because the state claimed that the souring of the relationship was Coney's motive for killing Southworth. However, once Coney acknowledged the relationship, evidence of Coney being caught naked under the sheets in his cell with Southworth had no relevance whatsoever, and could only have served to prejudice Coney in the eyes of the jury. The court therefore erred in overruling defense counsel's objection to this testimony.

D.

THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE ADMISSION OF THE OPINION TESTIMONY OF AN ARSON INVESTIGATOR THAT TISSUE PAPER FOUND IN A TRASH CAN HAD BEEN USED TO SEAL THE TOP OF CANS CONTAINING FLAMMABLE LIQUIDS.

Expert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991), rev. dismissed, 598 So. 2d 78 (Fla. 1992).

During the arson investigation conducted in the area of the fire, a strong lacquer/thinner-type odor was discovered emanating from a garbage pail at the bottom of a stairway (R. 1333). Inside the garbage pail, investigators found a shoe box which had contained sneakers, five soda cans, pieces of whole wheat bread which had the odor of thinner, tissue paper which had the odor of

thinner, and a key to the room where the fire was started (R. 1352). A strong presence of flammable vapors left by a flammable liquid was discovered on each of the soda cans (R. 1350-51).

The fire department official who conducted the arson investigation, Lieutenant Leonard Platteis of the Dade County Fire Department, testified that in his opinion, the tissue paper found in the garbage pail "was probably used to seal the top of the cans." (R. 1406). Defense counsel's objection to this testimony was overruled, and his motion for mistrial based upon its prejudicial effect was denied (R. 1407-08).

The trial court erred in allowing the jury to consider Lieutenant Platteis' opinion as to the connection between the tissue paper and the soda cans. The presence of the tissue paper in the garbage pail was nonexpert evidence which the jury was free to consider, along with the other evidence in the case, in a common-sense resolution of the issue as to whether the tissue paper had been used to seal the top of the soda cans. This issue was very important at the trial, as the defense contended that Jimmie Coney could not have had the flammable liquids in his cell as the state claimed, because the prison authorities would have smelled the liquids whenever they entered Coney's cell. With the issue thus framed, it was very prejudicial to allow the arson investigator to give his official imprimatur to the state's theory that the top of the soda cans had been sealed with the tissue paper.

PENALTY PHASE ARGUMENT

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE MOTHER OF THE VICTIM OF JIMMIE CONEY'S PRIOR VIOLENT FELONY OFFENSE TO TESTIFY AT THE PENALTY PHASE CONCERNING THE HORRORS SHE EXPERIENCED WHEN SHE ARRIVED HOME TO FIND HER DAUGHTER AFTER SHE HAD BEEN BRUTALLY RAPED AND STRANGLED, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS, AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. However, "the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." Rhodes, 547 So. 2d at 1205.

The ruling by the trial court in this case allowing the testimony of Ann Ross Ferre crossed the line drawn by this Court in Rhodes, as any probative value of that testimony was vastly outweighed by its prejudicial impact.

To establish the aggravating factor of a prior felony conviction involving the use or threat of violence to the victim, the state introduced certified copies of the information, judgments of conviction, and sentences in a 1976 case in which Jimmie Coney was convicted of involuntary sexual battery, robbery with a deadly weapon, armed burglary, and attempted first degree murder (R. 275-281; 2716-17). The victim of these offenses, Susan Ross Lumas, testified at the penalty phase (R. 2709). Ms. Lumas, who had been twelve years old when these offenses were committed, was 28 years old at the time of her testimony (R. 2710-11). In her graphic and highly emotional testimony, Ms. Lumas described for the jury how she was brutally raped and strangled in her home where she had been alone waiting until it was time to leave for school (R. 2710-14). She described how she had been dragged from room to room of her home by her ponytail, as her assailant unsuccessfully tried to have her perform oral sex on him, unsuccessfully tried to penetrate her, and finally raped her in her own bedroom (R. 2713-14). She further described how after she was raped, a macrame cord was tied around her neck so tightly that she passed out after a short period of time (R. 2714). Ms. Lumas also testified concerning the extent of the injuries she had received in the attack, and the reconstructive vaginal surgery that had been performed (R. 2715).

After Lumas completed her testimony, the state proffered the testimony of her mother, Ann Ross Ferre (R. 2718-2722). Over defense counsel's renewed objection, the judge ruled that Ferre would be allowed to testify concerning what she observed when she returned home on the day her daughter was attacked (R. 2724-25).

Ferre testified that at noontime on March 24, 1976, she called home to speak to her daughter (R. 2729). Ferre had expected her daughter to be preparing to go to school (R. 2729). The phone rang several times and then the receiver was lifted off the hook (R. 2729). Ferre could hear the dog barking very excitedly, and she said, "Hello, Susan. Susan." (R. 2729). Ferre heard a rasp at the other end of the line and then she made out the words, "Help me, help me." (R. 2729).

Ferre rushed home and on the way she flagged down a police officer to accompany her (R. 2729). When she arrived home, the front door was open (R. 2729). She rushed inside the house with the police officer and found her daughter on the couch (R. 2729). Ferre gave the following testimony concerning what happened next:

> I looked at her and her head was purple and just huge. I mean, way larger than anybody's head, and I looked. She had a cord tied around her neck in a knot and she was semiconscious.
>
> And the officer --- I mean, I was looking. The officer said, "Get a knife, get something to get this off." So I found a knife in my kitchen. He cut the cord off, and I looked at her and her eyes were opening and closing. Her eyes were blood red and her face was purple, and as I said, she was semiconscious.
>
> She was totally nude and she was covered partially with a little blue blanket. And as he picked her up, there was blood on her chest and there was blood running from her vagina, from the lower part of her body. There were no clothes. Blood was running down her legs.
>
> And he picked her up like a baby and we rushed out the door. And we were going -- and at that time the Rescue pulled up in front of my house, so we got into that. And I went with them and we went to Coral Reef hospital.

(R. 2729-30).

A strong argument can be made that the testimony of Susan Ross Lumas should not have been admitted at the penalty phase because its probative value was substantially outweighed by its prejudicial impact. Although this Court has established that a penalty phase jury is entitled to hear the details of the events which resulted in prior convictions involving the use or threat of violence, a jury should not hear those details from a 28-year-old woman forced to relive the horrors of being brutally raped and strangled sixteen years ago when she was twelve years old.

However, once the victim does testify at a penalty phase hearing and provides the jury with the details of the prior offenses, there is absolutely no justification whatsoever for allowing the victim's mother to follow her to the witness stand so that she can tell the jurors the horrors that she experienced when she saw the unspeakable brutality that had been perpetrated on her twelve-year-old daughter.

The highly prejudicial impact of the mother's testimony is self-evident. Furthermore, the testimony had no probative value. The certified copies of the information, judgments of conviction and sentences established that Jimmie Coney had been previously convicted of a felony involving the use or threat of violence to the person. Indeed, the jury was instructed, pursuant to Fla. Std. Jury Instr. (Crim.) at 76, that those previous convictions were for felonies involving the use or threat of violence to another person (R. 300, 2885). The testimony of Susan Ross Lumas provided the jury with the details of those prior convictions and clearly established that the prior convictions involved the use or threat

of force. To the extent that the nature of the injuries Ms. Lumas suffered were relevant, she testified about those injuries.

