IN THE SUPREME COURT OF FLORIDA

ALFRED L. FENNIE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,923

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On September 27, 1991, the grand jury in and for Hernando County returned an indictment charging Appellant with one count of first degree murder in violation of Section 782.04(1)(a), Florida Statutes (1991), one count of armed kidnapping in violation of Section 787.01(1), Florida Statutes (1991) and one count of robbery with a firearm in violation of Section 812.13(2)(a), Florida Statutes (1991). (R20-21) Appellant filed a motion to suppress his statement made to the grand jury. (R228-240) Appellant also filed a motion to suppress his statement made to the police upon his arrest. (R267-271) The state stipulated that it would not use Appellant's grand jury statement. (R247) A hearing was held on the second motion to suppress. (T891-952) Following presentation of evidence and legal argument, the trial court ruled that the statements were freely and voluntarily given and

that Appellant had never invoked either his right to remain silent or his right to an attorney. (T948-952)

Appellant filed numerous pretrial motions mainly directed to the constitutionality of the death penalty statute and also to the procedures concerning the penalty phase. (R168-169,181-183,194-198,199-212,213-214,215-220,170-173,174-177,178-180,184-187,188-190,191-193) Additionally, with the court's permission, Appellant specifically adopted the pretrial motions filed in the codefendants' cases. (R770-1022,616-617) On December 9, 1992, a hearing was held on all the pretrial motions filed in Appellant's case as well as his two codefendants' cases. (R614-718) The motions were uniformly denied with the exception of the motions requesting production of Brady material, and the motions for disclosure of impeaching evidence and mitigating evidence. (R622-623,632-633,633-634)

Appellant proceeded to jury trial on the charges on November 5-13, 1992, with the Honorable John W. Springstead, Circuit Judge, presiding. (T1-1926) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all counts. (T1925,R384-387) On November 13, 1992, the jury reconvened to hear the penalty phase. (T1933-2157) Appellant requested numerous special instructions during the penalty phase including expanded instructions on the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated. (T2007-2056,2021-2025,2026) The trial court denied these requested instructions ruling that the standard

instructions were sufficient. (Id.) Following deliberations, the jury returned a unanimous recommendation for death. (T2150-2151,R389)

Appellant filed a timely motion for new trial, (R424-426), which was denied. (R507,522) On December 1, 1992, Appellant appeared before Judge Springstead for sentencing. (R519-559) Judge Springstead adjudicated Appellant guilty on all counts and sentenced Appellant to death for the first degree murder count and consecutive life sentences for the remaining two counts. (R529-545,442-466) Judge Springstead filed written findings in support of the death penalty. (R452-463)

Appellant filed a timely notice of appeal on December 10, 1992. (R495-496) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R502-503,504-505)

STATEMENT OF THE FACTS

GUILT PHASE

On Sunday, September 8, 1991, Joseph Evans and his brother-in-law Bob Duckett were driving in the area of Ridge Manor in Hernando County. (T978-980) As they drove on Highway 301, north of Highway 50, they came across a woman lying on the side of the road face down. (T980) They immediately went to the Sheriff's substation and reported this. (T980) Several deputies responded to the area in Ridge Manor and located the body of a white female lying face down approximately two to three feet off the roadway. (T999,1026,1042-1043) The woman's hands were tied behind her with a white rope and her legs were crossed. (T1027, 1044) The woman was dressed in a gray T-shirt with black trim and had green army fatigue type shorts. (T1027) There were abrasions on the bottom of the woman's left foot and also on her right thigh. (T1027) The woman had a bullet wound to the back of her head. (T1027,1044) No physical evidence was found near the body. (T1031,1047,1049,1051) The body was eventually identified through fingerprint comparison and determined to be Mary Strickland Shearin. (T1086-1088)

Dr. Janet Pillow of the Medical Examiner's Office in Leesburg, Florida, conducted an autopsy on the victim's body on September 9, 1991. (T1092-1095) The body was that of a white female, 5' 8½" tall and weighing 179 pounds. (T1095) The body was clothed in a T-shirt and a pair of shorts and there was a dollar bill and some change in the pocket of the shorts. (T1095)

