IN THE SUPREME COURT OF FLORIDA

ERNEST D. SUGGS,

Appellant,

vs.

CASE NO. 80, 340

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR WALTON COUNTY, FLORIDA.

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STATEMENT OF THE CASE

Appellant was arrested on August 7, 1990, and charged with the murder of Pauline Casey, a barmaid at the Teddy Bear Bar located in Walton County, Florida. (R[1]-2241-42,2252,2718). Appellant was indicted on charges of first degree murder, kidnapping, robbery, and possession of a firearm by a convicted felon and entered a plea of not guilty. (R-11,15). The charge of possession of a firearm by a convicted felon was severed for trial purposes. (R-960).

Pretrial motions were filed regarding death penalty issues (R-33 et seq.), as well as a motion to suppress evidence based upon Appellant's illegal detention (R-775,787), a motion to preclude in-court identification (R-985), and motions in limine (R-965,977).

Before Appellant's trial began, there was a fire at the courthouse in Defuniak Springs. (R-4926-27). Appellant "waived" his right to be tried in Walton County and the case proceeded to trial in the neighboring county of Okaloosa. (R-4931,4992). An impartial jury could not be selected because of extensive pretrial publicity and the court granted Appellant's motion for change of venue, moving the case to Milton, fifty-eight miles from Defuniak Springs. (R-5118,5264,5270).

The case was tried in Santa Rosa County, resulting in a verdict of guilty on counts I, II, and III of the indictment. (R-1719). The penalty phase was conducted and the jury returned a recommendation that the death penalty be imposed by a vote of seven

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[1]References to the record on appeal will be made by the designation (R-page number).

to five. (R-1756).

On July 15, 1992, the trial court sentenced Appellant to death (R-1844 et seq., Appendix 3), finding seven aggravating circumstances, as follows:

> 1) A capital felony was committed by the Defendant while under sentence of imprisonment.
>
> 2) The Defendant was previously convicted of another capital felony and a felony involving the use or threat of violence to the person.
>
> 3) The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping.
>
> 4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> 5) The capital felony was committed for pecuniary gain.
>
> 6) The capital felony was especially heinous, atrocious or cruel.
>
> 7) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court found three mitigating factors, as follows:

> 1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> 2) The defendant's family background.
>
> 3) The defendant's employment background.

This appeal follows.

STATEMENT OF THE FACTS

The victim in this case, Pauline Casey, was a barmaid working at the Teddy Bear Bar, in Walton County, Florida, when she disappeared on August 6, 1990. (R-2241-46). Her body was found the next day, about four to five miles from the bar, near a dirt road off U.S. 98 in Walton County, Florida. (R-2332-35,2341-42,2995-96).

GUILT PHASE

I. BACKGROUND OF THE VICTIM, PAULINE CASEY.

Pauline Casey was married to Steve Casey. They were both in the U.S. Army and were stationed in Germany. Steve Casey's father became ill and he and Pauline requested a hardship discharge from the army to come home to be with his father. (R-3668-69).

Sandra Hall is the Leave Military Personnel Clerk at Fort Rucker. Her job is to brief soldiers who are being discharged about their benefits. Upon discharge, a soldier has a 120 day grace period to convert his or her life insurance to a personal policy. If the soldier dies within the grace period, the beneficiary can claim the life insurance benefits "without them having to pay a dime." (R-3710-11).

Sandra Hall personally handled the discharge for Pauline Casey and Steve Casey. It was an unusual situation to have two privates that were married come from overseas and present themselves for discharge at the same time. (R-3733-34,3745-46). On February 2, 1990, and again on May 4, 1990, she briefed them on their benefits and specifically remembers telling them about their $50,000 life insurance coverage and the grace period. The insurance coverage is

reflected on a DD214, which is a discharge and release from active duty form. (R-3712-14,3725,3736).

After their discharge from the army, Steve and Pauline Casey returned to Walton County. Pauline worked as a waitress at the Hilton and also as a barmaid at the Teddy Bear Bar. Steve Casey was out of work and Pauline was the "breadwinner" in the family. (R-3669-72).

II. THE TEDDY BEAR BAR.

The Teddy Bear Bar is a small bar with a pool table that is located on state road 30A in Walton County. The bar is owned by Ted Valencia and opened July 1, 1990. Pauline Casey worked at the bar for seven to ten days prior to her disappearance. She usually worked nights, and was a dependable employee. (R-2241-42,2252).

On the day she disappeared, Pauline Casey came into the bar with her husband about noon and Mr. Valencia asked Pauline to work that night. (R-2246). Mr. Valencia intended to have the locks changed at the bar because another employee quit the day before, so he asked Pauline to give him back her key. Later in the day, the locksmith called and said he could not come out until the following day. Mr. Valencia gave the key back to Pauline at approximately 5:30, as he was leaving the bar. She put it on top of the cash register. (R-2245-47).

Sandra Mullens was the manager of the Teddy Bear Bar until she quit on the Saturday prior to Pauline's disappearance. (R-3035). She gave Pauline her key to the bar on that Saturday. (R-3037). Mr. Valencia said there were three keys to the door. He "probably"

kept a key that fit the door and "Sandy probably gave one to Judy [one of the other barmaids]." (R-2253,2255-56). Ms. Mullens testified that Judy Pitkin "never had a side door key." (R-3059).

On several occasions, Mr. Valencia talked to Steve Casey about working at the bar. Mr. Valencia specifically recalls talking to Steve Casey about that on August 6, the day that Pauline disappeared. He did not personally give Steve Casey a key to the bar, but is not sure whether someone else did or not. (R-2272-74).

III. APPELLANT, ERNEST DONALD SUGGS.

The Appellant, Ernest Donald Suggs, is from Anniston, Alabama. His mother and father own a house on Choctawhatchee Bay in Walton County. Appellant was staying at his parents' home and working on the roof and the dock, for which he was paid $150 cash on July 29, 1990, and another $100 on July 31, 1990. (R-3913-19). His parents sent him two fifty dollar checks for his birthday. One check was cashed at the 331 Mini Market on August 6, 1990. (R-3916,3945).

Appellant was convicted of murder and assault with intent to commit murder in Alabama. He was paroled in June of 1989, and was in Florida "hoping to find a job." (R-3920,4640).

IV. PRIOR CONTACT BETWEEN APPELLANT AND PAULINE CASEY.

Prior to the date of Pauline's disappearance, Appellant had been at the Teddy Bear Bar on several occasions. Sandra Mullens remembered seeing a napkin on the bar with the name "Ernie Suggs" and a phone number, a week or so before. (R-3061). Pauline appeared to be friendly with Appellant and tried to get him a job working with John Villereal. Pauline referred to Appellant as "Her

friend from Alabama." (R-3672-73). On the date of her disappearance, she told one of the bar patrons that she had been at the Hitching Post [another bar] earlier that day and saw Appellant there. The witnesses were unsure whether Pauline had been in Appellant's car while over at the Hitching Post. (R-2816-17).

V. RAY HAMILTON.

Ray Hamilton had known Pauline Casey for six years and previously dated her. (R-2788,2808). He was on probation. (R-2820). The Caseys lived in a block house and Hamilton lived in a mobile home on the same piece of property. (R-2790).

Ray Hamilton was in the Teddy Bear Bar on the night that Pauline disappeared. Hamilton said he arrived at the Teddy Bear about 8:30 or 9:00 and, while he was there, talked to Steve Casey on the phone about 9:45. (R-2788,2797). Pauline was shooting pool with a white male that he later identified as Appellant. (R-2793-94). Hamilton said that Appellant was there for awhile, left and then came back; but, Hamilton had no way to verify that Appellant returned to the bar. Hamilton was likewise alone with Pauline that night. (R-2814).

Hamilton said he left the bar about 9:45 p.m. and Appellant was still there at that time. (R-2796-98). Hamilton said he went to get a pizza and took it home to eat. (R-2798-2800). The next day he gave the investigators a pizza box but no investigation was done to confirm Hamilton's alibi. (R-3069-72).

VI. PAULINE CASEY GOES MISSING.

Diane Hosmeier went to the Teddy Bear Bar on August 6, 1990,

at 11:10 p.m. The "open" sign was in the window and the door was ajar. There was a car parked outside, but nobody was in the bar. The inside was very clean and all chairs in order. There were no physical signs of a struggle. When she went to make change for a beer, there was only change - no bills in the register. (R-2220-23, 2227). She called Ted Valencia who instructed her to call the Sheriff's Office. (R-2223). There was a napkin next to the cash register with the name "Ray" and "Draft" with the numbers one and two, indicating that Ray had paid for two draft beers. There was nothing in the bar to indicate that Appellant had been there. (R-2232-33).

Deputies received the initial call to go to the Teddy Bear at 11:25 and arrived at 11:31. (R-2309). They confirmed there were no signs of a struggle at the bar. (R-2316-17). Steve Casey arrived at the bar about 12:30 and denied knowledge of his wife's whereabouts. (R-2681-82).

Through an interview with Ted Valencia, the investigators discovered that Ray Hamilton had been in the bar that night. (R-2683). A deputy picked up Ray Hamilton and brought him to the bar. (R-2323). When interviewed, Hamilton gave the investigators a description of an individual and a vehicle that had been at the bar on August 6 and the investigators put out a BOLO. (R-2684-85).

VII. APPELLANT'S DETENTION[2].

Deputy Sheriff Russell Townsend stopped Appellant driving a

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[2]Additional facts regarding the detention are set forth in Point II, wherein Appellant argues he was illegally detained.

vehicle that fit the BOLO on 331 South at Freeport approximately 4:50 a.m. on the morning of August 7, 1990. (R-852-54). Other officers arrived on the scene and Appellant and his vehicle were transported to the Sheriff's substation. (R-872-74,888).

At the Substation, Appellant signed a Consent to Search his vehicle and a Consent to Search his home. (R-876-77).

VIII. THE SEARCHES TAKE PLACE.

While Appellant was being held at the Substation, investigators sprayed WD-40 on a piece of cardboard and backed Appellant's vehicle over the cardboard, leaving an impression of the tire track. Photographs were made of these impressions and given to deputies with instructions to check dirt roads going into the woods. (R-2988-89).

In the meantime, other investigators went to search Appellant's home and took Appellant with them. (R-880). At Appellant's home, there was money in the bathroom sink that was wet.[3] (R-880-81). Appellant told the officers that he had been working on the dock and fell in the mud. (R-2756). The total amount of money found was $176 and included fifty-five $1 bills. (R-2739,3627). The money was processed by the FDLE Laboratory, but no blood or other evidence was developed on the money. (R-3318-19).

IX. PAULINE CASEY'S BODY IS FOUND.

An employee of the Sheriff's Office took one of the

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[3]There was also evidence introduced at trial that at approximately 4:12 a.m. that morning, Appellant purchased two sandwiches from a local convenience store and paid for them with four $1 dollar bills that were wet. (R-2853,2855).

photographs of the tire impression made with WD-40 and went west on U.S. 98. He located a tire track that he thought was similar leaving U.S. 98 about a quarter mile east of 331 and traveling north into the woods. (R-2332-35). This was a two rut road about 4-5 miles from the Teddy Bear Bar. (R-2341-42).

Investigator Brad Trusty went to the area of the tire tracks and followed the tracks north down the dirt road to a power line, where the track turned around. (R-2989). The body of Pauline Casey was found in this area, about 20-25 feet from the dirt road. (R-2995-96). The body was located in bamboo, thick brush, and cockleburrs. (R-2707-08). The brush was impenetrable in places and anywhere from a few inches to 3-4 feet high. (R-3005). The cause of death was loss of blood caused by a stab wound to the back and two knife wounds to the neck. (R-3374-76).

After finding the body, Appellant was formally arrested at his home at 8:56 a.m. on August 7, 1990, while the officers were still conducting the search. (R-2718,2997).

X. RAY HAMILTON IDENTIFIES APPELLANT.

After Appellant was initially detained and transported to the Sheriff's Office, the investigators sent a deputy to pick up Ray Hamilton and bring him to the Substation. According to Hamilton, the deputies said "Ray, we would like you to identify a vehicle for us" and put him in the back seat of the patrol car. (R-2803-04). Hamilton thought he was being arrested "Because I was the last one seen with her" and "it just ran through my mind that since I knew I was the last one there . . ." (R-1367,1383,2818).

As they drove into the parking lot of the Substation, Hamilton saw Appellant's jeep and told the officers there was something white sticking up on the driver's side in the back. Hamilton went over to the jeep and saw a red and white Coleman cooler in the back of the truck. (R-2804). The officers then showed Hamilton a polaroid picture. According to Hamilton, "They pulled that picture out of the Polaroid while I was standing there. So there was nothing else there." This testimony was verified by the investigator who said that the picture "was still developing at that time." (R-1397). The investigator asked Hamilton "if he would identify -- or, if he could identify the person in the photograph." (R-1393). Hamilton identified the picture (which was of Appellant) as the person in the bar. (R-2807).

Hamilton said he had never seen this person before and only had about one-half hour to see him at the bar. During that period of time, he was talking and looking at Pauline and other people in the bar and also talking on the phone. Hamilton said he was not looking directly at the individual while at the bar. (R-1384-85).

XI. PHYSICAL EVIDENCE FROM THE JEEP.

Appellant's jeep was processed by the FDLE laboratory. Despite the fact that there was a substantial amount of blood at the scene of Pauline Casey's murder, the laboratory found no blood on or in the jeep. (R-3010,3331). Similarly, despite the fact that there was loose "stuffing" in the seats of the vehicle, there were no fibers from the jeep on the victim and no fibers from the victim in the jeep. Also, there were no fibers from the victim's clothing

on the Appellant and no fibers from the Appellant's clothing on the victim. (R-3953-57). Hair examination had a similar result, with none of the victim's hair being found in the jeep or on Appellant and none of the Appellant's hair being associated with the victim or her clothing. (R-4458).

The only evidence obtained from the jeep that would tend to link Appellant with the victim was the victim's fingerprints. Two of the victim's fingerprints were found on the exterior of the passenger's window and one palm print was found on the inside of the passenger's door handle, in an area where the door handle would be grasped to open the door. (R-3360). It is impossible to know when those prints were placed on the vehicle because fingerprints cannot be aged. (R-3367).

Vegetation that was caught in the undercarriage of the jeep was submitted to the laboratory, along with vegetation from the crime scene. The vegetation from the jeep did not match that of the crime scene. (State's Exh #34). Also, paint scrapings collected from branches at the crime scene did not match that of the Appellant's jeep, with the expert finding "The paint on the bushes could not have come from this jeep." (R-4101).

Laura Russo of the FDLE laboratory also processed the tire tracks that were at the crime scene and compared them to the tires on the jeep. Three of the tires from the jeep have a similar tread design, but the left front tire is different. Also, the right front tire of the jeep is worn differently from the others and Ms. Russo did not observe the wear pattern from the right front tire at

the crime scene. There are no "individual" characteristics in the tire tracks at the scene that would associate Appellant's jeep with the scene. The tire tracks could have been made by another vehicle. (R-3283,3288,3302,3305-06).

Dale Nute worked for the FDLE laboratory for fifteen years, specializing in shoe tracks and tire tracks. (R-4093) While working for the FDLE, he helped train Laura Russo and was retained as a defense expert in this case. (R-4096,4155). Nute took Appellant's jeep to the crime scene and drove it down the dirt road, something Russo did not do.[4] (R-3312). Appellant's jeep created an "overlap" of the tire tracks as it traveled down the dirt road. This "overlap" occurs because the frame on Appellant's jeep is warped. As the vehicle rolls along, the back tire tracks should cover up the front tire tracks, but because of the warped frame on Appellant's jeep, the back tire tracks do not entirely cover up the front tire tracks. Instead, there is approximately one-half of an inch "overlap" created in the tire tracks wherein the front tire track remains visible. (R-4119-21,4126,4131).