Two cases from this Court demonstrate the error committed by the trial judge in admitting the testimony of Ann Ross Ferre. In Rhodes v. State, supra, the defendant claimed that the trial court had improperly admitted in the penalty phase of his trial the testimony of a police officer concerning his investigation of the defendant's prior violent felony convictions. The officer's testimony followed the introduction into evidence of a certified copy of the defendant's judgment and sentence showing his prior convictions. As part of his testimony the officer identified a tape recording of an interview he conducted with the sixty-year-old victim. The tape recording was subsequently admitted into evidence and played for the jury. In the taped statement the victim described how the defendant tried to cut her throat with a knife and the emotional trauma she suffered because of the attack.

This Court upheld the admission of the police officer's testimony, but found error in the admission of the tape recorded statement of the victim:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, Tompkins; Stano, the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross-examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and

> emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant. [FN6] For these reasons, it was error for the trial court to allow the tape recording to be played before the jury.
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> FN6. Furthermore, we see no reason why introduction of the tape recording was necessary to support aggravation in this case. The state had introduced a certified copy of the Nevada judgment and sentence indicating that Rhodes had pled guilty to and was convicted of an offense involving the use or threat of violence. There was the testimony from Captain Rolette regarding his investigation of the incident. This evidence was more than sufficient to establish the aggravating circumstance that Rhodes had previously committed a felony involving the use or threat of violence and to establish the circumstances of the crime.

547 So. 2d at 1204-05.

As in Rhodes, the testimony at the penalty phase of Ann Ross Ferre was irrelevant and highly prejudicial. Ms. Ferre's testimony did not directly relate to the crime for which Jimmie Coney was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by Coney. Furthermore, as in Rhodes, there was no reason why Ms. Ferre's testimony was necessary to support aggravation in this case, as the state had introduced certified copies of the judgments of conviction and sentences, indicating that Coney was convicted of offenses involving the use or threat of violence, and the victim herself testified regarding the details of those offenses.

The trial court's error in allowing the testimony of Ann Ross Ferre is also demonstrated by this Court's decision in Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990), cert. denied, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). There, this Court found that the state

should not have been allowed to present the testimony of Debra Epps at the penalty phase relating that the defendant was the man who had been previously convicted of killing her husband and describing some details of the murder:

> We agree that Ms. Epps should not have been called to testify concerning her husband's death. [FN1] While the details of a prior felony conviction are admissible to prove this aggravating factor, Perri v. State, 441 So.2d 606 (Fla.1983), Ms. Epps was not present when her husband was killed and, therefore, her testimony was not essential to this proof.
>
> FN1. The present circumstance can be roughly analogized to the rule which precludes a member of a murder victim's family from testifying for the purpose of identifying the deceased where a nonrelated witness is available to provide such information. See Lewis v. State, 377 So.2d 640 (Fla.1979).

This Court did not reverse based on this error because defense counsel had not objected to the fact that Ms. Epps was allowed to testify concerning the details of the prior conviction, and because Ms. Epps' testimony concerning her husband's death was brief, straightforward, and very general.

In the case at bar, defense counsel specifically objected to Ann Ross Ferre being allowed to testify concerning the details of the prior convictions (R. 2673-76, 2723-24). Furthermore, Ms. Ferre's testimony cannot be characterized as straightforward and very general; her testimony can only be described as graphic and specific. Considering the nature of Ms. Ferre's testimony and the fact that the jury in this case recommended the death penalty by the slimmest of margins, 7-5, it cannot be concluded beyond a reasonable doubt that the jury would still have recommended the death penalty if they had not erroneously been allowed to hear that

testimony. Accordingly, the erroneous admission of Ms. Ferre's testimony requires that Jimmie Coney's death sentence be vacated, and that he be granted a new sentencing proceeding before a jury.

VII.

THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE REPEATEDLY URGING THEM TO CONSIDER THE IMPACT AND MESSAGE THEIR SENTENCE RECOMMENDATION WOULD HAVE ON THE COMMUNITY WAS IMPROPER AND INFLAMMATORY AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is well settled that egregious prosecutorial misconduct during the penalty phase of a capital murder trial may warrant vacating the death sentence and remanding the case for a new penalty phase proceeding. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). Such prosecutorial misconduct occurs when, in his determination to win a death sentence for the defendant, the prosecutor makes comments that inject elements of emotion and fear into the jury's deliberations or urge consideration of factors outside the scope of the jury's deliberations. Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988); Garron v. State, supra at 359. In Bertolotti, this Court described the prosecutor's duty during penalty phase argument as follows:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the

> defendant rather than the logical analysis of the evidence in light of the applicable law. 476 So.2d at 134.

Accord Jackson v. State, supra at 809.

During the penalty phase in this case, the prosecutor made a series of comments to the jury that were so improper and prejudicial as to require a new sentencing hearing. During his closing argument, the prosecutor urged the jury to return a recommendation of death so as to send a message to the community that society will not tolerate first degree murder:

> The question you have to answer is, does the mitigation change the circumstances of the victim's murder? The death penalty is a message sent to certain members of our society who choose not to follow the rules. It is only applicable for a first degree murder, for those who violate the sacredness and sanctity of human life. Such behavior cannot, nor will not, be tolerated, because life has value, has meaning, has purpose. This community will not condone, nor permit, nor allow this type of behavior. We must outlaw it. We must condemn it. We must punish individuals convicted of first degree murder.

(R. 2867-68). Defense counsel's objection to this argument was overruled, and his motion for mistrial was denied (R. 2868-69).[13]

Emboldened by the trial court's sanctioning of his arguments urging the jury to consider the impact of their sentencing recommendation on the community, the prosecutor continued to emphasize that theme:

> We, as a group of human beings, formed a society and the society is based on the rule of law, not of man. Rules have been designed

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[13]When defense counsel asked the judge if he needed to continue objecting every time the prosecutor made such a comment, the judge indicated that he only needed to make objections that hadn't previously been raised (R. 2869).

> to proscribe certain activity. And if there's one universal rule, it is against the unlawful killing of another. Society has seen fit, this community has seen fit in this state and throughout the country, if someone violates the proscription, he must face the death penalty.
>
> * * * * * * *
>
> The jury's role is that of an advisory board to the court. You supply the court with a conscience of the community. You tell the judge how those selected from our community feel about this crime.
>
> * * * * * * *
>
> Reason among yourselves using your common sense and your everyday life experiences to discuss frankly and candidly what as members of our society, a society we all live in, a society we all share, a society that makes us responsible, makes us accountable for our actions, what as a society are we to do with someone who violates the highest crime, that of first degree murder. The decision that you render will speak for you, speak for the community.

(R. 2871, 2873).