The victim's hands were tied behind her with an off-white rope which was looped two times around her wrists. (T1095) Dr. Pillow found bruising on the back of the left hand of the victim and also on the left arm close to the area of her elbow. (T1101) These bruises could have been inflicted anywhere from seconds to a few days before the victim's death. (T1103) Dr. Pillow also found bruising on the right upper arm, the front of the right groin, the right thigh, and both lower legs including the ankle areas. Additional bruising was found on the left front thigh and just inside the left breast. (T1103-1104) Dr. Pillow found no evidence of any pre-death abrasions or bruising to the victim's face or mouth. (T1108) Dr. Pillow then examined the bullet wound to the right side of the back of the head. (T1109) The bullet had entered the right side of the back of the brain and traveled into the left half of the brain where it was recovered in the mid-to-lower portion of the left half of the brain. (T1109) This wound resulted in a few skull fractures at the base of the brain and some bleeding around the brain. (T1109) The cause of death was the gunshot wound to the head. (T1113) Dr. Pillow stated that the victim lost consciousness immediately upon being shot. (T1113) Dr. Pillow found no physical indication of forced sexual intercourse. (T1118) Dr. Pillow did note that the victim had a hysterectomy in the past. (T1122) Although the victim's hands had been tied, Dr. Pillow found no bruising on the wrists and no evidence of any struggle. (T1129) Although Dr. Pillow believed that the victim had had sexual intercourse

shortly before her death, this could have occurred within days of her death. (T1137)

John Shearin, the victim's husband, testified that on the night of September 7, 1991, his wife left the house between 7:00 and 8:00 p.m. to take their son to a friend's house where he was going to spend the night. (T1144-1146) When his wife did not return when he expected her, Shearin called the friend's house and spoke to his wife who told him that she was going to go get a snack and then come home. (T1146) Mary arrived home at 3:00 a.m., stayed 15 minutes, and left again. (T1146) Mary did not say where she was going and would not tell John. (T1146) John never saw his wife again. (T1146) On Monday, September 9, 1991, the police came to his house and told him that his wife had been killed. (T1147) Shearin had not reported his wife missing because he thought she might have gone to her mother's house. (T1147) Ever since his wife had had a hysterectomy she was quite moody. (T1147) Prior to the night that Mary left, the last time that John and Mary had sexual intercourse was over a week before. (T1151) John claimed that Mary did not care too much for sex since her hysterectomy. (T1151) Shearin had suspicions about Mary's friends and asked Mary if she had a drug problem, to which Mary replied no. (T1152) When Mary left that morning she was driving a 1986 Cadillac Cimarron, yellow in color with the tag CBB 85N. (T1150)

A BOLO was issued for the victim's vehicle and on the evening of September 9, 1991, Sergeant Lou Potengiano of the

Tampa Police Department observed a vehicle matching the description on the north side of Bexley's BBQ on the corner of 28th Avenue and 22nd Street in Tampa. (T1155) Potengiano observed a man get into the passenger side and then the vehicle pulled out of the parking space into traffic. (T1157) Potengiano followed the vehicle and verified the tag number and radioed for assistance. (T1157) Potengiano finally stopped the vehicle at a well-lit intersection and was assisted by five to ten police cars including a K-9. (T1158) Both men were taken into custody without incident. (T1158) The driver of the automobile gave his name as Ezell Foster and the passenger gave his name as Ansell Rose. (T1159) The vehicle was then secured and held for Hernando County. (T1159) The car was loaded onto a flatbed truck and taken to a police garage where it was then turned over to the custody of Hernando County deputies who transported the vehicle to Hernando County. (T1169,1172)

Deputy Tim Whitfield processed the vehicle and found a .25 caliber Raven Arms firearm with a clip in place under the mat in the front of the car. (T1179-1180) There was a live round in the chamber and two more in the clip. (T1180) Although the firearm was processed for fingerprints, no usable prints were lifted. (T1182-1183) Whitfield found rope in the trunk which was similar to that which was used to tie the victim's hands. (T1183) A woman's shoe was found in the trunk. (T1185) No usable fingerprints were found in the trunk of the car. (T1188) A comparison of the rope found in the trunk of the car to that

found binding the victim's wrists, revealed an exact match. (T1207) No head or pubic hairs from Appellant were found on the victim's clothing or on any items including sweepings from the victim's car. There were caucasian head hairs found in the trunk but these did not match the victim's. (T1226) A negro hair was found in the car which did not match Appellant's or the codefendant's. (T1227)