Because there was no "overlap" in any of the tire tracks at the scene, (R-4126,4131,4245), it was Nute's opinion that it is "highly unlikely" that Appellant's jeep left the tire tracks at the crime scene. (R-4134). The tires on Appellant's jeep are sold by eight different manufacturers and five different retread companies. They are customarily used as a light truck tire for pickup trucks,

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[4]Russo also did not measure the wheel base of the vehicle to compare to the wheel base of the tire tracks at the scene. (R-3318).

vans, and utility vehicles that inspect power lines. (R-4107-08).

XII. A STAIN ON APPELLANT'S SHIRT.

When Appellant was detained at 5:00 a.m. on August 7, 1990, he was wearing a T-shirt, shorts and flip flops.[5] (R-874). He had been in several different police cars while being transported to the Substation, to his home, and in returning to the Substation. At the Substation, he was held in several different rooms and ate lunch in the deputies' room. (R-2832-36) In the meantime, he kept on the same clothes that he was initially arrested in. Finally, at 2:01 p.m. on August 7, 1990, the officers took his clothes into custody. (R-2830). The clothes were not sent to the laboratory until August 15, 1990, and were maintained in the evidence vault (which is not refrigerated) until then. (R-3083-84,3106-07).

Charles Ginsberg, an FDLE lab examiner, tested Appellant's shorts, shoes and watch and found no blood. (R-3172). Four or five stains on the T-shirt were negative. Ginsberg said he found human blood in one stain on the T-shirt; but could not get an ABO blood type or any of the enzymes that are found in human blood, except the ADA enzyme. According to Ginsberg, he found ADA enzyme type 1 in the stain which is consistent with the victim's ADA enzyme type and is an enzyme found in the blood of 90% of the caucasian population. (R-3164-67,3189). Appellant's ADA enzyme is type 2-1. (R-3167). The test requires the examiner to "interpret" the banding patterns of enzymes and make a "scientific judgment" as to

[5]There were no scratches or scrapes on Appellant's legs despite the thick brush where Pauline Casey's body was found. (R-2709).

whether the enzyme is there. This is done "visually" without a microscope. (R-3214,3224,3230).

Robert Kopeck is a former supervisor in the FDLE laboratory in Sanford. He has extensive training in forensic serology and has testified as an expert over 1500 times and was retained by the defense as an expert in this case. (R-3972,3975). According to Kopeck, the test performed by Ginsberg does not test for human blood; but rather is a test for human protein which can be found in muscle, skin, saliva, urine, and other bodily fluids.[6] (R-4012-13). Therefore, it is impossible to determine whether this stain is human blood or some other bodily fluid (R-4013). It is also impossible to determine, using Ginsberg's tests, whether this is a "mixed stain," i.e. a stain that is a combination of different stains. Because there was no test to determine if this is a "mixed stain," all of the later tests need to be looked at with some "real suspicion." (R-4023-25).

According to Kopeck, the effect of not properly storing the shirt for 9 days is "everything" because the enzymes in a blood stain begin to "degrade" and are destroyed. (R-4030). As a result, there is a "red flag" in Ginsberg's results because Ginsberg got a result on the ADA enzyme and all the others were inconclusive or no activity. "This is not what should have happened." (R-4032). "It is clear in my mind that something is wrong with these results." (R-4058). The enzymes in a blood stain degrade at different rates and the one that degrades the fastest is ADA and "that's the one

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[6]Ginsberg agreed with this testimony. (R-4320).

that should be gone first." (R-4032-33). The ABO blood group lasts for years and can even be derived from mummies. The problem with Ginsberg's results is that the blood group and enzymes that should have lasted the longest are gone and the one that should have been the first to go is the only one that shows up. (R-4033,34).

When a blood stain degrades the proteins in the blood begin to change which means that the protein configurations change, the molecules change, and the types change. (R-4029). According to Kopeck, as the ADA type 2-1 begins to degrade, one of the "bands" is lost first and it starts to look like a type 1. (R-4036).

Also, the ADA enzyme is very common in beef, rabbits, squirrels, and other animals. (R-4035). Because Ginsberg did not test the stain to determine if it was a "mixed stain," the ADA enzyme could have come from something as simple as the Appellant dripping a hamburger on his T-shirt. (R-4062). Also, the ADA enzyme in saliva, tears and other bodily fluids is often not the same as the ADA enzyme found in the blood. In other words, the ADA enzyme can be different in the same individual depending upon what bodily fluid is being tested. (R-4039). The only bodily fluid from the Appellant that was tested was a blood sample, and no other tests on urine, saliva, etc. were performed.

Ginsberg could not say with 100% accuracy this was not a "mixed stain" and agreed it could have been a mixed stain of saliva and hamburger that hit the shirt. (R-4322-23). Ginsberg had no explanation for why he did not get any other enzyme activity and testified "I don't know." All of the sample was consumed in the

tests and therefore no other tests could be run. (R-4331-33).

XIII. A STAIN ON THE VICTIM'S JEANS.

Ginsberg also found sperm on the victim's jeans; but all other tests on the sample were inconclusive. (R-3169-70). Ginsberg did not request a DNA test on the sample because the lab would "probably" not have gotten a DNA type from it. (R-3227-28). Robert Kopeck testified that a PCR test was available that would cause the DNA material in the sample to "multiply." Once the DNA material was increased, the DNA test could be done and can say almost positively that an individual did or did not contribute the stain. According to Kopeck, DNA testing is "mandated by this type of case." (R-4009-10,4042). The tests done by Ginsberg were "destructive-type" testing techniques that used up all the sample and therefore further tests cannot be done. (R-4009-10).

XIV. THE DIVE TEAM.

Appellant was arrested on August 7, 1990. (R-2718). The next day, starting at 3:00 p.m., the Walton County Sheriff's Department called the "Dive Team" to search the Choctawhatchee Bay behind Appellant's house. (R-2861-62). Prior to the search taking place, Appellant's arrest had received substantial publicity and the Sheriff held a press conference at 11:00 a.m. on August 7, 1990, "on the high side of 98." The press was being kept advised on the progress of the investigation. (R-3100-03). The investigators admitted that the dive team did not start diving until at least twenty-four hours after the news media account and that news travels fast in a small community. (R-2700-01).

Appellant's house and the location of the dive are easily visible from the bridge causeway. (R-2711,2978). Prior to the search beginning, there was no security posted at Appellant's home. (R-2701). Choctawhatchee Bay is a public watercourse and the location of the dive team's search is accessible from the water by boat or, because the water is shallow, a person could enter the bay from the land as far as a mile away and walk to the location. (R-2980). Appellant's residence was easily identifiable and had the name "Suggs" in two different locations that were visible from the Mini Mart. (R-2700).

Late in the day on August 8, the dive team found a glass in two to two and one-half feet of water behind Appellant's house. (R-2872,2886). The glass was a pilsner beer glass, similar to beer glasses used at the Teddy Bear Bar, and most other bars. (R-2248-50,2290). No fingerprints or other evidence was developed from this glass. (R-3362-63).

The next day, August 9, 1990, a key was found in approximately four feet of water. (R-2874-75,2979). This key fit one of the locks at the Teddy Bear Bar. (R-2999). No murder weapon was ever found. (R-2689).

XV. WALLACE BYARS - AN INCOMPETENT WITNESS

In May of 1990, Wallace Byars was arrested by the Sheriff's Department for shooting at the Substation with a 30/30 rifle. (R-3408-09). Byars had been drinking heavily since he was 10-11 years old and suffered blackouts and hallucinations. He had attempted to commit suicide. (R-3410-11). Byars had six prior felony

convictions. (R-3398). He was facing a "lot of time" for shooting at the Sheriff's Office and the guidelines for his offense called for a sentence of between 15 and 17 years. (R-3408-09).

On June 19,1990, Byars was examined by Dr. Borlongan, a psychiatrist. Dr. Borlongan said that Byars' "memory was impaired for both recent and remote events, but recent past is much more impaired . . . He has minimal insight into his problem, and his judgment was impaired." Dr. Borlongan's opinion was that Byars was "not competent" and should be sent to the state hospital for "extensive treatment." (R-1058-61).

On July 11, 1990, Byars was examined by Wanda Ranger, a licensed mental health counselor, who specializes in competency determinations. (R-1062-63,3848-50). Ms. Ranger said that Byars' "memory appears to be severely impaired . . . and his judgment is very impaired." Ms. Ranger likewise reached the opinion that Byars was "not competent" and should be sent to the state hospital for "intensive treatment." (R-1062-63).

An order was entered by the court on July 26, 1990, adjudging Byars to be "incompetent" and finding that he "meets the criteria for involuntary hospitalization." (R-4742). After Byars was declared incompetent and while awaiting transport to the state hospital, Byars gave a statement to the Sheriff's Office that Appellant told him that he killed Pauline Casey and it was "over a robbery, and -- there was another intention there that he was going to rape her." (R-1270,1276,3399,3407). Byars also claimed that Appellant said that he stabbed her and "damn near cut her head off"

and drug her body off to the side of a dirt road. (R-3400).

Byars testified that he was not promised anything in exchange for his testimony and was not given a lesser sentence. (R-3404-05). However, on March 6, 1991, Byars entered into a plea agreement with the state that called for a three year sentence to be served in the county jail, "if sheriff agrees." (R-3490). The Sheriff wrote a letter to the judge asking that Byars be allowed to serve a sentence of three years in the county jail and agreeing there would be no probation after incarceration. The Sheriff wrote the letter knowing that Byars had made a statement. (R-3751-52,3754).

While Byars was serving his sentence and awaiting giving testimony in Appellant's trial, Byars was allowed to leave the jail to handle personal business. At one point, Byars was staying in the Hilton Hotel in Crestview where he got into a "family dispute" and was arrested. (R-3415-18).

XVI. JAMES TAYLOR - A "PROFESSIONAL JAILHOUSE INFORMANT"

James Taylor has been convicted of twenty felonies. (R-3574). He is a "professional jailhouse informant" who was in the Walton County Jail in August of 1990. (R-4780). Taylor was being held in the county jail because he was a witness for the prosecution in an unrelated case. (R-3576). Taylor worked as an informant for DEA, Customs, FDLE, and the Walton County Sheriff's Office. (R-3576,3602). Taylor admitted he was an "informant" for the government and worked drug cases while he was in prison. (R-3604). Even while he was in the county jail in August of 1990, he was working cases involving the FDLE and the federal government. (R-

3608).

Taylor was on probation for a case that arose in Walton County in 1985. (R-3578). He was scheduled for a violation of probation proceeding on August 24, 1990. (R-3434,3580). Taylor was in the same cell with Byars and Appellant. (R-3535). On August 21, 1990, Taylor made a statement to the Walton County Sheriff's Department describing statements Appellant made to him. (R-3539). Following his statement to law enforcement officers, Taylor's probation was extended three years. (R-3580,3609).

At trial, Taylor testified that Appellant said that he felt that law enforcement was bluffing about finding a key and a glass in the bay behind his house because the key would have been aluminum or brass and a magnet would not pick it up or the glass. (R-3537). Appellant also said that because Pauline Casey was dead there was no one to testify against him. Appellant said that because there was no witness and no weapon he felt he could beat this case. (R-3538).

Taylor also testified that Appellant told him that law enforcement did not have a weapon and would not find one and that he threw it into the canal as he was crossing the bridge. (R-3536-37). Appellant also said that he damn near taken her head off. (R-3539). These two latter statements were not included in Taylor's original statement to law enforcement officers and, according to Taylor, were made by Appellant after his August 21, 1990, statement to the police. (R-3614). However, in his deposition taken May 23, 1991, Taylor testified that <u>all</u> of Appellant's statements were made

to him prior to Taylor making the August 21, 1990, statement. (R-3588,3609).

Taylor said he was not promised anything in exchange for his statement and had no deals for his testimony; however, Taylor is expecting a letter of "substantial assistance" to take to his parole hearing in August of 1992. (R-3595).

XVII. THE OTHER SUSPECTS.

According to the investigators, as soon as Pauline Casey's body was found, the investigation of the two other prime suspects, Steve Casey and Ray Hamilton, stopped. (R-2765). The officers candidly testified that seeking evidence that someone else may have had a motive, or might have had the opportunity, or might have committed this crime was "not real high on the list of priorities of the department." (R-2727-28). There were no further attempts made to search Casey or Hamilton, their homes, seize their clothing, check their vehicles for evidence, or to check for unexplained bank deposits or sudden income. (R-2759,2761,3008).

Steve Casey's alibi was that he stayed home the night of the murder and sold his truck; but Casey could not remember whether he sold the truck for $1,200 or $1,500 and did not remember who he sold it to. (R-3682-83).

Casey does not remember discussing insurance benefits with Sandra Hall at the time of his discharge from the army and has no recollection of discussing the insurance policy and conversion period with her. (R-3689-90). According to Casey, a few days after the murder, he called the VA to inquire about funeral benefits and

was told to call Sandra Hall. She informed him of the grace period (that was about to expire) to convert the insurance policy. According to Casey, he did not even know what a DD214 was. (R-3691).

Sandra Hall testified that Steve Casey called her and said he needed a certified copy of Pauline Casey's DD214 form to file for the insurance benefits because she had been murdered. Steve Casey did not say anything to her about funeral expenses and instead said "he needed a certified true copy of her DD form 214 to file for that life insurance." (R-3715).

Steve Casey collected $50,000 in life insurance from the army and bought a Harley Davidson, traded Pauline Casey's car in on a truck for himself, and made a down payment on a lot on the bay. (R-3692-93). Casey never told law enforcement about the life insurance policy. (R-3693-94).

Casey produced his telephone records at the trial that reflected a long distance phone call on his phone to Evanston, Wyoming (his mother's home) that ended at 9:32 p.m. the night that Pauline disappeared. There was no one to verify his activities from then until 12:00 midnight when Casey said he saw Ray Hamilton. (R-3686). He then went to the Teddy Bear Bar and got there about 12:30. (R-2681).

By the next morning, Steve Casey knew that Appellant had been arrested and that he had been working on his parents' home on the bay. (R-3687). The investigators acknowledged that if someone wanted to try to tie Appellant to the crime, they could have left

a key in the water behind Appellant's house. (R-2714). Casey knew that Sandra Mullens gave his wife a key to the bar because there was a discussion concerning Steve Casey starting to work at the bar on Monday, the day Pauline disappeared. Casey said, "It wasn't ever decided, as far as I remember, whether I was really gonna work or not. It was still being talked about." (R-3685-86). Casey said he didn't remember if the purpose of the key was so he could open the bar. (R-3685-86).

PENALTY PHASE

I. STATE'S CASE

The prosecution recalled James Taylor, the "professional jailhouse informant." Taylor testified that Appellant also said, "the case in Alabama he was stupid but this case he was not because he didn't leave a damn witness, I almost taken her damn head off." (R-4625).

Investigator Sunday testified during the penalty phase that he removed a book from Appellant's house on August 7, 1990. The book was on a shelf with several other books. The name of the book is Deal The First Deadly Blow. (R-4628-29). The investigator turned to page 99 of the book and said he compared[7] the photographs on that page to the autopsy photographs of Pauline Casey. (R-4629). The book was located on a shelf in the living room along with a big collection of other books. There was nothing that tied the book to

[7]During closing argument, the prosecutor argued that the photographs in the book were similar to Pauline Casey's wounds and argued that existence of the book proved that Appellant had planned how his next victim would die. (R-4699).

Appellant and there was no handwriting or name in it. (R-4631,4637). The book could have belonged to Appellant's mother and father. (R-4632). The book is an instruction book for the military and Appellant's father is retired Air Force. (R-4632-33).

The state introduced the minutes of the Alabama Court showing that Appellant was convicted in Alabama in 1979 of first degree murder and assault with intent to murder and was paroled in 1989. (R-4639-40). He was on parole on August 6, 1990. (R-4641-43).

II. DEFENSE CASE

Barbara Tucker testified that she has known Appellant's family for thirty-two years and saw Appellant grow up. (R-4661-62). Appellant's father is a successful businessman and formerly the police commissioner of Anniston, Alabama. (R-4663-64). Appellant has a good relationship with his parents. (R-4665). She described Appellant as being a very hard worker, saying "when he works, he works hard." (R-4664).