These arguments by the prosecutor were highly improper and very inflammatory. The arguments simply had nothing to do with the relevant issues of weighing aggravating and mitigating factors. Instead, the arguments were intended to and did "inject elements of emotion and fear into the jury's deliberations" and thus went "far outside the scope of proper argument." Garron v. State, supra, 528 So. 2d at 359.[14]

This Court and other appellate courts in this state have

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[14]The prosecutor's characterization of the jury's role as merely that of an advisory board to the court also violates the dictates of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

repeatedly condemned such prosecutorial arguments. In Bertolotti v. State, supra, 476 So. 2d at 133, this Court found it improper for the prosecutor to urge the jury to consider the message its verdict would send to the community at large. The prosecutor told the jury that anything less than death in the case "would only confirm . . . that only the victim gets the death penalty." See also Garron, 528 So. 2d at 359 (error to ask to jury in penalty phase to bring back punishment that will "tell the people of Florida, that will deter people . . . deter others from walking down the streets and gunning down"); Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984) (reversible error for prosecutor to ask jury to "do something" about this "type of conduct," to "do your job today" and send the community and the criminals the message that "we're not going to tolerate it any more"; the "send 'em a message" argument is grossly improper in a court of law); Hines v. State, 425 So. 2d 589 (Fla. 3d DCA 1982) (error for prosecutor to ask jury to tell the community they are not going to tolerate the violence that took place).[15]

The fact that the prosecutor repeatedly and strenuously exhorted the jury to consider the impact of their sentencing

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[15]Moreover, the argument constituted an improper nonstatutory aggravating factor which is forbidden by Florida law. See Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985)(defendant entitled to new death penalty proceeding where jury heard argument that did not properly relate to any statutory aggravating circumstances, thereby tainting the jury recommendation), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986); Jones v. State, 569 So. 2d 1234, 1240 (Fla. 1990) (prosecutor's comments regarding defendant's lack of remorse constituted impermissible nonstatutory aggravating circumstance); Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988) (same).

recommendation on the community, coupled with the fact that the jury in this case recommended death by only a margin of 7-5, compels the conclusion that the prosecutor's improper argument requires reversal of the death sentence and remand for a new sentencing proceeding before a jury. The swaying of a single juror by this improper argument would have changed the jury's recommendation from a vote of six to six, resulting in a recommendation of life, to the 7-5 death recommendation. Cf. Phillips v. State, 608 So. 2d 778 (Fla. 1992)(defendant held entitled to relief on his claim of ineffective assistance of counsel at sentencing phase; prejudice prong met by reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six to six). Moreover, such a recommendation of life would have been reasonably supported by the substantial mitigating evidence presented by defense counsel at the penalty phase.[16] Under these circumstances, the prosecutor's argument cannot be deemed harmless error.

VIII.

JIMMIE CONEY'S SENTENCE OF DEATH IS UNCONSTITUTIONAL AND DISPROPORTIONAL TO THE LIFE SENTENCES OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF MURDERS INVOLVING DOMESTIC DISPUTES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In each death penalty case, this Court has a special duty to

[16]Defense counsel did not in any way base his penalty phase argument to the jury on a negative characterization of the victim. Compare Marshall v. State, 604 So.2d 799, 806 (Fla. 1992).

conduct a proportionality review, to examine the case "in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); Proffitt v. State, 510 So. 2d 896, 897 (Fla. 1987). A proportionality review of this case mandates reversal of the death penalty.

In almost every case where a death sentence arose from a lovers' quarrel or domestic dispute, this Court has found the death penalty to be disproportional. See, e.g., Farinas v. State, 569 So. 2d 425 (Fla. 1990)(death penalty not proportionately warranted where murder was result of heated, domestic confrontation; defendant obsessed during two month period with idea of having victim return to live with him and was intensely jealous based on suspicions that victim was involved with another man; jury recommendation of death); Blakely v. State, 561 So. 2d 560 (Fla. 1990)(death sentence disproportionate where killing resulted from an ongoing and heated domestic dispute; jury unanimously recommended death); Amoros v. State, 531 So. 2d 1256, 1261 (Fla. 1988) (life, not death, sentence is "proportionately correct" for shooting death of former girlfriend's lover; jury recommendation of death); Garron v. State, 528 So. 2d 353, 361 (Fla. 1988) ("death penalty is not proportionally warranted" for shooting death of wife and stepdaughter; jury recommendation of death); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) ("death sentence is not proportionately warranted" for shooting death of father and

stabbing death of cousin; jury recommendation of death; presence of heinous, atrocious, or cruel aggravator, and prior violent felony aggravator); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) ("death penalty is not proportionately warranted" for bludgeoning death of wife; jury recommendation of death; presence of heinous, atrocious, or cruel aggravator).

On the other hand, this Court has affirmed the death sentence under proportionality review in domestic cases where the defendant has been convicted of a prior similar violent offense. See Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984)(death sentence "is not comparatively disproportionate" for stabbing death of girlfriend where defendant had prior conviction for assault with intent to commit first-degree murder for stabbing another female victim), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); King v. State, 436 So. 2d 50, 55 (Fla. 1983)(death penalty affirmed as comparable where defendant had prior manslaughter conviction for axe-slaying of woman victim), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984); Williams v. State, 437 So. 2d 133, 137 (Fla. 1983)(death sentence "is not comparatively inappropriate" where defendant had prior assault convictions for shooting victims), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984). This Court has also affirmed the death sentence under proportionality review in domestic cases where pecuniary gain was a dominant motive in a spousal homicide. E.g., Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Byrd v. State, 481 So. 2d 468 (Fla. 1985), cert. denied, 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986).

In this case, as the following excerpts from the prosecutor's arguments to the jury demonstrate, the state maintained that the motive for the murder was an ongoing domestic dispute between Jimmie Coney and Patrick Southworth:

> Jimmie Coney poured paint on him and lit him on fire with a torch and burned him to death because Patrick Southworth had the audacity to break up the homosexual relationship and take up with another man.
>
> * * * * * * *
>
> Jimmie Coney took his life, set him on fire and burned him to death, because Patrick Southworth had the gall to tell him he wouldn't sleep with him anymore and to start hanging out with another inmate.
>
> * * * * * * *
>
> Ladies and gentlemen, the defendant is the only one with the motive. Defendant is the jilted, scorned, dumped lover. He's the one with the motive. He's the one who wants to get even.

(R. 1268-69, 2528, 2553).

To establish this motive, the state presented evidence at trial that Jimmie Coney and Patrick Southworth had been involved in a homosexual relationship at Dade Correctional Institution (DCI) for a substantial period of time prior to Southworth's death (R. 1833, 1984-85, 2016, 2390, 2394), and that Patrick Southworth became involved in a homosexual relationship with another inmate named Daries Barnes when Jimmie Coney was temporarily transferred out of DCI (R. 2039, 2217). The state also presented evidence at trial that when Jimmie Coney returned to DCI he was constantly asking other inmates about Southworth, that he was observed following Southworth all around the compound, and that on one

occasion after Jimmie Coney returned to DCI, he and Daries Barnes got into a very heated discussion over Patrick Southworth (R. 1834, 2151-54). In addition, the dying declarations which the state was allowed to introduce at trial contained statements made by Southworth indicating his belief that Coney had set him on fire because he had broken up with Coney (R. 1766, 1787, 1800).