On September 9, 1991, Kim Coleman was working as a teller at the Tampa Bay Federal Credit Union branch at Buffalo and Nebraska Avenues in Tampa. (T1231) On that date, Ms. Coleman was presented with a check drawn on the account of Mary Shearin and made out to Ezell Foster. (T1231-1234) The check was made out for $200.00 and Ms. Coleman noted that the canceled check indicated that she received an ID card from Mr. Foster as proof before she cashed the check. (T1240)

Detective Richard Kramer of the Hernando County Sheriff's Department interviewed the man known as Ezell Foster, Jr. (T1244-1246) The interview began at 6:38 a.m. when Kramer told Foster the vehicle he was stopped in was reported stolen and that it belonged to a person who was found murdered in Hernando County. (T1246) Kramer advised Foster of his Miranda rights and determined that Foster understood his rights and agreed to speak. (T1246-1248) Foster advised that the person with whom he was arrested was known to him as Mr. Jim and that he had been driving Mr. Jim around for two days. (T1250) While at Bexley's BBQ, Mr. Jim saw a Tampa police officer and told Foster they had to leave.

(T1250) As they drove, Mr. Jim kept looking back and at an intersection Mr. Jim told Appellant to turn right and keep on going as he had to get something done. (T1250) Mr. Jim handed Foster a towel with something in it. (T1250) Foster was curious and thought that the towel might contain drugs so he opened it up and observed a silver-colored gun. (T1250-1251) Foster picked the gun up and looked at it, put it back in the towel and stuck it between the seats. (T1250) At that point Foster stopped the vehicle and the police arrested him. (T1251) Foster told Kramer that he first met Mr. Jim between 4:00 and 5:00 a.m. on September 8th, as he was walking to Riverview Terrace projects. (T1251) A vehicle approached Foster and the driver, a white woman, asked Foster if he was holding any crack cocaine. (T1251) Mr. Jim was seated in the front passenger seat. (T1251) Foster told the woman he did not have any crack cocaine but he pointed to an area where she could buy some. (T1252) The lady told Foster that she had tried that area before without success so Foster told her that he knew of another place at Robles Park. (T1252) Foster got in the backseat of the car and directed the woman to Robles Park where she purchased a $20.00 crack piece. (T1252) The woman was wearing a T-shirt, dark shorts and had dark curly hair. (T1252) After the drug transaction, they drove away and the lady and Mr. Jim got into a verbal argument. (T1252) Mr. Jim wanted to know when the lady was going to leave her husband but the woman said she couldn't. (T1253) Mr. Jim then wanted to know when he would get the money that the woman owed him and the woman

told him she could not afford to pay him. (T1253) Mr. Jim wanted to know if the lady could get if from her husband but the lady said no. (T1253) The woman pulled into a 7-11 and went inside to buy a soda. (T1253) Mr. Jim and the woman had a conversation which Foster could not hear. (T1253) When they returned to the car, the woman asked Foster if he would drive. (T1253) Foster drove the car while the woman and Mr. Jim got into the backseat and smoked the crack cocaine. (T1253-1254) After smoking the crack, Mr. Jim said he was tired of supporting the woman's habit for the last two months and the woman responded that she wouldn't have any habit if it wasn't for Mr. Jim. (T1254) They drove back to the projects and Foster got out. (T1254) The couple left but returned a few minutes later when Mr. Jim asked Foster if he wanted to earn some money by driving the car around for him. (T1254-1255) Foster agreed and Mr. Jim said that they would be back in an hour. (T1255) About two hours later the vehicle returned and only Mr. Jim was in the car. (T1255) Foster got in and asked Mr. Jim why he needed someone to drive to which Mr. Jim responded that he had an expired driver's license. (T1255) Mr. Jim told Foster that he took the woman home and for the rest of the day Foster drove Mr. Jim various places. (T1256) The next day, Monday, Foster picked up Mr. Jim and they drove around smoking crack cocaine. (T1257) Mr. Jim asked Foster if he knew where he could get a check cashed. (T1257) The check which Mr. Jim had was dated and was signed my Mary Strickland. (T1257) Foster told Mr. Jim he could cash the

check if it was made out to him. (T1257) They drove to a bus station in front of the Tampa Bay Credit Union where Foster wrote his name on a piece of paper. (T1258) Mr. Jim took this paper and left for about five minutes and returned with Foster's name on the check. (T1258) Foster went into the bank and cashed the check for $200.00 and came back and gave the money to Mr. Jim. (T1258) At various times during the evening, Foster again drove Mr. Jim around where they bought crack cocaine and smoked it. (T1258-1260) The final time that Foster hooked up with Mr. Jim was at 2:45 a.m. at the Chicken Bar. (T1260) They then went to Bexley's BBQ where Mr. Jim saw the police officer. (T1260)