Rhonda Carlson testified that she had known Appellant since 1975 and that her father was Mr. Mayne. (R-4672). Appellant worked for her father from 1975 to 1979, when he was arrested in Alabama, and again in 1989 when he was paroled. (R-4673-74).

Appellant's mother testified that Appellant was a normal happy child (R-4680). He obtained a GED and completed a 3,000 hour course to become certified in gunsmithing. (R-4681).

SUMMARY OF THE ARGUMENT

On appeal, Appellant argues that his conviction should be reversed for a new trial. In the alternative, the death penalty should be vacated with directions that a life sentence be imposed. At a minimum, a new sentencing hearing should be granted.

In Point I, Appellant argues that the trial court committed per se reversible error by failing to conduct a Richardson hearing prior to the testimony of Acting Circuit Judge Lewis Lindsey, who was not on the state's witness list. The discovery violation was called to the trial court's attention on two occasions, but no Richardson hearing was conducted. Furthermore, a sitting judge should not have been permitted to testify regarding his thought processes for making a judicial decision. Judge Lindsey was permitted to comment on the credibility of witnesses, testify to hearsay, give legal opinions, instruct the jury on the law, and otherwise give a "judicial testimonial" vouching for the testimony of a crucial state witness.

In Point II, Appellant argues that the trial court erred in denying his motion to suppress evidence that was derived from his illegal detention. The facts of this case are even more compelling than established precedent from this Court and the United States Supreme Court. Appellant was illegally detained by the officers, transported to the sheriff's office where he was held for four hours without probable cause. During the illegal detention, his vehicle and home were searched. The evidence derived from those searches should be suppressed.

In Point III, Appellant argues that the trial court erred in denying his motion for a mistrial when the prosecutor, in opening statement, said that Appellant had been in prison in Alabama.

In Point IV, Appellant argues that the cumulative effect of the prosecutor's misconduct deprived him of a fair trial. This was a "close case." The misconduct was extensive and included a blatant "Golden Rule" argument, comments on Appellant's Fifth and Sixth Amendment Rights, "missing witness" arguments, questions and arguments denigrating Appellant's expert witnesses, and arguments diminishing the state's burden of proof.

In Point V, Appellant argues that the evidence is insufficient to support his conviction for kidnapping, in light of the specific language of the indictment.

In Point VI, Appellant argues that the trial court erred in denying his motion in limine regarding the identification testimony of Ray Hamilton, who was asked to identify a photograph of Appellant under the most suggestive circumstances imaginable.

In Point VII, Appellant argues that the trial court erred in permitting the state to introduce the book, Deal The First Deadly Blow, during the penalty phase. The book was never connected to Appellant (or the crime) and was hearsay. The book was relied upon by the trial court as evidence of an aggravating circumstance.

In Point VIII, Appellant argues that the trial court erred in permitting the jury to consider evidence of nonstatutory aggravating circumstances and submitting aggravating circumstances to the jury that were not proven beyond a reasonable doubt.

ARGUMENT

POINT I

DURING THE GUILT PHASE, THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR IN FAILING TO CONDUCT A RICHARDSON HEARING, AND FURTHER ERRED IN PERMITTING ACTING CIRCUIT JUDGE LINDSEY TO TESTIFY.

The testimony of the two jailhouse informants and impeachment of these witnesses was a crucial aspect of this case. The impeachment took many different forms, including the extent to which either of these witnesses had received leniency or special treatment. One of those informants, Wally Byars, was serving a three year sentence in the county jail, but was repeatedly released from the jail on his own. On one of those occasions, Byars was staying at the Hilton Hotel in Crestview when he got into a dispute with his wife and was arrested. (R-3415-18).

In an effort to minimize the obvious impact this impeachment evidence had on the credibility of Byars, the prosecutor announced, after the jury was selected and sworn[8], that he intended to call Acting Circuit Judge Lewis R. Lindsey to testify that Judge Lindsey made the decision to release Byars. (R-2120-21). Judge Lindsey was not on the witness list. Defense counsel objected and, on two occasions requested a Richardson hearing. (R-2121, 3458-59). No Richardson hearing was conducted and the trial court permitted Judge Lindsey to testify. (R-3500 et seq.).

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[8]. The jury was sworn on May 27, 1992 (R-2625). The State attorney first mentioned Judge Lindsey as a witness on May 28, 1992 (R-2121), immediately prior to opening statements. The transcripts in the Record are out of order. The break in the transcripts is reflected at R-2107.

THE DISCOVERY VIOLATION

This Court has repeatedly held that, upon a discovery violation being brought to the trial court's attention, the failure to conduct a hearing pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971), is per se reversible error. Smith v. State, 500 So. 2d 125 (Fla. 1986); Brown v. State, 515 So. 2d 211 (Fla. 1987). In the case at bar, defense counsel brought the discovery violation to the court's attention on two separate occasions: "we will request a Richardson's (sic) hearing" (R-2121) and "He is not on the discovery list anywhere and a Richardson hearing wouldn't cure it." (R-3459). The failure to list Judge Lindsey was clearly a discovery violation. See Fla. R. Crim. P. 3.220 (b)(1)(A). When the state attempts to call a witness who has not been disclosed, the trial court must conduct an inquiry into "all of the surrounding circumstances" of the violation. Richardson, 246 So. 2d at 776. The inquiry must include "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial." Brown, 515 So. 2d at 213, citing Cumbie v. State, 345 So. 2d 1061, 1062 (Fla. 1977). Following the inquiry, the trial court has discretion to remedy such a violation by granting a continuance, or limiting the evidence to be introduced, or granting no remedy at all, but the failure to conduct the Richardson hearing is reversible error:

> Richardson states that although the trial court has discretion in determining whether the state's noncompliance with the discovery rules resulted in harm or prejudice to the

> defendant, such discretion could be exercised only after the court made an adequate inquiry into all of the surrounding circumstances. At a minimum the scope of this inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial. [citations omitted]. It is clear that the court did not comply with Richardson. We have repeatedly held that a trial court's failure to conduct a Richardson inquiry is per se reversible. (emphasis added).

Brown, 515 So. 2d at 213 (emphasis added) (citations omitted).

Although the trial court heard argument on substantive objections to Judge Lindsey's testimony (R-3457-3472), at no time did the trial court conduct an inquiry into why Judge Lindsey was not previously listed as a witness by the state, nor did the court give defense counsel or the prosecution an opportunity to argue whether or not the defendant was prejudiced by this discovery violation. At least one obvious area of prejudice is that the voir dire would have been conducted differently because the witness was an elected county judge in Walton County and was likely known to some of the jurors. It is also obvious from the judge's testimony that other witnesses could have been called to testify on the matters covered by the judge's testimony. Usually, the trial judge has discretion in ruling on discovery violations, but when the judge did not conduct a hearing, she had no facts or arguments upon which to base any exercise of discretion. As this Court noted in Smith:

> [H]ad petitioner known what the officer was going to say, he might have successfully excluded the testimony before trial. At the

> very least, advance knowledge would have given petitioner time to gather rebuttal evidence. . . . Without a Richardson inquiry, the trial court was in no position to make an accurate judgment as to these possibilities.

Smith, 500 So. 2d at 126, quoting Wilcox v. State, 367 So. 2d 1020, 1023 (Fla. 1979).

In Smith, this Court held that the failure to conduct a Richardson hearing is per se reversible error, and the harmless error rule does not apply. The per se rule even applies to rebuttal witnesses. Smith, 500 So. 2d at 127. One of the reasons for the discovery rules is to give the defendant an opportunity (prior to trial) to attempt to exclude the evidence or testimony for substantive reasons. At the very least, advance knowledge would have given Appellant time to research and argue that the testimony of Judge Lindsey was inadmissible under the rules of evidence. (See discussion below).

THE INADMISSIBLE EVIDENCE

Even if no discovery violation existed, the trial court erred in permitting the State to call Judge Lindsey as a witness. Judge Lindsey's testimony was not probative, was highly prejudicial, and was only used by the prosecutor to inflame the jury as to the motives of defense counsel. This is not a case where a judge is giving testimony on undisputed matters.

Before the jury, the judge testified that he allowed Wally Byars to be released from jail based upon the judge's "understanding" that Byars would stay with his mother and be close to his doctors (R-3501). The judge rendered a legal opinion that

Byars' presence in Okaloosa County was not a violation of his order (R-3501). In an effort to also rehabilitate Byars because of the lenient sentence he received, the prosecutor questioned the judge about who was responsible for sentencing a defendant. The state's implication was obvious: "State Attorneys are not responsible for sentencing."; "Are sheriffs[9] responsible for sentencing?" (R-3516).

The prosecutor also inferred that the judge believed the doctor's reports about Byars' medical condition and asked the judge whether he had "any reason to disbelieve Kitty [the jail nurse who was also a witness in this case]," to which the judge replied "No, sir." (R-3518).

During closing argument[10], the prosecutor confessed his real reason for calling Judge Lindsey:

> A couple other witnesses we put on briefly. Judge Lindsey. Again, they [the defense lawyers] were trying to create a smoke screen that Wally Byars was let out of jail by the sheriff. The judge that was dealing in that case came in and told you why he was out. I brought him in just to show you, really just to establish the pattern that the defendant was trying to do, you know, insinuations they were trying to make from this case. Insinuations again. And I think that, clearly, Judge Lindsey said, "No, I did that, not the sheriff, not the State Attorney's office, I did it." What can they [the defense lawyers] say about that? (R-4410-11).

It is obvious that the testimony of Judge Lindsey involves

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[9]Of course, in this case, it was at the suggestion of the Sheriff's Office (the same office that investigated Appellant and decided that he committed the murder) that the judge granted the medical release of the prisoner. (R-3504-05).

[10]The propriety of these arguments is addressed in Point IV of this brief.

evidence of matters that are not proper for inquiry. To begin with, the judge should not have been called to testify regarding matters that were within the scope of his judicial responsibilities. Professor Ehrhardt, in his treatise, states:

> Generally judges cannot be compelled to testify as to matters concerning their judicial duties. United States v. Ianniello, 740 F.Supp. 171, 187 (S.D.N.Y. 1990) ("Oral examination of a judicial or quasi-judicial officer as to matters within the scope of his adjudicative duties should be permitted only upon a strong showing of bad faith or improper behavior."). See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L. Ed. 2d 136 (1971); United States v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L. Ed. 1429 (1940); KFC National Management Corp. v. NLRB, 497 F. 2d 298 (2d Cir. 1974), cert. denied, 423 U.S. 1087, 96 S.Ct. 879, 47 L. Ed. 2d 98 (1976); United States v. Dowdy, 440 F.Supp. 894, 896 (W.D.Va. 1977).

C. Ehrhardt, Florida Evidence Sec. 607.1 n.1 (1992).

In United States v. Dowdy, 440 F.Supp. 894, a subpoena issued to require a judge to testify was quashed. The court noted that, when a judge is called to testify as a witness regarding action taken in his judicial capacity, the grounds set forth for requiring his testimony should be subject to careful scrutiny. If a judge is vulnerable to subpoena for the judicial acts taken by him, the judiciary will be open to "frivolous attacks upon its dignity and integrity," and an inquiry into the mental processes of a judge would be destructive of judicial responsibility and should not be permitted. Oral testimony of a judge as to the basis for his opinions should not be compelled by subpoena absent "extreme and extraordinary circumstances." Dowdy, 440 F.Supp. at 896. See

also, South Terminal Corp. v. EPA, 504 F. 2d 646 (1st Cir. 1974); United States v. Morgan, 313 U.S. 409.

The danger inherent in allowing a judge to testify is further acknowledged by Florida's Code of Judicial Conduct. Canon 2 of that Code prevents a judge from testifying as a character witness because, as the Commentary points out, such testimony "injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial." Fla. Code Jud. Conduct, Canon 2B, Commentary.

There appears to be no Florida case which discusses the issue of when it is appropriate for a judge to be called as a witness in a case not tried before him. One scholar acknowledges that some cases have disallowed a judge from testifying because "the presence of a judge as a witness on behalf of a party to a lawsuit is prejudicial to the rights of the opposing party." Timothy E. Travers, Annotation, Judge as Witness in Cause Not on Trial Before Him, 86 A.L.R. 3d 633, 639 (1978). This annotation also describes cases that discourage judges from being called as witnesses due to the inconvenience to the judge and resulting impact on the judicial system. Several cases cited in the annotation stand for the proposition that a judge should be called as a witness only when "the rights of a party cannot otherwise be protected." Policy decisions notwithstanding and quite pertinent to the instant case, other jurisdictions hold that a judge may not testify regarding the "secret and unexpressed reasons which led a judge to decide a former case in the manner in which he did." Id. at 667. Thus, in

several cases from other jurisdictions, judges have not been allowed to testify about their reasons for making a ruling when those reasons are not part of the record in the prior case. Such was the case in State v. Spinks, 344 S.W. 2d 105 (Mo. 1939) (reversible error found); Rickard v. State, 219 So. 2d 363 (Ala. 1969) (error found, but harmless). Here, Judge Lindsey testified regarding his reasons for releasing the prisoner from jail prior to expiration of his sentence, when there were no docket entries or court records to indicate what official action was taken.

The abuses sought to be avoided by the above policy reasons are graphically demonstrated in the case at bar. By allowing the judge to testify as to the thought processes that he used in rendering a decision, the trial court opened Pandora's box and a plethora of improper, inadmissible, and prejudicial matters spewed forth. In this case, by calling the judge as a witness, the prosecution was able to receive a "judicial testimonial" that the jailhouse informant did not receive "special treatment," and inferred that there was nothing out of the ordinary in releasing a prisoner who was serving a three year minimum mandatory sentence in the Walton County jail (which should have been served in state prison in the first instance). The further inference was made that this "not unusual" scenario (releasing a prisoner from a prison sentence for medical reasons, despite being suggested by employees of the sheriff's department) was a decision made solely by the judge. Also, the judge rendered legal opinions, commented on the credibility of witnesses, was allowed to testify that he took

action based on hearsay [it was his "understanding" of the situation; "I read some doctors' reports" (R-3518); "What I heard was by word of mouth by the CO's when I went in there early that morning for first appearances" (R-3515)], and was otherwise used by the prosecutor to instruct the jury on the law, (i.e. who passes sentence in a criminal case?). This latter error is compelling in light of the fact that there was disagreement over the judge's testimony on this point. (R-3522). The defense was entitled to be heard prior to the jury being given any instructions on the law, Fla. R. Crim. P. 3.390(c), regardless of whether those instructions were given by the presiding judge or by a judge called as a witness.

The error was further compounded by the prosecutor's argument that the judge's testimony was beyond reproach ["what can they say about that?" (R-4411)]. This is precisely the evil the annotation cited above reveals when it speaks of a judge's testimony tending to diminish the rights of the opposing party. How is the Appellant - or any other litigant - supposed to deal with the testimony of a judge? Impeach the judge with the absence of records to support his testimony? Call a bailiff or other such witness to testify to different facts? Argue that the judge - an expert in the law and its processes - was mistaken or prejudiced? Once a judge is allowed to testify, the equivalent of a "directed verdict" has been granted on the facts or opinions given by the judge. In this case, that directed verdict was that the jailhouse informant had not been given any leniency or special treatment, and the judge made the

decision in the "ordinary course of business" to release this prisoner from his sentence.

It is submitted that this important issue deserves a strong statement by this Court, in line with the decisions of other jurisdictions and the federal judiciary:

> (1) That the policy of this state should be to discourage judges from being called as witnesses in cases not tried before them.
>
> (2) That judges should be allowed to testify only upon a showing of extreme and extraordinary circumstances.
>
> (3) That they should not be allowed to testify under any circumstances about their secret or unexpressed reasons for ruling a particular way in a prior case.