Thus, viewing the evidence presented at trial in the light most favorable to the state, as that evidence must be viewed based on the jury's verdict, it is clear that the murder resulted from an ongoing, heated domestic confrontation. That being the case, the death penalty imposed in this case cannot withstand proportionality review. This is obviously not a case where pecuniary gain was a dominant motive in a spousal homicide. This is also not a case where the defendant has been convicted of a prior similar violent offense. Neither of Jimmie Coney's prior violent offenses even remotely resemble the killing in this case. Accordingly, Jimmie Coney's death sentence is disproportional to the life sentences of similarly situated defendants convicted of murders involving domestic disputes. That death sentence must therefore be reversed, and the case remanded for imposition of a life sentence.

IX.

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY BASED ON THE AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

THE TRIAL COURT ERRED IN CONSIDERING THIS AGGRAVATING CIRCUMSTANCE WHERE THE DEFENSE HAD NO NOTICE PRIOR TO THE JUDGE'S IMPOSITION OF THE DEATH PENALTY THAT THIS AGGRAVATING CIRCUMSTANCE WAS GOING TO BE CONSIDERED.

Prior to the penalty phase in this case, the state gave defense counsel notice that it was going to rely on four of the aggravating circumstances listed in section 921.141(5), Florida Statutes (1989). The defendant having knowingly created a great risk of death to many persons was not one of those aggravating circumstances (R. 299-302, 2651-52, 2658-59). The state made no argument to the jury in the penalty phase concerning the aggravating circumstance of great risk, and no jury instruction was given on that aggravating circumstance (R. 299-302, 2854-74).

After the jury returned its 7-5 death recommendation, the court set sentencing for a date approximately two weeks later (R. 2893). The court directed that any written submissions by either side be given to the court at least two days before the sentencing hearing, and then stated the following:

> I would imagine that the issues that you would want to raise before the court are based on the law, which has already been instructed to the jury. I mean, we know what aggravating circumstances the state is going to be arguing, what mitigating circumstances the defense is going to be arguing.

(R. 2894).

At the outset of the sentencing hearing, both sides indicated that they had no further evidence to present (R. 2899). The prosecutor and defense counsel argued their respective positions to the court, with the prosecutor making no argument that the

evidence had established the aggravating factor of the defendant having knowingly created a great risk of death to many persons (R. 2899-2902). Following the arguments, the court imposed the death sentence, and in support thereof found the aggravating circumstance that the defendant knowingly created a great risk of death to many persons (A. 6; R. 2914).

"Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Without such notice, the court is denied the benefit of the adversary process. . . . If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error . . . and with that, the possibility of an incorrect result." Lankford v. Idaho, 500 U.S. ---, 111 S.Ct. 1723, 1732-33, 114 L.Ed.2d 173 (1991)(footnote omitted).

In Lankford, the defendant had been advised by the court at his arraignment on two counts of first degree murder that he could receive the death penalty if convicted. A jury subsequently found him guilty, and prior to sentencing, the court ordered the state to provide notice whether it would seek the death penalty. The state filed a negative response, and there was no discussion of the death penalty as a possible sentence at the sentencing hearing. The court nevertheless imposed the death penalty based on five aggravating circumstances. On appeal, the Idaho Supreme Court concluded that the express advice given to the defendant at arraignment, together with the provisions of the Idaho death penalty statute, were sufficient notice to him that the death penalty might be imposed.

The United States Supreme Court held that the sentencing process violated the Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, the defendant and his counsel did not have adequate notice that the judge might sentence him to death. The Court found it to be unrealistic to assume that the notice provided by the arraignment and the statute survived the state's notice that it would not be seeking the death penalty. The Court noted that the trial judge's silence following the state's notice had the practical effect of concealing from the parties the principal issues to be decided at the hearing.

The imposition of the death sentence in this case based in part on the aggravating circumstance of great risk of death to many persons constituted a similar denial of due process. While a defendant charged with a capital offense is usually charged with notice of all of the statutory aggravating circumstances, see Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), it is unrealistic to assume in this case that the notice of the great risk aggravating circumstance provided by the death penalty statute survived (1) the state's notice that it would not be relying on that aggravating circumstance; (2) the state's failure to argue that aggravating circumstance to either the jury or the court; (3) the court's failure to instruct the jury concerning that aggravating circumstance; and (4) the court's statement to counsel prior to the sentencing hearing that the issues to be raised at that hearing would be limited to the aggravating circumstances on which the jury had been instructed.

The aggravating factor of great risk of death to many persons is dependent upon proof adduced at trial and is not necessarily encompassed by the felony of arson. Toole v. State, 479 So. 2d 731 (Fla. 1985). Accordingly, it was essential for defense counsel to be given the opportunity to present evidence to negate that aggravating circumstance and/or argue that the aggravating circumstance did not apply based on the evidence previously introduced. The failure to give defense counsel any notice that the trial judge was going to consider this aggravating circumstance denied him the opportunity to present such evidence and/or argument. Accordingly, the judge's imposition of the death penalty based in part on a finding of the aggravating circumstance of great risk of death to many persons constituted a denial of due process.

B.

THE TRIAL JUDGE USED THE WRONG STANDARD TO DETERMINE WHETHER THE AGGRAVATING FACTOR HAD BEEN ESTABLISHED.

In King v. State, 390 So. 2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981)(King I), this Court affirmed the trial court's finding the aggravating factor that the defendant knowingly created a great risk of death to many persons by setting fire to the murder victim's house, and stated that "when the appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call."

In the present case, the trial court found the aggravating factor that the defendant knowingly created a great risk of death

to many persons by setting fire to the murder victim's cell at DCI (A. 6). As a basis for this finding, the trial court cited to this Court's decision in King I, and stated that the defendant "should have reasonably foreseen that the fire would pose a great risk to the inmates and others in the prison." (A. 6). The trial court's citation to King I, and use of the exact same language used by this Court in that case, demonstrate beyond any doubt that the trial court used the same standards used by this Court in King I.

In King v. State, 514 So. 2d 354, 360 (Fla. 1987), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988)(King II), this Court reconsidered its holding in King I and invalidated the aggravating factor that the defendant knowingly created a great risk of death to many persons. This Court directed that in determining whether to find this aggravating circumstance, the court must consider that "great risk" means not a mere possibility, but a likelihood or high probability. A person may not be condemned for what might have occurred. See also Jackson v. State, 599 So. 2d 103 (Fla.), cert. denied, 113 S.Ct. 612, 121 L.Ed.2d 546 (1992); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989).

In the sentencing order in this case, the judge does not say anything about a "likelihood or high probability" of death to many persons resulting from the defendant's actions. The judge's failure to use the standard established by this Court in King II, and express reliance on the since-repudiated standard established in King I, require that this aggravating factor be invalidated.

C.