The statement given to Detective Kramer lasted approximately two hours and midway through, Foster told Kramer that his real name was Alfred Lewis Fennie. (T1260) Appellant told Kramer that he was sure that Mr. Jim would try to put all the blame on him since all the evidence seemed to point to Appellant. (T1263) Appellant stated that he did not kill the woman. (T1263)

The man whom Appellant described as Mr. Jim, was identified as Ansell Rose. (T1313,1262,1275) Rose testified that he happened to be with Appellant at the time of the arrest because he had been at Bexley's BBQ looking for a ride home. (T1278) When Rose approached Appellant and asked for a ride, Appellant agreed even though he had never seen Appellant before. (T1280) Rose wanted to go to Chelsea Street but when Appellant got to that street he drove past. (T1283) Rose reminded

Appellant of where he wanted to go and when they got to the intersection of 22nd Street and Osborne Avenue, Rose told Appellant to turn right so that they could double back to Chelsea. (T1283) Once again Appellant ignored Rose's directions. (T1283) When the car suddenly got brighter, Rose turned to look behind at which point Appellant said "Don't look back." (T1284) Rose got suspicious and asked why but Appellant responded "Just don't." (T1284) At the intersection of 22nd Street and Hillsborough Avenue, Appellant turned left, took a small gun from behind him, and put it on the floor. (T1285) When they got to Nebraska Avenue, the police ordered them to stop and get out of the car. (T1287) As they got out of the car, Appellant tried to push the gun under the mat on the floor. (T1288) Rose told the police officers of his activities that weekend and after verifying that Rose's story was true, he was released. (T1313-1314)

Detective James Noblitt of the Tampa Police Department, met with Appellant and told him he thought he was lying about Mr. Jim. (T1315-1316) Appellant told Noblitt that the evidence made it look like he was involved in this crime but that he did not kill any woman. (T1316) Appellant told Noblitt he knew who killed the woman but it would do him no good to tell since the evidence did point to him as the culprit. (T1316) Eventually Appellant agreed to tell Noblitt what occurred. (T1321) Appellant stated that at approximately 4:00 a.m. Sunday morning a vehicle approached him which was driven by a white woman and had

a black male in the passenger seat. (T1323) The black male was known to Appellant only by the name of Eric. (T1322) This man was approximately 23 years of age, light skinned, and had gold teeth. (T1322) The man was 5' 10" tall and weighed about 190 pounds. (T1322) Eric wore a necklace with a medallion that had the name Eric on it and another necklace with an Egyptian head on it. (T1322) When the vehicle approached Appellant, the woman asked to buy some rock cocaine. (T1323) Appellant got into the backseat and directed the woman to an area where she bought some rock. (T1323) They then began to smoke the cocaine and eventually Eric left the car. (T1323) At this point Appellant and the woman had consensual sexual intercourse. (T1323) When Eric returned he became very angry. (T1324) Appellant began driving the car while Eric and the woman were in the backseat. (T1324) Eric and the woman got into a physical altercation so Appellant stopped the car and got out. (T1324) Eric and the woman left and returned about an hour later. (T1324) Upon their return, Appellant again entered the car in the driver's seat. (T1324) Eric told Appellant to take the interstate north out of Tampa. (T1324) While Appellant was driving, Eric and the woman got in a big argument over $700.00 which Eric told the woman she owed him for cocaine he had bought for her. (T1324) Eric began punching the woman so Appellant pulled over to the side of the road and told Eric to stop hurting her. (T1325) The woman yelled to Appellant to please not let Eric kill her. (T1325) Appellant continued north on I-275 while Eric and the woman