It is fundamental error for a presiding judge to give testimony on a disputed matter. Section 90.607(1)(a), Fla. Stat. (1991). Surely, a judge who presided over a crucial aspect of a case should be precluded from testifying about disputed matters in that case, especially when there is objection to the testimony and other witnesses available to testify on the disputed matter.

The judge's testimony was clearly not relevant under Section 90.401, Fla. Stat. (1991), and even if marginally relevant, it should have been excluded pursuant to Section 90.403, Fla. Stat. (1991). In addition, much of the judge's testimony was inadmissible because he did not have personal knowledge of the

facts about which he testified (he relied upon medical reports, the nurse's opinion, etc.) as required by Section 90.604, Fla. Stat. (1991), and he should not have been allowed to testify regarding hearsay (what he discussed with the informant and the jail personnel), which was inadmissible under Section 90.802, Fla. Stat. (1991).

In all deference to Appellant's trial attorneys, these points would have been more forcefully argued by them had they been given proper notice of the state's intention to call Judge Lindsey as a witness. When they were hit by this last minute disclosure, they objected to the testimony sufficiently to preserve the record, but obviously did not have time to research the law of Florida and other jurisdictions to forcefully argue on policy grounds that the testimony should be excluded. Had there been no Richardson violation, then the error of allowing the judge to testify about inadmissible matters may not have occurred.

Given the extreme weight the jury must have accorded the testimony of such a respected witness, the jury surely determined that the jailhouse informant did not receive any special treatment or leniency, and this could have tipped the scales in favor of a finding of guilt in this circumstantial case. After all, if a judge comes into the courtroom and testifies against Appellant, can the ordinary juror conclude that a judge was on the "wrong side" of the case? Under these circumstances, allowing the judge to testify was not harmless error, and Appellant's conviction should be reversed and remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM HIS ILLEGAL DETENTION.

Appellant filed a pretrial motion to suppress evidence derived from his illegal detention. (R-775-76). During the course of that illegal detention, Appellant signed consents to search his home and his vehicle. Evidence obtained during those searches was used as the probable cause for subsequent search warrants.

A hearing was conducted by the trial court (R-846 et seq.) and an order was entered denying the motion. (R-837). The trial court's order must be reversed under the authority of Dunaway v. New York, 442 U.S. 200, 99 S.Ct 2248, 60 L. Ed. 2d 824 (1979); Florida v. Royer, 460 U.S. 491, 103 S.Ct 1319, 75 L. Ed. 2d 229 (1983); and Reynolds v. State, 592 So. 2d 1082 (Fla. 1992).

A. FACTS LEADING UP TO THE SEARCHES.

The Walton County Sheriff's Department issued a BOLO[11] for "an old model, light green Jeep Station Wagon" because a vehicle of that description had been seen at the Teddy Bear Bar. At 4:50 a.m. on the morning of August 7, 1990, (approximately six hours after Pauline Casey went missing), Deputy Townsend saw a vehicle headed

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[11]This BOLO was apparently based upon Ray Hamilton's statement of seeing a person at the bar that was 5'11" tall weighing 220 pounds "or heavier" (Appellant is 5'8", 180 lbs.) who was driving a big dark colored jeep. (R-1363-64). No evidence was offered at the motion hearing as to who was the source of the BOLO. Assuming Hamilton was the source, it is clear that Hamilton left the bar about 9:45 p.m. and it was not until 11:10 that Pauline Casey was discovered missing, an hour and twenty-five minutes later. In the interim, the bar was open for business. (R-2796-98,2220-23). Thus, a substantial issue that was not argued at the motion hearing was whether the police officers had a "reasonable suspicion" that would even justify Appellant's initial stop.

north on 331 South that appeared to be speeding. (R-852-54, 874). The car made a U-turn at the Fina Station at Bay Grove and started back toward Townsend. Townsend said that the vehicle fit the BOLO description, so he turned on his blue lights and flashed his headlights. (R-854-55).

The vehicle pulled into a convenience store parking lot and stopped. Townsend pulled up behind the vehicle and got out. Appellant, the driver of the vehicle, asked why he had been stopped and Townsend informed him that his vehicle fit the description of a vehicle they were looking for. Appellant produced his driver's license, but said he didn't have a registration. The officer then instructed Appellant to "Just sit where you are and I'll be back with you in a few minutes. See if you can find the title to your vehicle." The officer returned to his patrol car. (R-856).

Appellant exited his vehicle, approached the police car, and told the officer that he was on probation for murder. Townsend testified at the hearing that he put his hand on his revolver[12] and told Appellant to go back to his vehicle and sit down, "Put both hands on the steering wheel and just stay there." The officer said that he "ordered him to step back into his vehicle." A few minutes later, other officers appeared on the scene and took over the investigation. (R-857-58,868).

Investigator Steve Sunday arrived on the scene, and by then,

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[12]At his previous deposition, Townsend testified that he withdrew his weapon, walked Appellant back to his vehicle and stood there until the other officers arrived. (R-866-67). Townsend said he was "mistaken" when he gave this previous testimony. (R-867).

there were five or six officers there and four patrol cars. Appellant appeared to be a "little nervous." (R-887). Sunday told Appellant they wanted to transport him to the Walton County Substation to talk to him about an "incident" which had occurred in Walton County. Appellant asked what incident it was and the officer put him off, saying to wait until they got to the Substation to talk about it. (R-885). Appellant agreed to go and was transported to the Substation in the back seat cage of a marked patrol car. According to the officers, Appellant "was secured inside the back of that vehicle." Lt. Mann drove Appellant's vehicle. (R-872-74,888). Appellant showed Lt. Mann how to shift the gears in the vehicle. (R-908). Appellant was never given any option other than to allow the officers to drive his vehicle to the station. (R-907). Appellant was never advised that he was free to leave and, at the station, Lt. Mann kept Appellant's car keys. (R-886,890). The officers also kept his driver's license and car title. (R-858). According to Appellant, he was told by the officers that he was going to the station "one way or the other" and was never given any other options. (R-920).

Appellant was interviewed at the Substation but was not advised of his rights. (R-875,889). According to the officers, the Appellant was not under arrest and there was no basis to arrest him. Appellant told the officers that he had been at the bar earlier that day looking for work. (R-876). When he left, the bartender was fine and in good health. (R-900).

While at the Substation, an hour and twenty-five minutes after

he was stopped, Appellant signed a Consent to Search his vehicle. Fifty six minutes later, two hours and twenty-one minutes after the stop, Appellant signed a Consent to Search of his home. (R-876-77). The officers could not account for the time difference between the two consents. (R-913). According to the officers, these consents were signed "freely and voluntarily;" although, Appellant was "nervous," looked "sick," and complained that his stomach was bothering him. (R-891). Appellant testified that he had been drinking and that the consents were signed only after the officers repeatedly said, "Well, if you haven't anything to do with it, let us look in your house and the jeep." (R-922,932). The officers said that Appellant expressed "concern" about the search; but the officers assured Appellant they were just looking for a missing woman, and wanted "to eliminate him." (R-878-80).

B. THE SEARCHES TAKE PLACE.

While Appellant was being detained at the Substation, the investigators sprayed WD-40 on a piece of cardboard and backed Appellant's vehicle over the cardboard, leaving an impression of the tire track. Photographs of these impressions were made and given to deputies to check dirt roads. (R-2988-89).

In the meantime, investigators went to search Appellant's home under the authority of the consent to search, and took Appellant with them. (R-880). At Appellant's home, there was money in the bathroom sink that was wet. (R-880-81). Appellant told the officers that he had been working on the dock and fell in the mud. (R-2756). While this search was taking place, the body of Pauline

Casey was found. Appellant was formally arrested at 8:56 a.m., over four hours after his initial detention. (R-2718).

C. THE TRIAL COURT'S ORDER.

The trial court entered an order denying Appellant's motion to suppress. (R-837). The trial court's findings are tantamount to a determination that Appellant was illegally arrested. The trial court found that "Although law enforcement officers were suspicious, they has (sic) not concluded that a crime had occurred." (R-837). This finding is consistent with the officer's testimony that Appellant was not under arrest and there was no basis to arrest him. (R-876). All the officers knew at that point was that Pauline Casey was missing.

The trial court then found that Appellant "consented to accompany the law enforcement officers to the Substation." The trial court obviously recognized there is a substantial likelihood that this Court would not agree and said, "Even if an Appellate Court finds that this was not a consensual trip to the Substation, the Defendant's conduct at the Substation created a valid waiver." (R-837-38).

What "waiver" the trial court is talking about is unclear from the order. The court did note Appellant's testimony that he had been drinking and had not had any sleep, but then opined, "Had the defendant been as tired or drunk as he now asserts, it is reasonable to assume he would have stayed home and slept." (R-838). This latter finding reflects that the trial court did not apply the correct legal standard because the court required Appellant to

prove that the consents were not valid. The law is clear that the burden of proof was upon the state to prove by clear and convincing evidence that Appellant's consent to search was not a product of the illegal detention.

D. LEGAL ARGUMENT.

Appellant was illegally detained at the substation by the law enforcement officers. The evidence is clear that the officers did not have probable cause to arrest Appellant and no claim was made to the trial court that they did. In fact, the officers admitted they had absolutely no basis to arrest Appellant. While the officers may have been justified in stopping Appellant initially, the scope and duration of Appellant's detention far exceeded that permitted by law and transformed a brief encounter into a seizure of Appellant's person that amounted to a full-fledged arrest based on less than probable cause.

Since the original detention of Appellant was not based on probable cause, the scope of that detention must be limited. In Terry v. Ohio, 392 U.S. 1, 88 S.Ct 1868, 20 L. Ed. 2d 889 (1968), the court examined the permissible scope of police-citizen encounters when there is no probable cause to arrest. The court held that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. at 16. When there is no probable cause to arrest the person so seized, then the intrusion must be confined in scope to a search for weapons, necessary to protect the safety of the officer. 392 U.S. at 29. In determining whether a seizure of

the person is reasonable, the Supreme Court has decided several cases which emphasize the limited authority of the police to detain an individual who has not been arrested on probable cause. Dunaway v. New York, 442 U.S. 200, is directly on point.

In Dunaway, the defendant was picked up by police and taken to police headquarters where he was advised of his rights and made statements to the officers. The Supreme Court considered "whether the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took petitioner into custody, transported him to the police station, and detained him there for interrogation." Dunaway v. New York, 442 U.S. at 206-07. The identical issue is presented in the case at bar. As in this case, in Dunaway, the police contended that the "seizure of petitioner did not amount to an arrest and was therefore permissible under the Fourth Amendment because the police had a 'reasonable suspicion' that petitioner possessed 'intimate knowledge about a serious and unsolved crime.'" Id. at 207. The Supreme Court concluded that Dunaway's detention was indistinguishable from a traditional arrest: "Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go[.]'" Id. at 212.

It should be clear that the pertinent facts in Dunaway and those in the case at bar are virtually identical. In both situations, the defendant was taken into custody on less than

probable cause. Here, the trial court's finding that the officers were "suspicious" but had not "concluded that a crime had occurred" is totally supported by the record and conclusively establishes that Appellant was taken into custody without probable cause. Neither Appellant nor Dunaway were told they were free to go. (R-886). After Dunaway was taken to the station, he was advised of his rights and made incriminating statements. Unlike Dunaway, here Appellant was not read his rights but was nevertheless interrogated by the officers. (R-875-76,889,900). Even though Dunaway's statements were voluntary, the Supreme Court suppressed the evidence saying; "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." Id. at 218.

The case of Florida v. Royer, 460 U.S. 491, is also directly on point. In Royer, the Supreme Court suppressed evidence obtained as a result of Royer's consent to search which was given during the course of an illegal detention. The Court said:

> Terry and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.

Royer, 460 U.S. at 499.

Thus, the officers' desire to "talk to [Appellant] about an incident which had occurred in Walton County" (R-872), did not authorize them to "seek to verify their suspicions by means that approach[ed] the conditions of arrest." Id., at 499.

The facts in this case are even more compelling than those in Royer. In Royer, the defendant was confronted in an airport by officers because he met the "drug courier profile." Royer became "noticeably more nervous" during his initial detention. Id. at 494. Unlike the case sub judice, Royer did not have a gun pulled on him, he was not surrounded by four police cars and six deputy sheriffs, and he was not taken to the police station. Instead, Royer was simply asked by the officers to accompany them to a room in the airport a few feet away that was not a police office. During that detention, Royer consented to a search of his luggage. The Supreme Court agreed that "the 'confinement' . . . went beyond the limited restraint of a Terry investigative stop, and Royer's consent was thus tainted by the illegality, a conclusion that required reversal in the absence of probable cause to arrest." Id. at 501. One of the crucial facts in the Supreme Court's analysis was that the officers took Royer's airline ticket and driver's license and never returned them. Similarly, in the case at bar, the officers took Appellant's vehicle, car keys, driver's license and car title and never returned them.

The trial court's order denying Appellant's motion to suppress finds that Appellant's consent to search was "voluntary." (R-838). In making this finding, the trial court notes that Appellant said

he was without sleep and had been drinking. The trial court disputes Appellant's testimony, saying that if Appellant was "as tired or drunk as he now asserts, it is reasonable to assume he would have stayed home and slept." (R-838). This finding is irrelevant because it is not Appellant's burden to show that he was "tired" or "drunk" or otherwise incapable of resisting the apparent authority of the officers. The burden is on the state to prove that Appellant's consent was not a product of his illegal detention. Instead, the State proved Appellant was detained for hours without probable cause for arrest, and that during his illegal detention he purportedly "consented" to the searches of his car and home.

Ironically, the trial court later accepted Appellant's testimony. In the sentencing order, the trial court specifically referred to Appellant's testimony in finding that a mitigating circumstance exists:

> [T]he court notes that the Defendant testified on April 19, 1991, at the hearing on his Motion to Suppress that he had drank one-half case of beer and had "quite a few drinks" at several bars in the 10 to 12 hours preceding his being stopped at about 5:00 a.m. on August 7, 1990. The court is reasonably convinced that the Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. (R-1848).

It is inconceivable that the trial court could find that the state proved with clear and convincing evidence that Appellant's consent to search was voluntary and, based on the same testimony, find that Appellant's mental condition was "substantially impaired" to the point where he could not "conform his conduct to the requirements

of law." These findings are totally inconsistent and further demonstrate that the trial court applied the incorrect legal standard to the evidence on the motion to suppress.

In determining whether a consent to search is tainted by the illegal detention, this Court held in Reynolds v. State, 592 So. 2d 1082, that: "Where there is an illegal detention or other illegal conduct on the part of the police, a consent will be found voluntary only if there is clear and convincing evidence that the consent was not a product of the illegal police action." Reynolds, 592 So. 2d at 1086 (emphasis added).

Thus, the trial court's attempt to focus the inquiry on whether Appellant was drunk or sleepy at the time he consented to the search is misplaced. The issue is whether there was "clear and convincing evidence that the consent was not a product of the illegal police action." Id. at 1086 (emphasis added).

In Reynolds, the defendant was stopped as he was driving down the road and handcuffed after he stepped out of the car. He was "patted-down" and one of the officers asked the defendant for consent to search his person. Reynolds was informed of his right to refuse a search and twice consented to be searched. A search of Reynolds' person resulted in drugs being found.

Unlike the instant case, Reynolds was not transported from the scene of the stop in the back seat of a police cruiser with a cage in it and was not taken to the police department where he was held for hours until he was interrogated and ultimately consented to the search. Nevertheless, this Court, in Reynolds, found the

circumstances in that case did not "present clear and convincing evidence that the consent was voluntary." Id. at 1087.

Two of the factors that this Court has specifically recognized as evidence of coercion is whether there was a prolonged detention and whether there were repeated requests for consent. Denehy v. State, 400 So. 2d 1216 (Fla. 1980). Both of those factors exist in the case at bar. In Reynolds, this Court noted that the only factor in favor of voluntariness was the fact that Reynolds was informed of his right to refuse the search. Here, the officers never informed Appellant of his right to refuse, nor did they even advise him of his Miranda rights, despite the fact that he was obviously in custody.