THE EVIDENCE PRESENTED BY THE STATE FAILED TO PROVE THE AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

To the extent that it can be determined in light of defense counsel's inability to present evidence concerning this factor, the record in this case does not establish that the defendant knowingly created a likelihood or high probability of death to many persons by setting Patrick Southworth on fire. Many persons were present in the dormitory building in which Patrick Southworth's cell was located. However, the evidence did not establish that there was a likelihood or high probability that any of these other persons would die as a result of the fire. The evidence was uncontradicted that Byrel Santerfeit, who was asleep in the bunk directly above Southworth at the time the fire was set, was able to get out of the cell without suffering any significant injuries, notwithstanding the fact that he was a very heavy sleeper because he took medication before he went to bed (R. 2193, 2234-35). The evidence did not establish that the fire spread to any other cells before it was extinguished by the corrections officer. This is not surprising because (1) it was Patrick Southworth, not any part of the structure of the cell, that was set on fire, and (2) the fire was set in an area that was monitored by an officer 24 hours a day, greatly lessening the risk of the fire injuring anyone else prior to the time that the officer on duty would be able to put out the fire. Indeed, that is exactly what happened in this case.[17]

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[17]These factors serve to distinguish this case from Welty v. State, 402 So. 2d 1159 (Fla. 1981). In Welty, this Court upheld the trial court's finding that the defendant created a great risk

Certainly, the possibility existed that some combination of circumstances could have led to the fire endangering the lives of other inmates in the dormitory. However, such a mere possibility is insufficient to establish the aggravating circumstance of great risk. See Jackson v. State, supra (fact that fire might have caused an explosion which might have killed those responding to the fire insufficient to support aggravating factor); Scull v. State, supra (aggravating factor not established where evidence indicated that fire was confined to one room of concrete block house). As the state failed to establish beyond a reasonable doubt that the defendant knowingly created a likelihood or high probability of death to many persons by setting Patrick Southworth on fire, that aggravating factor must be invalidated.

X.

THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH ANY NONSTATUTORY MITIGATING CIRCUMSTANCES WHERE THE UNCONTROVERTED EVIDENCE PRESENTED AT THE PENALTY PHASE ESTABLISHED A SUBSTANTIAL NUMBER OF VALID NONSTATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At the penalty phase in this case, the defense presented the testimony of eight family members, friends and acquaintances of

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of death to many persons where the defendant set fire to a condominium when six elderly people were asleep in other units. There is a much greater likelihood or high probability of death where elderly persons with limited mobility are asleep in the area of the fire. Furthermore, there is no indication in Welty that the condominium was constantly monitored by a law enforcement officer, as was the case here. Such monitoring significantly reduces the likelihood or probability of death to others from a fire.

Jimmie Coney (R. 2734-2813, 2847-53). Those witnesses gave extensive testimony concerning Jimmie Coney's deeply troubled childhood, the help he had given over the years to others, and his religious faith. Notwithstanding this evidence, the trial judge found that no mitigating circumstances had been established (R. 316). As a substantial number of valid nonstatutory mitigating circumstances were established by the uncontroverted evidence presented by the defense, the trial judge erred in failing to find and weigh any of those nonstatutory mitigating circumstances

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. Santos v. State, 591 So. 2d 160 (Fla. 1991); Hardwick v. State, 521 So. 2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). In Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court enunciated a three-part test for the evaluation of mitigating evidence:

> [T]he trial court's first task ... is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

The facts alleged in mitigation in this case were plainly

supported by the evidence. A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419 (Fla.1990); see also Fla. Std. Jury Instr. (Crim) at 81; Rogers v. State, supra. Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert; Campbell. Evidence of a mitigating circumstance must be construed in favor of any reasonable theory advanced by the defendant to the extent the evidence was uncontroverted at trial. Maxwell v. State, 603 So. 2d 490 (Fla. 1992). A trial court may only reject a defendant's claim that a mitigating circumstance has been proved if the record contains competent substantial evidence to support the court's rejection of the mitigating circumstance. Cook v. State, 542 So. 2d 964 (Fla. 1989); Kight v. State, 512 So. 2d 922 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988).

Uncontroverted evidence of a number of mitigating circumstances was presented at the penalty phase in this case. The evidence established (1) that Jimmie Coney had been good earlier in life and was the product of parental neglect; and (2) that he had a disadvantaged youth. Jimmie Coney was born in a small rural community in Georgia called Rocky Ford (R. 2735). After he was born, he lived in a two-bedroom house with his mother, five uncles,

two aunts, and his mother's parents. The family was very poor, and Jimmie's grandfather was their sole means of support (R. 2736).

When Jimmie was 18 months old, his mother left him and moved to Sylvania, Georgia to look for work (R. 2737). Jimmie's father was no longer around, and Jimmie was left with his mother's parents (R. 2737). Jimmie knew who his father was, and that he lived in Philadelphia, but his mother didn't want him to have anything to do with his father (R. 2803). Jimmie developed a close relationship with his grandmother and she tried to treat Jimmie as if he were one of her own children (R. 2756-57). Jimmie's grandfather became his father figure (R. 2805). Even though his grandparents were wonderful people, Jimmie felt he had been abandoned (R. 2802). He always wondered what was wrong with him that had caused his mother to leave him behind (R. 2802).

Jimmie was stricken with polio at the age of three and taken to the hospital in Sylvania (R. 2737-38). When his mother saw him at the hospital, Jimmie "was like a dead person" (R. 2738). Jimmie was in the hospital for six months (R. 2738). When Jimmie got out of the hospital he was again left with his grandparents, who had moved to Dover, Georgia (R. 2739). Jimmie's mother stayed in Sylvania and went back to work, visiting Jimmie two or three times a week (R. 2739-40). After he got out of the hospital, Jimmie couldn't lift his feet off the ground (R. 2744). He could only get around by letting his feet drag on the ground as other people assisted him from place to place (R. 2744). It took Jimmie three months to begin walking on his own after he left the hospital, and he still limped even after he had learned to walk (R. 2740, 2744).

When Jimmie began to walk, his mother left him again and moved to Savannah, Georgia (R. 2740). She lived in Savannah for two years, and during that period she would visit Jimmie on the weekends (R. 2740). Jimmie worked on the farm at an early age picking cotton (R. 2780-81). He would work in the fields picking cotton from the time he came home from school until the sun went down (R. 2782). He managed to work in the fields notwithstanding the lingering effects of his bout with polio (R. 2732).

When Jimmie was in school, he was constantly ridiculed by the other children because of the funny way he walked as a result of being stricken with polio (R. 2752-53). They called him names such as "Crip" and "Hoppy" (R. 2752). He would come home from school with tears in eyes and suffering from depression, and he would sometimes just go to his room and close the door (R. 2753).

After two years in Savannah, Jimmie's mother decided to move to Miami to look for work (R. 2741). By this time, Jimmie had two younger stepbrothers who lived with Jimmie and his grandparents (R. 2741). At some point after she moved to Miami, Jimmie's mother returned to Georgia and took Jimmie's stepbrothers back to Miami with her (R. 2741-42). Jimmie's mother left him behind in Georgia because she couldn't take care of all three children in Miami (R. 2742). Jimmie wanted very badly to go with his mother to Miami, and his mother's refusal to take him along with his two stepbrothers disturbed him greatly (R. 2742).