continued fighting. (T1325) When he reached the exit for State Road 50, Appellant pulled off the interstate and the woman attempted to jump out of the car. (T1325) Eric prevented the woman from getting out and pulled out a chrome handgun, pointed it at both the woman and Appellant and ordered Appellant to keep driving. (T1325) Appellant had noticed some concrete blocks in the backseat. (T1326) When Eric ordered Appellant to stop in the parking lot of a furniture store, he directed Appellant to take the blocks out of the car. (T1327) After Appellant finished unloading the blocks, he noticed that Eric had tied the woman's hands behind her. (T1327) Appellant drove on State Road 301 to a Circle K convenience store where he got out. (T1327) Eric drove away with the woman lying in the backseat. (T1327) Appellant went into the store and asked the clerk where the Sun Bank was and also asked for a bus schedule. (T1327)

About fifteen minutes later, Eric drove back to the store without the woman. (T1328) Appellant got in the car and they drove on Highway 50 back to the interstate. (T1328) They passed a police officer in a parking lot of a Sun Bank and then got on the interstate south towards Tampa. (T1328) Eric wanted something to eat so they stopped at the Stuckey's where Eric got into an argument with the waitress over the size of the orange juice he had ordered. (T1328) They returned to Tampa about 9:30 a.m. and took the car to an auto detailing shop to have it cleaned. (T1328) Then they drove to a Pamela Colbert's house. (T1328) Colbert is Appellant's girlfriend. (T1328) Appellant

then stated that he cashed a check on Monday because he needed money. (T1329) Although Appellant said he did not see Eric kill the woman, he stated that he (Appellant) did not kill anyone. (T1329)

Later that afternoon, the detectives from Hernando County told Appellant that he was going to be charged with homicide, robbery, and kidnapping which caused Appellant to become extremely upset and angry. (T1333) Appellant stated that he probably was not going to continue to assist the officers and Noblitt asked him why he had changed his mind. (T1333-1334) Appellant told Noblitt that it did not matter since the evidence made it look as though he was guilty. (T1334) After Noblitt spoke with Appellant for about fifteen minutes, he asked Appellant if the other person involved was related to him. (T1334) Appellant told Noblitt that he was not really related to him but that he and the other individual called each other cousin. (T1334) Appellant was upset that this other person had set him up and told Noblitt that the other person was Michael Frazier and was his girlfriend's cousin. (T1335) Appellant told Noblitt that Frazier was wearing a necklace with the name of Eric on it and that was why he used the name Eric when he told Noblitt what had happened. (T1335) Appellant then identified Frazier from a photo pack and told Noblitt that Frazier's girlfriend, Regina, was wearing one of the victim's rings. (T1336) When Regina was contacted, the officers did in fact recover the ring from her. (T1338-1339)

At 6:44 p.m., Appellant again spoke with Detective Kramer who took a recorded statement from Appellant. (T1349-1350) After again being given his Miranda rights, Appellant agreed to give a statement to Kramer. (T1351-1352) At approximately 4:15 a.m., a car approached Appellant containing the victim and Michael Frazier. (T1352) The woman who was driving the car asked Appellant if he had some crack cocaine she could buy, but Appellant told her he did not. (T1352) Appellant told the woman she could get some at Robles Park after which the victim asked Appellant if he would show her. (T1352) Appellant agreed and got into the car. (T1352) Appellant directed the woman to Robles Park where she purchased some crack cocaine. (T1353) The woman then drove to a 7-11 where she got out and got a soda. (T1354) Frazier also got out of the car and when he and the woman returned Frazier asked Appellant if he would drive. (T1354) Frazier and the woman got into the backseat and smoked the crack cocaine while Appellant drove. (T1354) Frazier and the victim argued over money that the victim owed Frazier and the victim told him that she would pay him the following week. (T1354) Appellant stopped the car near the library which was across the street from the high school. (T1355) Frazier got out of the car and left the area. (T1355) The woman wanted to thank Appellant for helping her get some crack cocaine so she offered to have sexual intercourse with him. (T1355) While Appellant and the woman were having sexual intercourse, Frazier returned to the car and caught them causing him to become quite angry.