As this Court said in Norman v. State, 379 So. 2d 643 (Fla. 1980), "[W]hen consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search." Norman, 379 So. 2d at 646-47. In order to overcome the presumptive taint of illegal police activity, this Court said: "The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." Id. at 647. There was never any evidence offered of a "break in the chain of illegality" in the case at bar. Appellant was taken into custody and held in that status until Pauline Casey's body was found, four hours after he was initially detained.

In Bailey v. State, 319 So. 2d 22 (Fla. 1975), this Court

determined that the defendant's consent to search was invalid based upon the fact that the officer's testimony "consisted entirely of conclusions." Bailey, 319 So. 2d 26-27. The testimony of the investigators sub judice is similar:

> Q. Did he sign those [consent forms] freely and voluntarily?
> A. Yes, sir.
> Q. Was he forced in any way to sign them?
> A. No, sir. (R-878).

Contrast this testimony with the additional testimony of the investigators that (1) Appellant expressed "concern" about the search (R-878-79); (2) Appellant "appeared to be a little nervous" (R-887); (3) Appellant looked "Nervous. He looked sick. I think I may have asked him and he said his stomach was bothering him." (R-891); (4) Appellant "requested a lot of water, drank a lot of water . . . He complained about his stomach hurting." (R-912); (5) Appellant was never advised of his Miranda rights or advised that he could leave. (R-889-90); (6) The police kept Appellant's keys, driver's license, and title. (R-858,890); (7) It was an hour and twenty-five minutes before the consent to search the vehicle was signed and another hour after that before the consent to search Appellant's home was signed. (R-890-91); (8) The officers could not explain the difference in the times on the two consents or what happened in the interim. (R-913); (9) The officers repeatedly told Appellant that they wanted to conduct the searches "to eliminate him." (R-880,895-97); (10) Appellant repeated numerous times that "I wish she [Pauline Casey] would hurry up and call. I wish she would call in." (R-903); (11) The investigators were "not sure if

Mr. Suggs read it [the consent to search] or not." (R-909).

On the other hand, Appellant gave specific testimony about the consents saying that he told the officers, "I don't like anybody going through my stuff, or anything like that," but "[t]hey [the officers] kept on." (R-922). In Bailey, this Court said, "Mere conclusions of an officer are insufficient to establish a valid consent. Officers are not qualified to make such a conclusion." Bailey, 319 So. 2d at 27. The Bailey Court also observed; "A distinction is recognized . . . between submission to the apparent authority of an officer and unqualified consent. Mere acquiescence in a search is not necessarily a waiver of a valid search warrant." Bailey, 319 So. 2d at 27, quoting Talavera v. State, 186 So. 2d 811, 814 (Fla. 2d DCA 1966).

In this case, Appellant simply submitted to the "apparent authority" of the officers. The testimony of the investigators on this point belies the obvious. While the officers testified that Appellant "agreed to go" with them to the station, what choice did Appellant have? He was never told he was free to leave and never given any option other than to let the officers take his car to the station. The officers refused to discuss the matter with him on the scene of the stop (R-885), despite Appellant's repeated requests. (R-919).

It is clear that Appellant's consent to search was a product of this illegal detention. As a result, the state had the burden to establish by clear and convincing evidence that there was a break in the chain of illegality. There was no evidence of such a

break in the chain and, in fact, the evidence is overwhelming that Appellant was held for four hours under conditions approaching arrest, while he was repeatedly questioned and the officers repeatedly sought to obtain his consent to search. Under these circumstances, Appellant's motion to suppress should have been granted and all evidence derived from the illegal searches suppressed.

E. FRUIT OF THE POISONOUS TREE.

Following Appellant's arrest, the officers obtained search warrants for both the house and jeep. The probable cause affidavit[13] for the warrants specifically refers to the consents being signed by Appellant, and alleges that, "During the search of the residence, approximately $173 in small bills were found in an (sic) bathroom sink." (R-8). The probable cause affidavit further states that the tire tracks at the scene of the crime "resembled" the tires from Appellant's vehicle [taken with WD-40]. (R-8).

Without the information gained from the illegal searches, there is no probable cause for the issuance of the search warrants. Accordingly, all evidence seized during either search should be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct 407, 9 L. Ed. 2d 441 (1963).

This is not a situation where the evidence obtained through

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[13]The probable cause affidavit further states that "there appears to be blood located on the passenger side of the green jeep." (R-8). In fact, the laboratory confirmed there was no blood on the jeep and when the officer was asked whether he knew that before he did the search warrant, the officer said, "That I don't remember." (R-899).

the search warrants would have been inevitably discovered. Craig v. State, 510 So. 2d 857 (Fla. 1987). Without the search warrants, the investigators would never have discovered the fingerprints on Appellant's vehicle, could not have removed the tires from the vehicle, or found the book, Deal the First Deadly Blow, in Appellant's home. In Segura v. United States, 468 U.S. 796, 104 S.Ct 3380, 82 L. Ed. 2d 599 (1984), agents illegally entered the defendants' home and observed drugs in plain view. The agents then secured the premises and obtained a search warrant. The subsequent search, pursuant to the warrant, was upheld because there was an "independent source" for the issuance of the search warrant:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant.

Segura, 468 U.S. at 814 (emphasis added).

Unlike Segura, in the case at bar, the evidence that was secured illegally during Appellant's detention is precisely the evidence that was relied upon by the officers to obtain the search warrants. As a result, not only should the evidence initially seized by the officers be suppressed, but all evidence obtained through the search warrants should likewise be suppressed.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL RESULTING FROM THE PROSECUTOR'S STATEMENT THAT APPELLANT HAD BEEN IN PRISON IN ALABAMA.

During the prosecutor's opening statement to the jury, he referred to Appellant's prior relationship with James Taylor, the "professional jailhouse informant." The prosecutor told the jury:

> The defendant is taken to the Walton County Jail. There will be two witnesses that will testify that they were in jail at the time the Defendant was brought in, Wally Byars and James Taylor. They are both convicted felons. . . . James Taylor will tell you that he's from Alabama. He's been in prison up there. He and the Defendant -- he knew the Defendant. They knew some people, the same people and got to talking about that. (R-2166). (emphasis added).

The defense objected and moved for a mistrial. (R-2168-69). The trial court found "a reasonable person might infer that the Defendant was in prison with Mr. Taylor," but nevertheless denied the motion for mistrial. (R-2198,99).

Both the state and defense agreed that a cautionary instruction would only serve to "highlight" the error and both counsel agreed that no instruction would be given. (R-2199,2200-03). Nevertheless, the trial court repeatedly brought the issue up later in the trial and insisted that counsel take some action to cure the error. The state and defense finally agreed that the prosecutor would read a statement to the jury that he did not intend to imply that Appellant met Mr. Taylor in prison in Alabama. (R-2349-52,2639-51,2675-77).

The denial of Appellant's motion for a mistrial was clearly

error. The case of Czubak v. State, 570 So. 2d 925 (Fla. 1990), is directly on point. In Czubak, a witness referred to the defendant as an "escaped convict." This Court reversed the conviction for first degree murder saying, "reference to the fact that Czubak was an escaped convict was clearly inadmissible . . . [because] . . . the fact that Czubak was an escaped convict had no relevance to any material fact in issue." 570 So. 2d at 928. Similarly, in the case at bar, the fact that Appellant was in prison in Alabama was "clearly inadmissible" and had no relevance to any issue.

In Czubak, this Court noted that the evidence was "largely circumstantial" and reversed the conviction. The state's argument - that referring to the defendant as an escaped convict was "harmless error" - was dismissed by this Court with the admonition, "erroneous admission of collateral crimes evidence is presumptively harmful." Id.

Ward v. State, 559 So. 2d 450 (Fla. 1st DCA 1990), and McGuire v. State, 584 So. 2d 89 (Fla. 5th DCA 1991), are also directly on point. In Ward, the prosecutor elicited testimony from the victim regarding how long she had known the defendant. The victim said, "It was right after - he was already in prison and it was after he got out." 559 So. 2d at 450. The District Court reversed the conviction, finding that the evidence against Ward was conflicting and the state had failed to establish that the comment was harmless error. Similarly, in McGuire, a first degree murder conviction was reversed when evidence was introduced that the defendant had been "doing time in Georgia." The District Court found there was "at

least a reasonable possibility that the impermissible statement . . . improperly influenced the jury's verdict." 584 So. 2d at 89.

Sub judice, there should be no doubt that the prosecutor's statement that Appellant had been in prison was "presumptively harmful." Cyubak, 570 So. 2d at 928. A mistrial should have been granted. The evidence in this case was primarily circumstantial and presented a "close case" [14] on the issue of guilt. For the jury to learn from the prosecutor that Appellant had been in prison undoubtedly affected the verdict. No attempt was made to cure the error, except for the prosecutor's subsequent statement to the jury that he did not intend to imply that Appellant met Mr. Taylor in prison in Alabama. The jury was never instructed to disregard the statement.

In order to affirm this judgment, the State has the burden to convince this Court that the error was harmless beyond a reasonable doubt. Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Such a conclusion is impossible on the record before this Court, especially in view of the fact that the prosecutor later exacerbated the error when Appellant's mother took the witness stand and, again during closing argument.

Appellant's mother was called as a defense witness to testify regarding money that she had given to Appellant, either in cash or by check. (R-3913 at seq.). During cross examination, the prosecutor questioned her to force her to admit that her son was in

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[14]See argument under Point IV infra.

prison from 1979-89, or to admit that he had been unemployed during that time period. The prosecutor attempted to elicit testimony that would leave a ten year time gap in Appellant's work history.

The prosecutor asked Appellant's mother about Appellant's employment at the time of the offenses: "What income did he have at that time?" The witness answered, "He was hoping to find a job," but the prosecutor pressed the issue: "Okay. How long had he been hoping to find a job?" Objection was made to this line of questioning, but the objection was overruled. (R-3920-21). The prosecutor pressed on:

> Q. Was he working before he came down here in July?
> A. Yes, sir.
> Q. With who?
> A. He worked with Mr. Mayne in Anniston.
> Q. How long did he work with him?
> A. He had worked with him several years.
> Q. Your son had been working with Mr. Mayne?
> A. Mayne, M-a-y-n-e, in construction.
> Q. Several years before he came down here in July?
> A. Yes, sir.
> Q. Worked with him in 1990? What year did he work with him, tell me that.
> [Objection overruled]
> THE WITNESS: He had worked part-time in 1990, yes, sir.
> Q. (By Mr. Adkinson) In 1989--
> (R-3920-21).

Objection was again made and during a bench conference, the prosecutor accused the witness of "lying to this jury" and admitted his intention: "So I have a right to go, I think, back and say, well, when did he work for Mr. Mayne for a year. Was it '89, '88, and show that she just misrepresented to the court and to the jury." (R-3926). During a proffer outside the jury's presence, the

Appellant's mother clarified her testimony saying that Appellant worked for Mr. Mayne from 1975 to 1979 and again starting in July of '89, when he was paroled. (R-3928-29). The trial court permitted the prosecutor to question the witness about Appellant's employment with Mr. Mayne both before and after his time in prison and authorized the prosecutor to demonstrate to the jury that Appellant "did not work with Mr. Mayne from '79 until July of '89." (R-3933-34).

In the presence of the jury, the prosecutor established that Appellant had only worked from July of 1989 to January of 1990. From January 1990 to the date of his arrest, Appellant worked "off and on." The prosecutor also established that Appellant last worked for Mr. Mayne from 1975 to August of 1979. (R-3942-43). No explanation was ever provided to the jury for the gap in Appellant's work history.

To further exacerbate the error, in closing argument, the prosecutor returned to this testimony and said,

> He suggests to you that they, in regards to the money, the defendant was a working individual, had money given to him. Let's talk about it. What evidence was there about his working? His own mother's testimony was that from January of '90 to August he had not done any work, except perhaps help his father. He had worked six months from August of '89 to January of '90. And no other evidence about his working, except back to 1975 to '79. So we don't have an individual, as he suggests to you, that's out here working and has access -- or money. (R-4492).

Thus, the trial court's erroneous refusal to grant a mistrial during the prosecutor's opening statement was compounded by the

trial court's ruling that allowed the prosecutor to "remind" the jury that Appellant had a ten year gap in his employment history during the questioning of Appellant's mother. The third emphasis (in his closing argument) on this Alabama prison sentence sealed Appellant's fate and forecloses any possibility that the denial of his motion for mistrial was harmless error.

This case should be reversed for a new trial upon the authority of Czubak v. State, 570 So. 2d 925; Ward v. State, 559 So. 2d 450; and McGuire v. State, 584 So. 2d 89.

POINT IV

THE CUMULATIVE EFFECT OF THE IMPROPER ARGUMENT AND TACTICS OF THE PROSECUTOR DEPRIVED APPELLANT OF A NEW TRIAL.

As a review of the prosecutorial tactics outlined below will demonstrate, this case presents prosecutorial excesses which deprived Appellant of a fair trial. The tactics and conduct complained of explored the depths of prosecutorial misbehavior, condemned by precedent from every appellate court in this state. In many instances, there was no objection to the improper conduct, but both the objected-to and the unobjected-to prejudicial conduct of the prosecutor combined to deprive Appellant of a fair trial.

As was previously pointed out, the prosecutorial misconduct began in the opening statement (with the prosecutor's statement that Appellant was in prison in Alabama) and continued throughout the trial. The cumulative effect of the errors must be considered in determining whether Appellant was denied the right to a fair trial. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). Because this was a "close case" on the issue of guilt, this Court must review the record paying "particularly careful attention to" the prosecutor's improper arguments and tactics. Lipman v. State, 428 So. 2d 733, 736 (Fla. 1st DCA 1983); Ryan v. State, 457 So. 2d 1084, 1086 (Fla. 4th DCA 1984), rev. denied, 462 So. 2d 1108 (Fla. 1985); Thompson v. State, 318 So. 2d 549, 552 (Fla. 4th DCA 1975), cert. denied, 333 So. 2d 465 (Fla. 1976).

A. CLOSE CASE.

This was a "close case". Except for the testimony of the two jailhouse witnesses, the evidence was entirely circumstantial and

was equally consistent with innocence as with guilt.

This case also had an extraordinary emotional impact on the jury. Throughout the trial, the victim's mother was present in the courtroom, crying. (R-2844,3369-70). During the testimony of the medical examiner, the details offered by the prosecution of the autopsy were so gruesome that two of the jurors became physically ill. (R-3385-3392). The defense obviously could not cross examine the medical examiner for fear that the jurors would hold such tactics against the defendant. (R-3393).

The expert testimony in the case is hopelessly in conflict and the testimony of the lay witnesses is of little value. The investigative techniques of law enforcement were questionable at best and completely inept in certain areas. The two other prime suspects in this case were never investigated and it is clear that the sheriff's department pursued the case with a view of proving Appellant did it, without regard to evidence that other persons had substantial motives to commit the crime.

The state's case hinged upon placing Appellant's vehicle at the crime scene, but the evidence failed to bear out this theory. The state's expert on tire tracks could not identify the tire tracks at the scene as having come from Appellant's vehicle. Her testimony only established that the back tires on Appellant's vehicle were similar to tire tracks at the crime scene. The defense expert, based upon additional tests that were not performed by the state crime lab, concluded that it was "highly unlikely" that Appellant's vehicle was at the crime scene. Other forensic

evidence supported this conclusion: the paint scrapings at the crime scene did not come from Appellant's vehicle; and the vegetation removed from the undercarriage of Appellant's vehicle did not come from the crime scene.

There was absolutely no fiber transfer between Appellant's clothes or vehicle and the clothes of the victim. None of the victim's hair was found in Appellant's vehicle or on his person and none of the Appellant's hair was found on the victim. There was no blood or other evidence in Appellant's vehicle to suggest an abduction.