Jimmie's mother lived in Miami for five years before Jimmie was able to move to Miami (R. 2742-43). During that period, Jimmie saw his mother "maybe once a year" (R. 2743). Every time he saw

his mother, he told her that he wanted to be with her and his stepbrothers (R. 2743). By the time Jimmie was finally able to move to Miami and live with his mother, she was living with a man named Sanford and she had a daughter (R. 2743-45). Sanford did not help take care of the children, and he was very mean to Jimmie's mother (R. 2806). Sanford did not accept Jimmie as he had accepted Jimmie's stepbrothers, and the relationship between Sanford and Jimmie was a stormy one (R. 2746). The two argued all the time, and on one occasion Sanford struck Jimmie in the head so hard that he drew blood (R. 2747-49). Sanford treated Jimmie as an intruder in the family and he didn't want Jimmie living in the same house with his mother (R. 2807-08).

This evidence of Jimmie Coney's disadvantaged and troubled childhood was not contradicted in any way at the penalty phase, much less refuted by competent, substantial evidence.

Uncontroverted evidence presented at the penalty phase also established that (1) Jimmie Coney was a hard worker who helped members of his family and others; and (2) Jimmie Coney had performed a number of charitable and humanitarian deeds. Notwithstanding his troubled relationship with Sanford, Jimmie always did his best to help his mother and his stepbrothers and stepsister after he finally rejoined his mother in Miami (R. 2749). He would do the dishes, the yardwork, the laundry and anything else that needed to be done (R. 2749). He made sure the other children had breakfast in the morning and he helped them off to school (R. 2750). He worked on a farm picking and packing vegetables, and he brought the money he earned home for the family to use to buy food

and clothes (R. 2750). On one occasion, Jimmie saved Sanford's life when the house was on fire (R. 2751-52).

When Jimmie's stepsister had a drug problem, Jimmie kept after her until she got off drugs and became involved with the church (R. 2750-51, 2786, 2792). Even after he was incarcerated, Jimmie acted as a counselor to his stepsister and helped her with her problems, and he also helped his stepbrother Larry to get off drugs and to get involved in church activities (R. 2751, 2786). Jimmie's aunt, Virginia Coney, testified that she had known Jimmie for 19 years, that she had a great deal of respect for him, and that she often sought his advice when she had a problem (R. 2774-76).

This evidence of Jimmie Coney's hard work and help of members of his family, and his charitable and humanitarian deeds, was not contradicted in any way at the penalty phase, much less refuted by competent, substantial evidence.

Finally, the uncontroverted evidence presented at the penalty phase also established that during the time that Jimmie Coney was imprisoned he developed strong spiritual and religious standards. Jimmie's mother testified at the penalty phase that Jimmie had accepted Christ in life about three years ago, and after that a great change could be seen in the way he would teach people and help children (R. 2753-54, 2761-62). Pastor Bonny Coney, an ordained Pentecostal minister, described how Jimmie had come to give his life to the Lord, and had become a spiritual advisor for Pastor Coney's ministry (R. 2771-72).

Reverend Wellington Ferguson, an ordained minister, testified at the penalty phase that he had been visiting Jimmie in the Dade

County Jail for a period of 12-15 months prior to the trial (R. 2848). Reverend Ferguson testified that during that time he came to realize that Jimmie had accepted Christ (R. 2849-50). Jimmie had requested Reverend Ferguson to see if he could be baptized even though he was in jail (R. 2850-51). Reverend Ferguson testified that he believed that Jimmie was sincere when he accepted the Lord Jesus as his personal savior (R. 2851).

This evidence of Jimmie Coney's development of strong spiritual and religious standards during the time of his imprisonment was not contradicted in any way at the penalty phase, much less refuted by competent, substantial evidence.

Thus, a reasonable quantum of competent uncontroverted evidence was presented by Jimmie Coney which established (1) that he had been good earlier in life and was the product of parental neglect; (2) that he had a disadvantaged youth; (3) that he was a hard worker who helped members of his family and others; (4) that he had performed a number of charitable and humanitarian deeds; and (5) that during the time he was imprisoned, he developed strong spiritual and religious standards. As the record contains no competent substantial evidence to support the rejection of any of these factors, the court was required to find and weigh those factors if they are valid nonstatutory mitigating circumstances.

Nonstatutory mitigating evidence is evidence tending to prove the existence of any factor that in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed or anything in the life of the defendant which might militate

against the appropriateness of the death penalty. Maxwell v. State, supra, 603 So. 2d at 491 n.1; Rogers; Brown v. State, 526 So. 2d 903 (Fla.), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). Each of the five factors established by the uncontroverted evidence in this case has been previously determined by this Court to be a valid nonstatutory mitigating circumstance: (1) that Jimmie Coney had been good earlier in life and was the product of parental neglect, Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Maxwell, 603 So. 2d at 492; Hegwood v. State, 575 So. 2d 170, 173 (Fla. 1991); (2) that Jimmie Coney had a disadvantaged youth, Maxwell, 603 So. 2d at 492; Campbell, 571 So. 2d at 419 n.4; Brown, 526 So. 2d at 908; (3) that Jimmie Coney was a hard worker who helped members of his family and others, Maxwell, 603 So. 2d at 492; Campbell, 571 So. 2d at 419 n.4; Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984); (4) that Jimmie Coney had performed a number of charitable and humanitarian deeds, Maxwell, 603 So. 2d at 492; Campbell, 571 So. 2d at 419 n.4; and (5) that during the time Coney was imprisoned, he developed strong spiritual and religious standards. Songer v. State, 544 So. 2d 1010, 1012 (Fla. 1989).

As the uncontroverted evidence presented at the penalty phase established a substantial number of nonstatutory mitigating circumstances, and as each of those circumstances have been found to be valid by this Court, the trial judge was required to find and weigh those mitigating circumstances prior to imposing the death sentence. The trial court's total failure to find or weigh any of these mitigating circumstances requires that the death sentence be vacated, and the case remanded to the trial court for resentencing.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant respectfully requests this Court to reverse his judgments of conviction and sentences and remand the case to the trial court with directions that he be granted a new trial; or, in the alternative, reverse his sentence of death and remand for imposition of a life sentence; or, in the alternative, remand the case for a new sentencing hearing before a jury; or, in the alternative, remand the case for a new sentencing hearing before the trial judge.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 2nd day of April, 1993.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

U.S. probes why judge gave cases to 5 attorneys

By DON VAN NATTA Jr.
And ALFONSO CHARDY
Herald Staff Writers

Dade Circuit Judge Roy T. Gelber, a target of Operation Court Broom, handed out a large chunk of his court appointments — worth more than $50,000 — to five lawyers whose names have also surfaced in the judicial corruption probe, court documents show.

Gelber showed a preference for certain lawyers and federal investigators are trying to uncover the motive.