(T1355) Appellant got out of the car to look for a friend at which time Frazier told him to stick around and he would be back within the hour. (T1355) Frazier and the woman did return and Appellant again drove the car so that Frazier and the woman could smoke crack cocaine. (T1356) Frazier told Appellant to head out to the interstate. (T1356) Frazier and the woman argued again and Frazier wanted the woman to get the money from her husband but she refused. (T1356) The victim then told Frazier he could take her car until she got paid. (T1356) Appellant noticed some concrete blocks in the backseat of the car. (T1356) Apparently the victim owed Frazier $700.00 for crack cocaine. (T1357) Frazier started punching the woman who was yelling at Frazier to stop. (T1357) Appellant pulled the car over to the side of the road and asked Frazier to stop hitting the woman, but Frazier pulled a handgun and ordered Appellant to keep on driving. (T1357-1358) Appellant eventually exited the interstate at which time the victim tried to jump out of the car. (T1358-1359) Once again Appellant pulled the car over to the side of the road at which time Frazier put the gun to the woman's head, ordered her to get back into the car and said he'd kill her if she tried to escape again. (T1359) Appellant drove to the parking lot of a furniture store where Frazier ordered him to take the concrete blocks out of the car. (T1360) Appellant then drove to the Circle K store where he asked the clerk if there was a bus station nearby or a Sun Bank. (T1361) When Appellant exited the store, he noticed that Frazier had driven off. (T1362)

Approximately ten or fifteen minutes later Frazier returned and told Appellant to drive the car. (T1362) The woman was in the backseat lying down. (T1363) They drove a short distance when Appellant stopped the car and Frazier ordered the woman to get out of the car. (T1363) The victim refused so Frazier grabbed her and pulled her out of the car. (T1363) The woman told Frazier she wanted to go home and see her kids. (T1364) Frazier and the woman walked down the road until they were out of Appellant's sight. (T1364) Frazier had a gun in his hand. (T1364) After Frazier and the woman were out of sight, Appellant heard Frazier yell "Bitch, you bit me," and then heard a gunshot. (T1365) Frazier returned to the car and told Appellant to start driving. (T1365) Appellant observed that Frazier had been bitten on his hand and when Appellant asked where the woman was Frazier said he was going to "Make the bitch walk home." (T1365) As they drove away, they passed a sheriff's car at which point Frazier said "Don't fake no moves. Just drive." (T1365) During this exchange, Frazier had the gun in his lap pointed towards Appellant. (T1365) Appellant drove back to the interstate but got off at the next exit because he was hungry so they stopped at Stuckey's. (T1366) Frazier got into an argument over the size of the orange juice. (T1366) Frazier asked Appellant how much money he had to which Appellant replied between $400.00 and $500.00. (T1366) Frazier wanted the money and told Appellant he could keep the car in return for the money. (T1366-1367) Frazier then told Appellant to drive to the auto detail shop

where they got the car cleaned. (T1368) While there, Appellant's girlfriend, Pamela Colbert, arrived. (T1368) Frazier gave Colbert money to pay for the detailing and told her she could keep the change. (T1368) Colbert asked Appellant if he was okay because he looked sick. (T1368) Appellant drove back to the area to see if he could see the victim, but he could not. (T1369) Frazier told Appellant to keep cool or else he knew what was going to happen, the same thing that happened to the victim. (T1370) Appellant saw a shoe in the car but saw no purse. (T1371) He also saw some rope in the car in addition to the credit cards which were in a slot above the ashtray. (T1371) Appellant looked through the credit cards and then put them in the glove box. (T1371) Appellant saw a towel on the floor and reached down and saw a firearm wrapped in it. (T1371) Appellant handled the gun. (T1372) Appellant found a check in the car which was previously signed and dated and made out in the amount of $200.00 but listed no payee. (T1372) Appellant filled in the name Ezell Foster and cashed it with an ID card which he had in the name of Ezell Foster. (T1373) Appellant admitted that on the day of the arrest he had pulled up to the BBQ place and some man came up and asked for a ride. (T1375) The man got in and told Appellant there was a cop behind him. (T1375) Since Appellant heard the victim tell Frazier he could keep the car until she paid him back, Appellant did not figure the car was reported stolen. (T1376) Although Appellant never saw Frazier take any jewelry from the victim, he later did see Frazier with

it. (T1376) Frazier gave some of the jewelry to his girlfriend Regina. (T1377)