The expert testimony regarding the stain on Appellant's shirt is hopelessly in conflict. The sperm on the victim's jeans was not submitted for DNA testing, despite the fact that the tests were available and could have identified the contributor with a high degree of accuracy.

The only other evidence placing the victim in or around Appellant's vehicle was the victim's fingerprints on the exterior of the vehicle and on the inside of the passenger's door handle in a position consistent with the victim opening the door. There is no way to know when these prints were placed on the vehicle, and they could have been left there earlier in the day when Appellant and the victim were together at the Hitching Post.

The only direct evidence of Appellant's guilt came from the testimony of two jailhouse informants, one of whom was judicially declared to be incompetent at the time he claims Appellant talked to him. The other informant admittedly was a "professional

jailhouse informant," who was working for law enforcement at the time he says Appellant talked to him. The testimony of both these witnesses was seriously impeached by contradictory prior testimony and with evidence that leniency had been extended to them by law enforcement. More importantly, these witnesses produced no evidence that was not readily available from the local media.

Law enforcement candidly admitted that, once Appellant was arrested, the investigation of the case as to the two other obvious suspects stopped and, as a result, it is now impossible to know whether Steve Casey or Ray Hamilton[15] (or both of them) may have committed this crime. Their motives and opportunity to commit the crime are documented in the record.

B. THE ERRORS.

This Court is constitutionally mandated to review the record for any error that may have infected the trial and that could have resulted in Appellant not receiving a fair trial. A major factor to be considered is whether the improper conduct was an isolated incident or whether the improper tactics were cumulative and infected the entire proceedings. Compare, Davis v. State, 604 So. 2d 794 (Fla. 1992); and Lipman, 428 So. 2d 733. In Davis, the improper comment was a single statement in an otherwise unemotional

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[15]It is obvious the jury was very concerned about these two suspects. The only request the jury made during deliberations was to have Casey's and Hamilton's testimony and depositions. (R-4536). Because the court reporter had left her notes in DeFuniak Springs, the Judge told the jury it would take three hours to bring the notes of this crucial testimony to Milton, and the jury deliberated without the requested information being provided to them. (R-4540,4547,4549).

closing argument, and the error was harmless. In Lipman, the improper tactics, each standing alone, would have constituted harmless error, but when considered as a whole, were harmful and reversible.

Appellant submits that the multitude of improper comments, statements, arguments, and tactics that were used by the prosecutor to secure this conviction deprived Appellant of a fair trial. Many of these tactics were further exacerbated because Appellant did not testify in his defense, a fact that the prosecutor made clear to the jury.

1) A BLATANT GOLDEN RULE ARGUMENT.

During closing argument, the prosecutor attempted to explain to the jury why Steve Casey (the victim's husband) could not remember the crucial events during the time period surrounding his wife's death. In an obvious ploy to curry sympathy for Steve Casey and to vouch for his credibility, the prosecutor portrayed Steve Casey's plight to the jury using extreme emotionalism. The prosecutor told the jury (without objection):

> Yes, Steve Casey, he talks about Steve Casey not remembering certain events or times or dates around the date of his wife's death. You know, I don't know how many of you have ever lost a close family member and had to bury one. You know, it's not an easy time. This kind of case is perhaps, perhaps the most difficult, when all of a sudden, you know, you're talking to your wife one minute on the telephone and then a couple of hours later you find out that she's missing and then some eight or nine hours later you find out that she's been brutally murdered. I don't know that I would recall everything that happened around that time. I suggest to you that that's another explanation for his not

> recalling all the events that happened right around that time. (R-4502-4503). (emphasis added).

An appeal to the jurors to place themselves in the position of a victim or a witness is a "golden rule" argument, which has been "universally condemned." Peterson v. State, 376 So. 2d 1230, 1233 (Fla. 4th DCA 1979), cert. denied, 386 So. 2d 642 (Fla. 1980); Adams v. State, 192 So. 2d 762 (Fla. 1966); Lucas v. State, 335 So. 2d 566 (Fla. 1st DCA 1976).

In Peterson, the appellate court reversed a conviction in a drug case. The court found that the violation of the golden rule by the prosecutor, along with other improper comments, constituted fundamental error. In that case, like the instant case, the prosecutor presented the reviewing court with a "mail order catalogue of prosecutorial misconduct," including personal attacks on the defense counsel and personal attacks on the defendant, improper reference to extra-testimonial knowledge of witnesses, etc. Peterson, 376 So. 2d at 1233. The court reasoned:

> It is true that much, even most of the argument went entirely unobjected to at trial; that the only motion for a mistrial was made as a result of what was probably the least prejudicial of counsel's statements; and that the only other objection was not accompanied by a motion for mistrial or a request for a cautionary instruction. But we need not consider whether the errors preserved by the single mistrial motion and the single additional objection would be sufficient in themselves to require reversal. This is so because we are convinced beyond question that the contents of the final argument, taken as a whole, were such as utterly to destroy the defendant's most important right under our system, the right to the "essential fairness of [his] criminal trial." Dukes v. State, 356

> So. 2d 873, 874 (Fla. 4th DCA 1978). Thus, the record presents fundamental error, error which reaches into the very heart of the proceeding, and which would therefore mandate a new trial even in the total absence of timely preservation below.

Id. at 1234 [footnotes omitted].

The golden rule argument also caused convictions to be reversed in Lucas, 335 So. 2d 566, and in Bullard v. State, 436 So. 2d 962 (Fla. 3d DCA 1983), rev. denied, 446 So. 2d 100 (Fla. 1984). In Bullard, a timely objection was made, although other improper comments by the prosecutor were not preserved for review in a trial that was "replete with improper comments and conduct by the prosecutor." The prosecutor's golden rule argument was a "fatal error." Bullard, 436 So. 2d at 962.

The "golden rule" is no stranger to this Court. See Jackson v. State, 522 So. 2d 802 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct 183, 102 L. Ed. 2d 153 (1988); and Taylor v. State, 583 So. 2d 323 (Fla. 1991). In State v. Wheeler, 468 So. 2d 978 (Fla. 1985), this Court held the "highly prejudicial" golden rule argument -- the prosecutor argued that the jurors might be the defendant's next victims -- constituted an independent basis for reversal. See also Grant v. State, 194 So. 2d 612 (Fla. 1967); Barnes v. State, 58 So. 2d 157 (Fla. 1952); and Stewart v. State, 51 So. 2d 494 (Fla. 1951), which are cited in Wheeler, 468 So. 2d at 981.

As in Peterson, 376 So. 2d 1230, the lack of objection to this argument should not preclude reversal, especially in view of the other improper tactics of the prosecutor in this trial.

2) REPEATED STATEMENTS THAT THE VICTIM COULD NOT TESTIFY, WHILE ASKING THE JURY TO SPECULATE ON THE SUBSTANCE OF HER TESTIMONY.

During closing argument, the prosecutor repeatedly referred to the fact that the victim could not testify. This "missing witness" argument is highly improper and was exacerbated in this case because the prosecutor told the jury what her testimony would be, if she could have testified. The prosecutor attempted to invoke sympathy for the victim and play upon the emotions of the jury:

> You know, and let's not forget that, you know, the one person that's not here, the person that is killed in this case, Pauline Casey. You know, we're trying Ernest Donald Suggs for the murder and for the kidnapping and robbery. But we have a victim in this case too, although she can't come in this courtroom and give you her version of what happened. But she left enough, she left enough behind for us to build a case on, those items she left in the bar, how she left the bar, the blood on the shirt, the fingerprints in the jeep. While she can't talk to us today, she did leave enough to name her murderer. (R-4379-80). (emphasis added).

This tactic was continued by the prosecutor with a specific reference to the "missing witness:"

> [A]s to the only witness that could actually say she was taken out of the bar it was her. But she can't talk, she cannot talk verbally to us today. But she has talked to you, she has talked to all of us through that key, that glass, that blood, those tire tracks and that fingerprint in that jeep. She's talked to you, she has pointed to the person that murdered her, in her own way. (R-4407). (emphasis added).

During rebuttal closing argument, the prosecutor continued with this theme: "[T]here were two young people involved in this case: One, the Defendant, and then, of course, the one that's not

in the courtroom with us today." (R-4491). (emphasis added).

Then, the prosecutor inflamed the jury by insisting that the jury view the crime scene photographs and conjure up images of ants and animals attacking the victim's body. (R-4500).

These arguments are similar to those condemned in Garron v. State, 528 So. 2d 353 (Fla. 1988), where the closing argument of the prosecutor in the penalty phase contained "egregious, inflammatory, and unfairly prejudicial" remarks that mandated reversal despite curative instructions. The arguments included the following:

> If [the victim] were here, she would probably argue the defendant should be punished for what he did . . . I would hope at this point, that the jurors will listen to the screams and to her desires for punishment for the defendant. (footnotes omitted).

Garron, 528 So. 2d at 359.

Although Appellant did not object to the comments made by the prosecutor, these improper arguments should be taken into consideration when determining whether the cumulative effect of the prosecutorial misconduct deprived him of a fair trial.

3) REPEATED COMMENTS ON THE APPELLANT'S FIFTH AMENDMENT RIGHTS, INCLUDING REPEATED STATEMENTS TO THE JURY THAT THERE HAD BEEN "NO EXPLANATION" BY APPELLANT FOR CERTAIN EVIDENCE.

The prosecutor repeatedly argued to the jury that Appellant had offered "no explanation" for the evidence presented by the state; repeatedly called the jury's attention to the fact that the State's evidence was the "only evidence" on certain points; and argued that Appellant had not offered evidence on crucial areas of the case. The prosecutor's arguments take on added significance in

light of the fact that Appellant did not take the stand to testify and therefore had offered "no explanation" as to certain evidence.

To quote each instance of this tactic would consume many pages, but the court's attention is respectfully directed to the following portions of the argument (the entire closing argument is filed as an appendix to this brief): "No evidence of Ray Hamilton or Steve Casey committing this crime." (R-4386); Jailhouse informant's testimony is the "only evidence" that victim in Appellant's jeep. (R-4389); "No evidence[16] of any working on that dock." (R-4390); The prosecutor suggested that Appellant "testified" and then implied that the "testimony" was "not true." (R-4390); "No explanation why he [Appellant] would have fifty-five one-dollar bills in his pocket." (R-4394); "No evidence" that Appellant dropped hamburger juice on his shirt; "No other explanation for that ADA enzyme 1. None." (R-4400-01); "They didn't give you one bit [of evidence] that she was in that jeep." (R-4406); "No explanation of why she was there." (R-4507); "We don't know what he [Appellant] did during that six-day period." (R-4493); "Where is the evidence that he [Appellant] cashed a check and got fifty one-dollar bills?" (R-4499); "There's no explanation for a key in the bay." (R-4509).

The above actions of the prosecutor were direct comments on Appellant's failure to testify and failure to produce evidence. These insinuations by the prosecutor stand our system on its head.

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[16]In fact, Appellant's mother testified about Appellant working on the dock. (R-3918-20).

It is the state, not the defendant, which has the burden of proof. The right of the defendant to "stand mute" at trial is a constitutionally protected right, and the prosecution can make no statement that is fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify, State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985). Commenting on the defendant's silence is a "serious error." In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), this Court said that the state is not allowed to use a defendant's silence to raise an inference of guilt.

It is also impermissible for the state to comment on the defendant's failure to produce evidence to refute an element of the crime, because the jury could be led to believe that the defendant has a burden to produce evidence, Jackson v. State, 575 So. 2d 181 (Fla. 1991), or to testify, Cunningham v. State, 404 So. 2d 759 (Fla. 3d DCA 1981).

4) REPEATED ARGUMENTS TO THE JURY THAT THE DEFENSE ATTORNEYS WERE PUTTING UP A "SMOKE SCREEN" AND WERE CREATING A "DIVERSION," DEPRIVING APPELLANT OF HIS SIXTH AMENDMENT RIGHTS.

One of the other tactics of the prosecutor was to denigrate the defense attorneys in the eyes of the jury by arguing that they were trying to put something over on the jury. Arguments were made to the jury that Appellant's lawyers were putting up a "smoke screen" or trying to "create a diversion" so the jury would ignore the evidence. These arguments deprived Appellant of his Sixth Amendment right to counsel.

The following pages in the record reflect this tactic:

"Defense counsel, not only in this case but in most cases, creates a diversion;" . . . "creates a smoke screen;" . . . "to make you forget" the testimony. (R-4380-81); "They tried to . . . create another diversion;" . . . "to get you to think about something else." (R-4381-82); "another attempt to divert you or get you confused." (R-4382); They "create a smoke screen so they can fog this thing up enough for you to turn the Defendant loose." (R-4406); Prosecution called Judge Lindsey "to establish the pattern that the defendant was trying to do, you know, insinuations they were trying to make." (R-4410-11).

These attacks on defense counsel have been repeatedly condemned as improper trial tactics which can poison the minds of the jury. See Ryan v. State, 457 So. 2d 1084, (fundamental error found due to the cumulative effect of prosecutorial misconduct); Briggs v. State, 455 So. 2d 519 (Fla. 1st DCA 1984) (comments condemned, yet conviction affirmed because evidence was overwhelming). The right of an accused to be represented by counsel and to be fairly tried is basic to the concept of due process and a violation of this concept by the prosecutor "cannot be tolerated, even at the expense of requiring a new trial." Carter v. State, 356 So. 2d 67 (Fla. 1st DCA 1978) (error properly preserved).

Although no objection was made to these tactics of attacking and belittling defense counsel, in considering whether Appellant received a fair trial, this error cannot be ignored. Adams v. State, 192 So. 2d 762 (Fla. 1966).

5) REPEATEDLY ATTACKING THE DEFENSE EXPERTS WHILE CALLING THEM "HIRED GUNS" AND "MONDAY MORNING QUARTERBACKS."

In an effort to minimize the weight the jury would give to the two defense experts in tire track evidence and serology, the prosecutor engaged in personal attacks on the witness, mischaracterized the testimony of the witness, and, when all else failed, resorted to yelling at the witness. Some of the most egregious examples of these tactics are: Interrupting the witness (R-3980,3982); accusing the witness of "rambling" (R-4055); mischaracterizing the testimony (R-4208,09,4244); asking the witness to comment on the credibility of other witnesses (R-4076-77,4208); yelling at the witness (R-3834). During closing argument, the prosecutor called the experts names such as "hired guns" and "Monday morning quarterbacks." (R-4404-5). The prosecutor tried to inflame the jury regarding the amount of money these experts were being paid ("thousands of dollars"), when in fact the experts were being compensated by the county because the defendant was declared indigent for purposes of costs. (R-1563,4408). The prosecutor then capped off his closing argument with "The Monday morning quarterbacks, the hired guns, could not tell you anything other than perhaps it should have been done differently." (R-4412).

The attacks on Appellant's experts in this case are similar to those which led to reversal by this Court in Nowitzke v. State, 572 So. 2d 1346. There, the prosecutor pictured the defense expert as a "hired gun," attempted to impugn the integrity of the expert by accusing him of charging exorbitant fees, abusively cross-examined

the expert, and generally attempted to undermine the entire field of psychiatry. This Court held that these and other instances of misconduct deprived the defendant of a fair trial. While it appears that most of the abusive tactics in Nowitzke were objected to by the defendant, the opinion is not clear that all of them were, and it appears that the court relied upon the totality of the prosecutorial misconduct, whether preserved or not, to award a new trial.

6) DIMINISHING THE STATE'S BURDEN OF PROOF AND ATTEMPTING TO REVERSE THE BURDEN OF PROOF TO REQUIRE THE APPELLANT TO PROVE HIS INNOCENCE.

One of the prosecutor's underlying premises was that all the state needed for conviction was probable cause and that simply raising reasonable doubts was insufficient to overcome the state's evidence. This tactic first surfaced when the prosecutor questioned two of the investigators about the factors used to make up probable cause to arrest the defendant. (R-2768-69, 3025-27). No objection was made to this testimony, despite the fact that the testimony was not based on the personal knowledge of the witness and was a summary of hearsay from the investigation.