Since September 1989, the judge gave nearly a quarter of his court appointments work to two defense lawyers: Manuel Casabielle and William Castro. Both lawyers were listed on a federal search warrant served on Gelber's office and home June 8.

Gelber gave Castro 28 criminal cases that paid $25,750 and Casabielle received 16 criminal cases that paid $15,000. Judges appoint private defense lawyers to represent defendants who cannot afford a private attorney and whose cases the public defender's office cannot represent. The county pays the fees.

Gelber did not return several phone calls Friday. Neither did Castro and Casabielle.

Gelber's lawyer, Robert Moore, said neither he nor his client would make public statements.

"Because there's a pending grand jury investigation into these matters, it would be totally and wholly inappropriate to make public statements about this," Moore said.

Although the documents listing court appointments do not show wrongdoing, they show that Gelber and the lawyers cited in the 22-month corruption probe had a working relationship.

Investigators sought evidence of payments from the private attorneys picked for court appointments. The search warrant served on Gelber demanded "any and all documents reflecting the appointment of attorneys to represent indigent defendants."

The warrant also demanded "all ledgers, lists or other documents reflecting the acquisition or disbursement of funds to any person as a result of court appointments made to any attorneys."

The other defense lawyers listed on Gelber's search warrant are Steven Glass, Eugene Sauls, Harris Sperber and Miguel DeGrandy, a state legislator from North West Dade.

Gelber assigned Sperber to two cases that paid $5,255. Sauls earned $3,000 from three court-appointed cases. And DeGrandy was given five cases worth $3,400.

Only Glass did not receive a court appointment from Gelber.

Dade Circuit Judges Alfonso Sepe and Phillip Davis are under investigation for allegedly taking payments from defense lawyers — secretly working for government prosecutors — in exchange for judicial favors.

Nevertheless, Sepe and Davis gave court-appointed cases to four of the six lawyers named in the Gelber search warrant, but not nearly as much work as Gelber gave to Castro and Casabielle.

For example, Davis assigned eight cases to Castro worth $6,500. Sepe assigned four cases worth $3,000 to Sperber.

Attorneys for some of the judges and some of the defense attorneys named in the search warrants said they didn't do anything wrong. Defense lawyers said the cases they accepted were properly assigned.

Lawyers defend appointments

Judges often assign cases to experienced attorneys they know and trust, rather than to attorneys fresh out of school or randomly picked, some of the attorneys named in probe documents said.

"A judge would not appoint you if he didn't know you," DeGrandy said. "To really profit from a scheme like that, you need volume work."

DeGrandy said the court appointments he received were no different from those handed out to other attorneys.

"No one has charged me with anything, no authorities have called me or interviewed me, nothing," said DeGrandy, a Republican state legislator elected in 1989. "Yet my career is going down the tubes because my name has been linked to this investigation."

Sperber said the investigators' decision to include his name in the search warrant was "unfair" because he rarely handles court-appointed cases.

"I don't make my business from court appointments," Sperber said. "I don't solicit court appointments. I couldn't pay my rent if I relied only on revenue from court appointments."

Sperber complained that investigators made a mistake connecting his name to the investigation.

"I have to live in this community and now my name has been smeared," he said. "I'm taking a beating."

Sauls said simply: "I have done absolutely nothing wrong."

Pattern not unusual

Ron Guralnick, an attorney representing Judge Davis, said court documents do not show any unusual pattern of assignments.

"How he handles court-appointed cases is not unusual," Guralnick said. "He appointed lawyers just like any other judge. It's as simple as that. He has not been involved in any such scheme as alleged."

Said Sepe: "I've received no payment or kickbacks from any lawyer that I have appointed."

CASES GIVEN TO LAWYERS IN PROBE

Here is a complete list of the amount of money paid and the number of court-appointed criminal cases assigned to the six defense lawyers listed on Operation Court Broom's search warrants served on the home and office of Circuit Judge Roy Gelber. The cases are from September 1989 to May 1991.

	Judge R. Gelber		Judge P. Davis		Judge A. Sepe		Total	
Defense lawyer	Cases	Amount	Cases	Amount	Cases	Amount	Cases	Amount
William Castro	22	$25,750	6	$6,500	2	$2,250	38	$34,500
Manuel Casabielle	16	$15,000	1	$750	3	$4,488	20	$20,238
Miguel DeGrandy	5	$3,400	2	$3,000		$0	7	$6,400
Stephen Glass		$0		$0	2	$3,000	2	$3,000
Eugene Sauls	3	$3,000		$0		$0	3	$3,000
Harris Sperber	2	$5,255	4	$3,000	4	$3,000	10	$11,255

SOURCE: Dade County Court Administrator's Office, Accounting Division

LOCAL
The Miami Herald
SECTION B
THURSDAY, JUNE 13, 1991

Grand jury expands judicial probe

By DAVID LYONS
And DON VAN NATTA Jr.
Herald Staff Writers

In a clear signal Operation Court Broom is broadening its scope, a federal grand jury has been impaneled to question lawyers and secretaries about alleged illegal payments to Dade judges, sources familiar with the investigation said Wednesday.

A new public corruption panel began private interviews in Miami's federal courthouse on Tuesday, one day after federal and state agents armed with a new batch of search warrants opened safe deposit boxes belonging to Circuit Judge Alfonso Sepe and former Judge David Goodhart.

Using keys seized during raids over the weekend on the judges' homes and offices, agents sifted through boxes at City National Bank in downtown Miami and in Miami Beach, and at the main offices of Southeast Bank.

The agents took nothing.

But the warrants made their objective clear: Pick up a money trail in the form of documents showing alleged payoffs for judicial favors as early as Jan. 1, 1988.

As the grand jury joined the probe — a 22-month sting operation that started in late 1989 — speculation heightened in Dade's legal community that more judges and lawyers will soon be scrutinized by federal

PLEASE SEE COURTS, 4B

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Judicial probe expanding, sources say

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and state prosecutors.

Four judges and a defense lawyer are in the spotlight: Dade Circuit Judges Phillip Davis, Roy Gelber and Sepe, County Judge Harvey Shenberg and Miami attorney Goodhart.

In addition, six defense lawyers, who have done court-appointed work, have also been named in federal search warrants: Manny Casabielle, William Castro, Miguel DeGrandy, Stephen Glass, Gene Sauls and Harris Sperber.

None of the men has been charged. All have denied any wrongdoing.

The probe began shortly after Miami Beach defense attorney Ray Takiff agreed to cooperate with federal and state investigators. Takiff's role: Offer judges money in exchange for favors in fictional criminal cases using undercover agents posing as defendants.

At the weekend raids, more than 100 federal and state agents also carted off rolls of $100 bills, computer equipment, financial records and appointment books, along with safe deposit keys.

According to several search warrants made public Wednesday, agents were seeking documents showing judges received money from attorneys. They were also looking for files on the phony criminal cases.

One warrant sought papers showing money transfers from Castro, a Miami attorney, to Judge Davis. Castro could not be reached for comment. Vincent Flynn, a lawyer representing Castro, did not return phone calls.

A second warrant authorized agents to seek papers showing money that agents believed Goodhart had held for Judge Sepe. It did not mention any amounts.