When the detectives attempted to verify Appellant's statements, they learned that Frazier's girlfriend Regina did in fact have the jewelry. (T1384) Frazier also was discovered to have a bite mark on his hand when he was arrested. (T1388)

Officer John Prior went to Bexley's BBQ where he met with Pamela Colbert. (T1431) Colbert took Prior to her home where Michael Frazier was discovered asleep on the couch. (T1431) Frazier was arrested and was observed to have a bite mark on his right hand which he was trying to hide. (T1432-1435)

Michael Frazier testified that in September of 1991 he was living with his cousin Pamela Colbert who had been dating Appellant for approximately twelve years. (T1462-1463) A couple of weeks before his arrest, Frazier saw a firearm in his cousin's house. (T1470-1471) This was the same firearm that he saw on the day of the incident at hand. (T1471) Shortly after midnight on September 8, 1991, Frazier bumped into Appellant at the River View Terrace projects and told him that he desperately needed money. (T1472-1473) Appellant suggested to Frazier that they go to the corner of Florida Avenue and Broad Street and try to get some money and Frazier agreed. (T1473) They stood on the corner for approximately forty-five minutes at which time a white woman drove up in a cream-colored Cadillac. (T1474) Appellant waved her down and got into the car with her. (T1474) They drove up the block and turned down the next street so Frazier ran up to

catch them. (T1474) When Frazier got to the car Appellant had the woman at gunpoint and was forcing her into the trunk. (T1474) Appellant had credit cards, jewelry and the woman's purse in his hand. (T1474) Appellant also had the same gun that Frazier had previously seen in his cousin's house. (T1474) As the woman got into the trunk, Frazier did not hear her say anything. (T1474) Appellant told Frazier to get into the car, so he did and they drove to the City Bank of Tampa at Buffalo and Armenia to try to get some money from the ATM. (T1475) At the bank, Appellant tried but failed to get money. (T1476) They got back in the car and Appellant asked the woman for numbers for the ATM and she gave them to him. (T1476) They then went to the Barnett Bank to get some money and again were unsuccessful. (T1476) Appellant got back in the car and drove about one block to a darkened area where he let the woman out of the trunk. (T1477) Appellant told the woman that she had given him the wrong numbers but she insisted they were correct. (T1477) Appellant told the woman to get into the backseat and Appellant got in after her. (T1478) Frazier began walking away and could not see what was going on in the backseat. (T1478) Frazier never saw anyone take off any of their clothes during the five to ten minutes that Appellant and the woman were in the backseat. (T1479) Appellant then told the lady to get back into the trunk and she did without putting up any fight. (T1479) Appellant then drove to a brick company where Appellant took four cement blocks and put them in the backseat of the car. (T1479) Frazier

asked Appellant about the blocks to which Appellant replied that he should not worry about it. (T1480) Appellant then drove to Pamela Colbert's house where they arrived shortly after 7:00 a.m. (T1480) Appellant parked the car about a block away and went to Pam's house. (T1481) Frazier heard no noise coming from the trunk. (T1481) While at the apartment, Frazier went to the kitchen while Appellant and Pamela talked. (T1481) Pam got dressed and all three left. (T1481) Appellant picked up some rope from the apartment. (T1481) When they got to the car, Colbert drove, Appellant sat in the front passenger seat, and Frazier sat in the back passenger seat. (T1482) They drove out to the interstate and proceeded north out of Tampa. (T1482) Appellant said the lady had seen his face and he had to do her in. (T1482) Appellant was going to tie the bricks to her legs and throw her in water. (T1482) Frazier protested that he had never killed anyone, that he only did robberies. (T1483) Frazier then heard the woman rattling something in the trunk. (T1483) Appellant subsequently said he was going to shoot the woman to which Frazier told him he wanted nothing to do with it. (T1483) Appellant replied that if Frazier didn't want anything to do with it he should not be around when it happened. (T1483) Frazier happened to turn around and saw the woman's fingers sticking out of the side of the trunk, so he told Appellant. (T1484) Appellant told Colbert to get off at the next exit, which she did, and stopped at a flea market. (T1484-1485) Appellant removed the three blocks from the car and then went and