This testimony fit perfectly in the prosecutor's closing argument, which misstated the law by implying that the two verdicts available to the jury were either "guilty or innocence." (R-4370,4494). As noted above, the prosecutor continuously referred to the fact that Appellant had offered no explanation for the state's evidence. Attempting to reverse the burden of proof, the prosecutor attacked the defense attorneys for offering alternative

explanations for the state's evidence. In doing so, the prosecutor continuously mocked defense counsel with rhetorical questions such as "Isn't it possible this happened? Isn't it possible that happened?" (R-4387). Following these statements, the prosecutor argued that the jury should not deal in "possibilities" but instead should deal with what is "probable." (R-4387,4395,4411). The law is clear that a prosecutor's argument that attempts to shift the burden of proof to the defendant is totally improper, and in some cases has risen to the level of fundamental error. See, Clewis v. State, 605 So. 2d 947 (Fla. 3d DCA 1992), and cases cited therein.

So, not only was the state able to admit evidence of the police officer's belief in the guilt of the defendant under the guise of explaining the hearsay that constituted "probable cause" for arrest, but the prosecutor built on this scenario throughout his closing argument. That no objection was made to the testimony or the argument belies logic, but again may be relied upon by this Court in determining whether the Appellant received his constitutionally guaranteed fair trial.

C. CUMULATIVE EFFECT.

The cumulative effect of the prosecutor's improper conduct, even the errors that were not properly preserved for appeal, when considered in the context of the entire trial and the properly preserved errors, deprived Appellant of a fair trial. Nowitzke v. State, 572 So.2d 1346; Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

This Court apparently reaffirmed in Sochor v. State, 580 So.

2d 595 (Fla. 1991), death penalty vacated, 504 U.S. ____, 112 S.Ct ____, 119 L. Ed. 2d 326 (1992), that prosecutorial misconduct may rise to the level of fundamental error. There, the defendant complained of "various errors" which were not the subject of an objection at trial. Although the conviction was affirmed, the logical inference of the Sochor opinion is that the cumulative effect of prosecutorial misconduct may amount to fundamental error, which will justify reversal in the absence of preservation of all the errors. This is consistent with the holdings of several cases decided by the district courts of appeal.

In Thompson v. State, 318 So. 2d 549, the lack of objection was not fatal to the court's consideration of the prosecutorial misconduct, because of this general rule:

> [W]hether requested to or not, it is the duty of the trial judge to check improper remarks of counsel to the jury, and by proper instructions to remove any prejudicial effect such remarks may have created. A judgment will not be set aside because of the omission of the judge to perform his duty in the matter unless objected to at the proper time. This rule is, however, subject to the exception that if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in such event, a new trial should be awarded regardless of the want of objection or exception.

Thompson, 318 So. 2d at 551, quoting Carlile v. State, 129 Fla. 860, 176 So. 862, 864 (1937).

The Thompson court considered the improper comments in light of the "close case" analysis and concluded that the closing argument of the prosecutor deprived the defendant of a fair trial.

In Carter v. State, 332 So. 2d 120, 126 (Fla. 2d DCA 1976), a conviction was reversed because "the accumulation of . . . improprieties was so great as to warrant a new trial." There, several prosecutorial misdeeds were described, and some were preserved for appeal while others were not. The lack of objection to some of the misconduct did not preclude consideration by the court of whether the defendant received a fair trial.

Groebner v. State, 342 So. 2d 94, 96 (Fla. 3rd DCA 1977), likewise involved many errors that were not preserved by objection. The conviction was reversed because the improper remarks were of such a character that neither an objection nor a curative instruction could "entirely destroy their sinister influence."

Peterson v. State, 376 So. 2d 1230, held that the misconduct of the prosecutor rose to the level of fundamental error, so that the absence of an objection or motion for mistrial did not preclude reversal. The same holding was made in Ryan v. State, 457 So. 2d 1084.

If the conduct of the prosecutor is compared to the conduct condemned in the cited precedents, it is clear that Appellant is entitled to a new trial. This case presented a close call on the issue of guilt; the improper conduct infected the trial from soup to nuts, and this is not a case where there is overwhelming evidence or an isolated incident of misconduct. The cumulative effect of the prosecutor's misconduct deprived Appellant of a fair trial. This case should be reversed for a new trial.

POINT V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR KIDNAPPING.

Count II of the indictment charged Appellant with Armed Kidnapping in violation of section 787.01, Florida Statutes, as follows: "by force or threat confine, abduct or imprison Pauline Denise Casey. . . ." (R-11). The indictment does not allege that the offense was committed "forcibly, secretly, or by threat." See Section 787.01, Fla. Stat. (1991). (emphasis added).

Thus, the indictment sub judice differs materially from that in Bedford v. State, 589 So. 2d 245 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1773, 118 L. Ed. 2d 432 (1992), wherein this Court specifically noted that the indictment alleged that the defendant did "forcibly, secretly, or by threat, confined, abducted or imprisoned" the victim. Bedford, 589 So. 2d at 251 (emphasis added). Thus, the rationale of Bedford, i.e., that transporting the victim to an isolated area was tantamount to "secretly" abducting and confining her does not apply to the case at bar and will not support Appellant's conviction for kidnapping under the indictment in this case.

Instead, the evidence must be viewed based upon the allegations of the indictment that Appellant committed kidnapping by "force or threat." The record in this case is void of evidence that Appellant confined, abducted or imprisoned the victim by force or threat. In Bedford, this Court cited with approval Robinson v. State, 462 So. 2d 471 (Fla. 1st DCA 1984), rev. denied, 471 So. 2d 44 (Fla. 1985), wherein the First District relied upon the term

"secretly" in the statute to find that the defendant was guilty of kidnapping, when the evidence showed that "the transportation of P.R. from the location at which defendant picked her up to the point where the sexual battery allegedly occurred was not shown to be accomplished by physical force or threat." Robinson, 462 So. 2d at 476. Similarly, in the case at bar, the evidence from the Teddy Bear Bar demonstrated no signs of struggle or other evidence that the victim did not go with Appellant peacefully and of her own volition. This conclusion is further supported by the location of the fingerprints on Appellant's vehicle demonstrating that the victim opened and/or closed the passenger's door herself. There was no evidence that the victim was tied up, held down, or otherwise restrained, as there was in Bedford, 589 So. 2d 245. The state's evidence is consistent with the victim voluntarily leaving the bar with Appellant and driving to a remote area with him where, after some disagreement, Appellant killed her. Thus, the case sub judice lacks the elements found sufficient in Bedford and Robinson.

The indictment contains language that Appellant acted "with intent to commit or facilitate the commission of a felony, to wit: Murder and/or Robbery" (R-11); however, regardless of what the Appellant's intention may have been, the state was still required to prove that the victim was confined, abducted or imprisoned by force or threat. Simply taking the victim to a secluded area is insufficient under the allegations of this indictment.

It is axiomatic that the state is required to prove the crime was committed in the manner alleged in the indictment. In Long v.

State, 92 So. 2d 259, 260 (Fla. 1957), this Court said, "[W]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment." Accordingly, Appellant's Motion for a Judgment of Acquittal should have been granted as to Count II of the indictment.

Similarly, because the trial court instructed the jury they could find as an aggravating circumstance that the homicide was committed while Appellant was engaged in the commission of the crime of kidnapping (R-4721-22), Appellant is entitled to a new sentencing hearing.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE THE IN COURT IDENTIFICATION OF APPELLANT BY RAY HAMILTON.

During the course of Appellant's illegal detention, the officers went to get Ray Hamilton and transported him to the sheriff's substation. Hamilton thought he was being arrested. (R-1367). As they pulled into the parking lot, Hamilton saw Appellant's jeep and said there was something white and red in the back of the jeep. He went over and observed a red and white Coleman cooler in the back of the jeep. (R-1368).

While Hamilton was standing outside the substation, the officers asked him if he could identify the person that he saw in the bar that night. At that point, one of the officers came out of the substation with a camera in his hand and pulled a polaroid photograph from the camera. According to Hamilton, "We had to wait for it to develop." After the photograph developed, Hamilton identified the photograph (of Appellant) as the person he had seen in the bar. (R-1370).

Appellant moved to suppress Hamilton's identification and a hearing was conducted by the trial court. (R-985,1357 et seq.). The trial court entered an order finding that the identification procedure was "suggestive," but also finding that "the suggestive procedure did not give rise to a substantial likelihood of irreparable misidentification." (R-1146-47). The trial court's order must be reversed under the authority of Grant v. State, 390 So. 2d 341 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L. Ed. 2d 303 (1981), and Edwards v. State, 538 So. 2d 440 (Fla.

1989).

In Grant, 390 So. 2d at 343, this Court quoted Neil v. Biggers, 409 U.S. 188, 93 S.Ct 375, 34 L. Ed. 2d 401 (1972), as follows: "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Thus, for many years, this Court has condemned the use of suggestive identification techniques, recognizing the danger inherent in such procedures. Nevertheless, it is apparent from the record in this case that the law enforcement officers were totally unconcerned with whether Hamilton's identification of Appellant was tainted or not. As is pointed out throughout this brief, early in this investigation, the officers decided that Appellant did it. Thereafter, they completely ignored all proper investigative procedures. This Court simply cannot approve the way in which this case was handled by law enforcement (or the prosecutor).

Despite the admonitions of this Court and the United States Supreme Court, the officers showed Hamilton Appellant's photograph under the most suggestive procedure imaginable. They picked up Hamilton from his home in the middle of the night under circumstances where he thought they were arresting him. Once at the station, they pulled Appellant's photograph from the camera right in his presence and let him watch it develop, so that the only possible conclusion Hamilton (or any other witness) could reach was that the person in the photograph was in custody just

inside the door to the sheriff's department.

The trial court's order lists a number of factors that the court considered in denying the motion. (R-1147). In other cases, those factors may be significant, see e.g. Grant, 390 So. 2d 341, but in the case sub judice, the overriding factor in the identification of Appellant was the procedure employed by the sheriff's department. In Edwards, 538 So. 2d at 444, this Court held that the state had the burden to show "by clear and convincing evidence that the courtroom identification had an independent source" outside the improper identification procedure; otherwise the identification must be suppressed. The trial court never applied this standard to the evidence presented.

Hamilton had never seen the person he identified before. He was in the bar for about a half hour, was not paying particular attention to the person, and instead was talking and looking at Pauline Casey and other people in the bar. He was also talking on the phone. He was never looking directly at the person in the bar and part of the time the person was on the other side of a partition in the bar. (R-1375,1384-85,2811-12). When the proper legal standard is applied to the case, it is clear that Appellant's motion to preclude the in-court identification should have been granted.

POINT VII

DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE BOOK, DEAL THE FIRST DEADLY BLOW.

During the search of Appellant's home on August 7, 1990, the law enforcement officers seized a book entitled Deal the First Deadly Blow. The book was on a shelf in the living room, along with numerous other books. There was nothing in particular that tied the shelf of books to Appellant and the investigator said it was a big collection of books. (R-4631).

There was also a notebook on the shelf. On one page of the notebook it had "something with 'Ernie'" on it. (R-4599-60). This notebook also talked about doing an armed robbery in a pharmacy. (R-4604). The notebook referred to by the officers was never offered into evidence and no fingerprint or handwriting analysis ever done to establish that the notebook was Appellant's.

More importantly, no evidence was offered to establish that Appellant ever saw or read Deal the First Deadly Blow. There was no handwriting in the book, no name, and no fingerprints or other evidence to link Appellant to the book. (R-4637). The house was not only Appellant's property, but was his parents' as well. Appellant's father is retired Air Force and the book deals with soldiers and military techniques. (R-4601-02).

Nevertheless, the trial court permitted the state to offer the book into evidence at the penalty phase, over objection. (R-4590-95,4605). The book contains approximately 160 pages. Out of the 160 pages, the prosecutor selected page 99 and told the jury to compare the photographs on page 99 to the autopsy photographs. The

prosecutor argued that the two photographs on that one page of the book were similar to the wounds suffered by the victim (R-4699), but no expert testimony or other evidence was offered to establish the prosecutor's claims. The prosecutor then extrapolated on this evidence, arguing to the jury that the existence of the book established that Appellant committed the crime in a cold, calculated and premeditated manner and that Appellant "had already planned how his next victim was going to die." (R-4699). The trial court likewise relied upon the book, in imposing the death penalty, as the basis for finding that the homicide was committed in a cold, calculated and premeditated manner. (R-1847).

The case of Mendyk v. State, 545 So. 2d 846 (Fla.), cert. denied, 493 U.S. 984, 110 S.Ct 520, 107 L. Ed. 2d 521 (1989), is directly on point. In Mendyk, the trial court permitted the jury to hear a list of the titles of pornographic books and magazines that were seized from Mendyk's home. This Court held the evidence to be irrelevant and "inflammatory," finding that "the potential confusion and unfair prejudice far outweighed any probative value." Mendyk, 545 So. 2d at 849.

Similarly, in the case at bar, Deal the First Deadly Blow is highly inflammatory and totally irrelevant. There is no evidence to establish that Appellant even knew of the existence of the book, and certainly no evidence that he ever read it or even touched it. The state's attempt to link Appellant to the book because there was a notebook on the shelf with the name "Ernie" in it likewise fails because the state never introduced the notebook into evidence or

otherwise established that it was Appellant's notebook or handwriting. Under these circumstances, the state is attempting to "pyramid inferences," contrary to the law of this State. Weeks v. State, 492 So. 2d 719 (1st DCA 1986), rev. dismissed, 503 So. 2d 328 (Fla. 1987). The state should be required to establish some "link" between physical evidence and the defendant other than simply being in a location under the defendant's control. Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987); Moffatt v. State, 583 So. 2d 779 (Fla. 1st DCA 1991).

The book itself is hearsay and, although hearsay is generally admissible in penalty proceedings, this Court has repeatedly held that a defendant must be afforded a fair opportunity to rebut any hearsay statements. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Walton v. State, 481 So. 2d 1197 (Fla. 1985). Under somewhat similar circumstances, the Rhodes Court found error in the admission of a tape recorded statement of a victim of a prior conviction because "the statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom." Rhodes, 547 So. 2d at 1204. Thus, the defendant in Rhodes was denied the "fundamental right of confronting and cross-examining a witness against him." Id. at 1204. Similarly, Appellant could not confront and cross-examine a book. Like the defendant in Rhodes, if Appellant wished to deny or explain the contents of the book, "he was left with no choice but to take the witness stand himself." Id. at 1204.

By allowing the prosecution to argue to the jury the

similarity of the victim's wounds to the photographs in the book, the trial court was permitting the prosecutor to (1) give an opinion that he was not qualified to give and (2) ask the jury to form an opinion that they were not qualified to form. In this regard, Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct 2912, 115 L. Ed. 2d 1075 (1991), is directly on point. In Floyd, this Court found error in the trial court's decision to allow a police officer to testify that the victim's wounds appeared to have occurred at the same time and that one wound was a "defensive wound." Floyd, 569 So. 2d at 1232. In Floyd, the police officer simply was not qualified to render the opinion that he gave. The error in the case at bar is even more compelling because the trial court allowed the prosecutor to render the opinion and neither the prosecutor nor the book were subject to cross-examination.

Under these circumstances, it was error to permit the book to be introduced into evidence, error for the jury to be instructed on the aggravating factor of "cold, calculated and premeditated," and error for the court to find that aggravating circumstance. The book was the major evidence used to establish that aggravating circumstance, and in light of the seven to five advisory verdict, it is clear that there is a reasonable possibility that the introduction of the book contributed to the verdict. Appellant is entitled to a new sentencing hearing. Dudley v. State, 545 So. 2d 857 (Fla. 1989).

POINT VIII

DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES AND IN INSTRUCTING THE JURY ON AGGRAVATING CIRCUMSTANCES THAT WERE NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

During the penalty phase, the trial court permitted the jury to consider non-statutory aggravating circumstances and instructed the jury on aggravating circumstances that were not proven beyond a reasonable doubt.