Goodhart said Wednesday he could not comment, but he said the returns on the search warrants, showing nothing was seized from two of his safe deposit boxes, "speak for themselves."

Sepe could not be reached for comment.

A third warrant sought boxes of papers that were supposedly delivered from Sepe's office to the office of his lawyer, Richard Gerstein, a former Dade state attorney. The delivery, the search warrant said, was to have been made by Miami attorney Alan Soven or Anne Cates, a former secretary for Sepe.

Agents searched Gerstein's Biscayne Boulevard law office at 12:10 a.m. Tuesday. Gerstein angrily denied the implication that he tried to hide evidence.

Cates is vacationing in North Carolina this week with her mother, Soven said. She is expected to appear before the grand jury next week, he said.

Soven appeared before the grand jury Tuesday afternoon and denied any attempt to conceal documents.

"I was there for five minutes," Soven said Wednesday. "I told them I know nothing about the boxes, and I left. They were very cordial."

Soven said the agents were on a "wild goose chase.

"If you shoot enough, maybe you will hit something."

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 90-13913

SENTENCING ORDER

THE STATE OF FLORIDA,

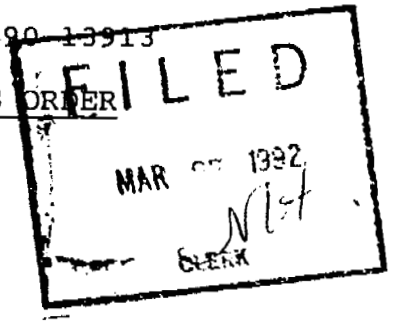
Plaintiff,

vs.

JIMMIE LEE CONEY,

Defendant.

_____/



This cause came before the Court for a trial by jury and a verdict was rendered by the jury finding the defendant guilty of first degree murder and arson.

Following the guilty verdict, the trial jury convened to consider evidence presented at a penalty proceeding authorized by Florida Statute 921.141. The jury, after hearing additional evidence, retired, deliberated and returned its advisory sentence as to Count I, First Degree Murder. The jury recommended by a majority vote of its members, that the Court impose the death penalty upon the defendant, Jimmie Lee Coney, for the murder of Patrick Southworth.

The Court, independent of, but in full agreement with, the advisory sentence rendered by the jury, and after full consideration of each of the applicable statutory aggravating circumstances and all mitigating circumstances, does hereby impose the penalty of death upon Jimmie Lee Coney for the crime of first degree murder.

In so doing, the Court has fully considered the evidence and testimony received at trial and at the penalty phase of the trial and further argument of counsel at the sentencing hearing.

Pursuant to Florida Statute 921.141(3) the Court makes the following findings upon which it has based its sentence of death:

AGGRAVATING CIRCUMSTANCES

1. The capital felony was committed by a person under sentence of imprisonment.

The defendant murdered Patrick Southworth, a fellow prisoner, while defendant was incarcerated in the Dade Correctional Institution serving a 420 year sentence imposed on May 25, 1976 for involuntary sexual battery, robbery, burglary with an assault and attempted murder.

2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

In 1965, in case no. 2241, in Dade County the defendant was convicted of rape, a crime which was then classified as a capital offense.[1] In that case, the defendant forcibly pulled an 18 year old girl from her car into his, raped her and bit her several times during the sexual assault.

In 1976, while the defendant was on work release from the earlier rape case, he savagely raped and strangled a 12 year old girl, leaving her near death. As a result of the defendant's brutality, the child was hospitalized in critical condition and later required reconstructive surgery to her vagina. For these crimes, he was convicted in case 76-3119 in Dade County.

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[1]The jury recommended mercy and the defendant was sentenced to 20 years in state prison.

3. The defendant knowingly created a great risk of death to many persons.

The evidence at trial proved that the defendant, in the early morning hours before the wake-up call for prisoners, gained access to Patrick Southworth's cell, which Mr. Southworth shared with another prisoner, threw a flammable liquid on him while he was asleep in the bottom bunk bed, ignited the liquid, engulfing the victim in flames, and left the room. The victim's roommate sleeping in the top bunk, was awakened by the feeling of heat from the flames on his bed and narrowly escaped from the burning cell, screaming that his roommate was on fire. By the time the prison guards understood what was happening, the cell door slammed shut, and it took several minutes while the fire was raging, for them to unlock the door and extinguish the fire.

There were approximately 100 inmates housed in that wing of the prison at the time of the fire.

The defendant therefore should have reasonably foreseen that the fire would pose a great risk to the inmates and others in the prison. See King v. State, 390 So.2d 315 (Fla.1980); Welty v. State, 402 So.2d 1159 (Fla.1981).

4. The murder was committed while the defendant was engaged in the commission of an arson.

The facts of the arson are set forth above.

5. The murder was especially heinous, atrocious or cruel.

The uncontested evidence at trial showed the victim was set on fire and consumed by flames for several minutes in his closed cell room, during which he received second and third degree burns over 60% - 70% of his body. His hair was burned off his head and face, his fingers were dripping blood, and pieces of his skin

were found on the cell floor. He lived for approximately 28 hours, suffering great pain and aware that he was going to die. During his treatment in the clinic and hospital he underwent several painful tests and procedures and consistently begged for pain medication.

MITIGATING CIRCUMSTANCES

Turning as the law requires, to an examination of any mitigating factors, the Court finds none that apply. The defendant offered no evidence of any of the mitigating circumstances specifically set forth in the statute. He did offer the testimony of many relatives, who described the defendant's childhood and early life in an impoverished rural Georgia community. However, the testimony showed that in spite of the material deprivation suffered by the defendant, he received love and support of a large extended family headed by strong religious grandparents.

Defendant later moved to Miami as an adolescent and lived with his mother, step-father and several other children. Although the defendant has implied that he was abused by his step-father, the evidence showed only that they did not have a good relationship and that the step-father hit him once during an argument about a car. This certainly in no way bears upon or mitigates the depravity of defendant's acts. Nor is the Court persuaded to mitigate the sentence because the defendant encouraged his sister to give up drugs or tried to help other people from his jail cell.

In conclusion, the Court finds that there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty. The Court finds no mitigating circumstances. On this record, the sentence of death is not disproportionate.

It is therefore the judgment and the sentence of the Court that as to Count I of the Indictment in this case JIMMIE LEE CONEY be adjudicated guilty of murder in the first degree for the death of Patrick Southworth and that the defendant be sentenced to death in the electric chair.

It is further the judgment and sentence of the Court that as to Count II, arson, the defendant be adjudicated guilty and sentenced to 30 years in state prison, consecutive to the sentence imposed in Count I.

It is therefore ordered that JIMMIE LEE CONEY be taken by the proper authorities into the custody of the Department of Corrections and be kept under close confinement, to be executed at a time, date, and place to be set according to law.

DONE AND ORDERED on this 27 day of March, 1992 at Miami, Dade County, Florida.

Fredricka G. Smith

FREDRICKA G. SMITH
CIRCUIT COURT JUDGE