A. UNCHARGED AND NONVIOLENT CRIMES.

During the penalty phase, the state deliberately elicited testimony that Appellant had committed or planned to commit offenses that were not charged and were not cognizable as aggravating circumstances. During the testimony of Investigator Steve Sunday regarding the search of Appellant's house and the finding of Deal the First Deadly Blow (See Point VII, supra.), the prosecutor attempted to link the book to Appellant. In doing so, the prosecutor elicited testimony from the investigator regarding a notebook located on the shelf with the book. The prosecutor asked Sunday:

> Q. How about the notebook that you found next to -- on the same shelf as this book, did it give some details about how to rob someone?
> A. Yes, sir, it did.
> Q. And whose notebook was that?
> A. Believed to be Mr. Suggs', Ernie Suggs'.
> (R-4635) (emphasis added).

The prosecutor then injected evidence of yet another crime:

> Q. Now, he asked you about what else you saw in the house there and this book being in regards to firearms. Did you find --
>
> Mr. Kimmel: Objection, Your Honor.

(R-4635).

This question by the prosecutor is a clear inference that Appellant, a convicted felon, was in possession of a firearm.

Thus, the jury was provided evidence that Appellant committed at least two other crimes. This testimony was inadmissible as irrelevant evidence of nonstatutory aggravating circumstances. The only statutory aggravating circumstance remotely relating to this evidence is the one for previous convictions for violent felonies. Section 921.141(5)(b), Fla. Stat. (1991); Lewis v. State, 398 So. 2d 432 (Fla. 1981). However, evidence of a prior crime, arrest, or pending charges does not qualify without an actual conviction. Robinson v. State, 487 So. 2d 1040 (Fla. 1986); Elledge v. State, 346 So. 2d 998 (Fla. 1977). In order to qualify as a crime of violence under Section 921.141 (5)(b), the offense must be a "life-threatening crime[] in which the perpetrator comes in direct contact with a human victim." Lewis, 398 So. 2d at 438.

The evidence offered by the state fails to meet any of these standards for admissibility. The allegation that Appellant had written down "how to rob someone" is not evidence of a conviction. Simple possession of a firearm is likewise not evidence of a conviction for any offense. Furthermore, possession of a firearm by a convicted felon does even qualify under Section 921.141 (5)(b) as a crime of violence because it does not involve "direct contact with a human victim."

This evidence was irrelevant and prejudicial. The inference of other criminal activity tainted the sentencing hearing and

tainted the jury's recommended sentence. The trial court permitted the jury to hear this evidence which was a violation of the Eighth and Fourteenth Amendments and Article I, Sections 9 and 17 of the Florida Constitution. A new sentencing hearing is required.

B. WITNESS ELIMINATION.

There was no evidence introduced during the penalty phase regarding the details of Appellant's prior convictions in Alabama. Instead, the prosecutor supplied those details in his arguments to the jury:

> Yes, 1979 he was convicted of murder and assault with intent to murder. The assault with intent to murder is the one witness that he did not kill, that he shot, thought was dead, but left. (R-4618-19). (emphasis added).

And, again:

> The evidence establishes that one of the reasons, one of the reasons for the death of Pauline Casey in this case is because of this conviction right here in June of 1979, assault with intent to murder. The victim in that case was the one witness that was able to provide the conviction of the murderer. There were two people involved in that and one of them was the one that he told Jim Taylor, "I wasn't stupid this time like I was in Alabama. I took care of the only witness in this case." (R-4697). (emphasis added).

No evidence was offered to support these allegations of the prosecutor that there was "one witness that he did not kill," that Appellant had "shot" that person, or that Appellant had left that witness for "dead." The only evidence on this point was the testimony of the jailhouse informant that Appellant had told him, "He said the case in Alabama he was stupid but this case he was not because he didn't leave a damn witness. . . ." (R-4625). Appellant

did not say anything to the informant about the "one witness he did not kill," about shooting that witness, or about leaving a witness for "dead." Nor was there evidence (as opposed to the prosecutor's statements) that there existed the "one witness" in Alabama that was able to provide the conviction.

Since there was no evidence to establish the prosecutor's allegations, the trial court erred in instructing the jury with regard to aggravating circumstances that, "The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (R-4722).

Even if the evidence had been presented to establish the prosecutor's allegations, those allegations are insufficient to support this aggravating circumstance. Appellant's statement to the effect that he didn't leave a witness this time is an after-the-fact reflection upon the evidence available to the state. There were no witnesses to the events surrounding the murder and a reasonable interpretation of Appellant's statement is that, from hindsight, Appellant is comparing this offense to the one in Alabama--not that with foresight, Appellant set out to kill the victim to avoid her identification of him.

In Riley v. State, 366 So. 2d 19 (Fla. 1978), this Court said that for the aggravating factor of witness elimination to be present, a mere death is ordinarily not enough; "[T]he mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid

arrest and detection must be very strong in these cases." Riley, 366 So. 2d at 22. The law is clear that in order to establish this aggravating circumstance, the State must show that elimination of a witness was a dominant motive for the homicide. Green v. State, 583 So. 2d 647 (Fla. 1991).

Dufour v. State, 495 So. 2d 154 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct 1332, 94 L. Ed. 2d 183 (1987), is virtually identical to the case at bar. In Dufour, the defendant told a state witness "anybody hears my voice or sees my face has got to die." When questioned about some jewelry he had, the defendant said, "You couldn't afford it. It cost somebody a life." Dufour, 495 So. 2d at 156. These statements parallel closely the statements Appellant allegedly made to the jailhouse informant. In Dufour, this Court found error in the trial court's finding that the murder was committed for the purpose of avoiding arrest because the evidence failed to show "beyond a reasonable doubt" that the "dominant or sole motive for the murder was the elimination of witnesses." Id. at 163.

Sub judice, the evidence was insufficient to establish this aggravating factor beyond a reasonable doubt. The trial court erred in instructing the jury on it, and the trial court erred in finding that the aggravating circumstance existed. Sochor v. Florida, 504 U.S. ____, 112 S.Ct ____, 119 L. Ed. 2d 326 (1992); Espinosa v. Florida, 505 U.S. ____, 112 S.Ct 2926, 120 L. Ed. 2d 854 (1992).

C. HEINOUS, ATROCIOUS AND CRUEL.

The trial court instructed the jury on the aggravating circumstance of heinous, atrocious and cruel. The trial court told the jury they could consider the following as an aggravating circumstance:

> (6) The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.
> "Heinous" means extremely wicked or shockingly evil.
> "Atrocious" means outrageously wicked and vile.
> "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. (R-4722).

This instruction is unconstitutionally vague as a matter of law. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct 1853, 100 L. Ed. 2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct 313, 112 L. Ed. 2d 1 (1990); Espinosa v. Florida, 120 L. Ed. 2d 854.

Although Appellant did not specifically object to this instruction at the time it was given, Appellant did file motions prior to trial challenging the heinous, atrocious and cruel [HAC] aggravator as being "vague, indefinite, and open to reasonably different subjective interpretations and understandings that they (sic) violate the due process and equal protection provisions of the United States and Florida Constitutions." (R-47-48).

Appellant is aware of the decision in Ponticelli v. State, 18 Fla. L. Weekly S133 (Fla. March 4, 1993), wherein this Court held that a challenge to the HAC instruction was barred for lack of an objection. Appellant respectfully suggests that this Court's

decision in Ponticelli constitutes a very narrow and strained reading of Espinosa, 120 L. Ed. 2d 854. The point of Espinosa is that, by virtue of the unconstitutional HAC instruction, the jury was permitted to find an invalid aggravating circumstance. Thus, regardless of whether Appellant made a contemporaneous objection to the instruction, the jury was permitted to find that Appellant committed the crime in a heinous, atrocious, and cruel manner which, as a matter of law, was insufficiently defined to permit the jury to make that finding.

Under these circumstances, it was error for the court to instruct the jury on an invalid aggravating circumstance and it was error to permit the jury to consider it. Espinosa makes it clear that, under Florida's capital punishment scheme, neither the judge nor the jury is permitted to weigh an invalid aggravating circumstance. The Supreme Court said, "We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 120 L. Ed. 2d at 859. The Supreme Court also noted, "Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Id. at 858.

Alternatively, if this argument is barred by lack of objection, Appellant would argue that the jury was instructed on an aggravating circumstance that was so vague that there was no way

that the jury could make a rational determination whether the aggravating circumstance existed. Thus, in effect, the jury was instructed on a non-statutory and unauthorized aggravating circumstance. The trial court's instructions deprived Appellant of his rights guaranteed by the Eighth and Fourteenth Amendments and Article I, Sections 9, 16 and 17 of the Florida Constitution.

As a further basis for invalidating the HAC aggravating circumstance, Appellant would argue that the evidence failed to establish this aggravating circumstance beyond a reasonable doubt.

The victim in this case received four knife wounds. Two wounds were to the back and the other two were in the area of the throat. One wound in the back entered just to the left of the spinal column and traveled upward penetrating the lung. (R-3374). The other wound to the back went under the skin but did not enter the body cavity. One of the wounds to the neck was to the front of the neck going from the left side of the neck to the right side. This wound did not injure anything of any importance and in the medical examiner's words, "It simply went under the skin from left to right." (R-3375). The second wound to the neck was to the left side of the neck tracking to the rear and exiting at the rear of the neck through another large wound. This wound was deep and cut the spinal cord. (R-3376). The medical examiner could not say which wound came first, but if the large wound to the neck was first, it would produce paralysis from that point down to the whole body. (R-3378). The medical examiner said the wounds would inflict pain, but not "instantly;" "it isn't necessarily so that these

would be painful immediately." (R-3384-85).

Thus, from the medical examiner's testimony, it becomes clear that there were only two wounds of any significance - one to the neck severing the spinal cord and causing paralysis and the second to the back puncturing the lung. It is uncertain whether the victim was in any pain or how long she lived after the attack.

Other than the knife wounds, there was no other evidence of acts of cruelty or indications that the victim suffered. There was no evidence the victim was bound, gagged, strangled, sexually molested, or otherwise tortured. In short, there is no evidence that this offense was "extremely wicked" or "designed to inflict a high degree of pain" or that Appellant experienced "enjoyment of the suffering of others" or that it was "unnecessarily torturous to the victim." See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 945 S.Ct 1950, 40 L. Ed. 2d 295 (1974).

Under these circumstances, the trial court erred in submitting the case to the jury for consideration of the HAC aggravating factor and the trial court erred in finding that the aggravating circumstance existed. Sochor v. Florida, 119 L. Ed. 2d 326; Espinosa v. Florida, 120 L. Ed. 2d 854. Appellant is entitled to a new sentencing hearing.

D. COLD, CALCULATED AND PREMEDITATED MANNER.

The trial court instructed the jury on the aggravating circumstance of "[t]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated

manner without any pretense of moral or legal justification." (R-4722). This instruction simply tracks Section 921.141(5)(i), Fla. Stat. (1991), and does not explain the operative terms of the statute; i.e. "cold," "calculated," "premeditated," "pretense," "moral justification," and "legal justification." The law requires the court to sufficiently define the circumstances giving rise to this aggravating factor in order to prevent arbitrary application of the law and denial of due process as provided by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution. Espinosa, 120 L. Ed. 2d 854.

The evidence failed to establish the cold calculated and premeditated [CCP] aggravator beyond a reasonable doubt. The trial court relied upon Deal The First Deadly Blow in finding that this aggravator existed. As discussed in Point VII of this brief, the admission of the book was error and, even if properly admitted, it is mere speculation that the book was used by Appellant to plan the victim's murder.

In addition to relying on the book to support the CCP aggravator, the trial court also found that the "wounds were particularly expedient, giving their goal of death, and reflect the calculating mind of the defendant." (R-1847). The cases of Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct 733, 98 L. Ed. 2d 681 (1988), and Farinas v. State, 569 So. 2d 425 (Fla. 1990) are directly on point.

In Rogers, the defendant shot the victim three times, twice in

the back, while the victim was laying face down. This Court invalidated the CCP aggravator saying,

> There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers, 511 So. 2d at 533.

Similarly, in Farinas, the defendant shot the victim once and then had to unjam his gun three times before firing the fatal shots to the back of the victim's head. This Court held, "The fact that Farinas had to unjam his gun three times before firing the fatal shots does not evidence a heightened premeditation bearing the indicia of a plan or prearranged design." Farinas, 569 So. 2d at 431 (footnote omitted). It should be clear that the wounds allegedly caused by Appellant are no more expedient or calculating than two shots to the back (Rogers) or two shots to the back of the head (Farinas).

The trial court further found that "the entire criminal episode reflects the defendant's careful plan to rob Mrs. Casey, kidnap her, kill her, and hide her body, all with the aim of avoiding detection." (R-1847). This finding is unsupported by the record and is contradicted by the state's own evidence. Wally Byars, one of the jailhouse informants, testified that Appellant only killed the victim after "She put up a struggle." (R-3400). Furthermore, the trial court's finding that Appellant did this

crime "to avoid detection" constitutes an improper doubling of this aggravator with the "avoid arrest" aggravating circumstance.

In Gore v. State, 599 So. 2d 978 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct 610, 121 L. Ed. 2d 545 (1992), the evidence established that the defendant planned to kidnap the victim and take her to an isolated area. This Court emphasized that, to establish the CCP aggravator beyond a reasonable doubt, the state must show "a careful plan or prearranged design to kill." Gore, 599 So. 2d at 986. (emphasis added). The court invalidated the trial court's finding of the CCP aggravator, saying:

> ". . . [I]t is possible that this murder was the result of a robbery or sexual assault that got out of hand . . . There is no evidence that Gore formulated a calculated plan to kill . . ." Id at 987.

Similarly, in Peede v. State, 474 So. 2d 808 (Fla. 1985), the defendant kidnapped the victim with intent to take her to North Carolina. This Court invalidated the CCP aggravator, saying that the evidence did "not establish that he planned from the beginning to murder her once he completed his plan in North Carolina." Peede, 474 So. 2d at 817. (emphasis added). In Rivera v. State, 545 So. 2d 864 (Fla. 1989), the victim, a police officer, was shot during a struggle. Also, the evidence showed that the defendant had in his possession a semiautomatic weapon and could have killed the officer "from the start," if he had intended to do so. 545 So. 2d at 865. The evidence before this Court does not establish that Appellant planned "to kill" the victim "from the start." These factors distinguish Appellant's case from the "careful plan" and

"prearranged design to kill" that this Court has consistently required to establish this aggravating factor beyond a reasonable doubt. Because this aggravating circumstance was not supported by the evidence, it was error to instruct the jury on it and error for the trial court to find that it existed. Sochor v. Florida, 119 L. Ed. 2d 326; Espinosa v. Florida, 120 L. Ed. 2d 854.

E. CUMULATIVE EFFECT.

Once the improper aggravating circumstances that were considered by the jury and found by the trial court are eliminated, this Court's proportionality review should result in a determination that a life sentence is appropriate. This is especially true when consideration is given to the trial court's finding of three mitigating factors, including the mitigator that Appellant's mental capacity was "substantially impaired" to the extent that he could not conform his behavior to the requirements of the law. Appellant submits that this Court should remand to the trial court with instructions to impose a sentence of life imprisonment.

In the alternative, because the jury weighed aggravating circumstances that were not supported by the evidence, Appellant is entitled to a new sentencing hearing. In light of the seven to five death recommendation, it is obvious that allowing the jury to consider even one of the improper aggravators could have affected the advisory verdict.

CONCLUSION

The arguments contained in this brief conclusively establish that reversible error was committed in Appellant's trial. The case should be reversed and remanded for a new trial.

Alternatively, the death sentence should be vacated and the case remanded with directions to impose a life sentence. At a minimum, the case should be remanded for a new sentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by U. S. Mail to **Carolyn Snurkowski**, Office of the Attorney General, Legal Section, The Capitol, Tallahassee, Florida 32399-1050, this 20th day of April, 1993.

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