unlocked the trunk. (T1485) Appellant got back in the car and they proceeded to a Texaco gas station where Colbert gave Frazier $5.00 to pay for gas. (T1486) Once again the woman in the trunk made no noise. (T1486) Colbert then drove past a Circle K convenience store to a wooded area where Appellant told her to stop. (T1486-1487) Appellant got out and unlocked the trunk and proceeded to talk to the woman about her credit card numbers. (T1487) The woman insisted that she had given Appellant the right numbers so Appellant closed the trunk and told Colbert to go back to the Circle K. (T1488) Appellant said he wanted to know where the nearest bank was located so he went into the store. (T1489) While Appellant was in the store, Frazier told Colbert that they didn't have to do this, but Colbert said nothing in reply. (T1489) Appellant returned to the car and said the woman in the store had told him there was a bank about four miles up the road. (T1489) Appellant then told Colbert to drive back to the wooded area. (T1489) At Appellant's instruction, Colbert parked the car facing the street. (T1490) Appellant opened the trunk and hollered for Frazier to help him get the woman out of the trunk. (T1490) Frazier reached in, the woman bit Frazier on the hand. (T1490) Appellant pulled his gun and told the woman to let Frazier go and to also drop the wrench she had in her hand. (T1490) Frazier's hand was bleeding profusely so he got a towel out of the car. (T1491) The woman finally got out of the trunk and Appellant tied her hands behind her and then proceeded to walk her down the road. (T1492) The

woman asked Appellant whether she would get home to see her kids, but Appellant did not answer her. (T1493) Frazier asked what was going on and Appellant waved him off. (T1493) Frazier got back in the car while Appellant and the woman walked down the dirt road and out of sight. (T1493) Frazier heard a gunshot after which Colbert asked him if he thought Appellant really killed the woman. (T1494) Frazier replied he didn't know, and a few minutes later Appellant came running back to the car. (T1494)

Appellant gave the keys back to Colbert and told her to go to the Sun Bank. (T1495) However, there was a sheriff's car parked in the parking lot so Appellant told Colbert to keep on going. (T1495) They got back on the interstate and headed south towards Tampa but stopped at a Stuckey's for breakfast. (T1496) Colbert and Appellant ate but Frazier only ordered juice. (T1496) When the waitress brought the juice Frazier thought it cost too much so he complained and just got a soda. (T1496) They got back to Tampa and stopped at an Eckerd's drug store so Appellant could buy a baseball cap to hide his appearance at an ATM. (T1497) They then went to the Presto machine at Publix to try to get some money, but once again had no luck. (T1497-1498) Appellant told Colbert to go to the First Florida Bank where they tried the card again but failed to get money even though the machine did take the card. (T1498) Appellant then told Colbert to take the car to the auto detail shop where they got the car cleaned inside and out for $12.00. (T1498-1499)

The three of them proceeded to Colbert's house where Appellant gave Frazier a ring belonging to the woman while he kept the car for himself. (T1500) Appellant said that it would be a few days before they found the body. (T1500) While they were at Colbert's house, Frazier's girlfriend Regina came by and Frazier gave her the ring saying he had found it on the street at 22nd Avenue and Columbus Drive. (T1500) A few minutes later Frazier and his girlfriend left and he did not see Appellant again. (T1501) Upon his arrest, Frazier initially lied to the police and said he knew nothing about the incident. (T1502) Frazier admitted that he told the police that one of his cousin's children had bitten him. (T1502) When the police told him his story did not check out and that he needed to tell the truth, Frazier told the police that his cousin Pamela Colbert was involved. (T1502) Frazier claimed that he never touched the gun or the rope and never tried to use any of the victim's credit cards. (T1504) Frazier admitted that he made money by selling cocaine and that often times he would jump into people's cars, get money, and then leave, never giving the people the drugs. (T1511) Frazier was testifying after he had been convicted of first degree murder, armed kidnapping and armed robbery because the state agreed not to seek the death penalty and would not seek sentencing under the habitual offender statute. (T1463-1469) Frazier also admitted that in all the years he had known Appellant he had never known him to be violent. (T1536)

Denise Mattingly who worked at the Circle K convenience

store on the corner of State Roads 50 and 301, recalled that on Sunday, September 8, 1991, a black male came in and spoke with the male clerk about the location of the nearest ATM. (T1600-1601) Mattingly told the man about the Sun Bank and then he left. (T1601) The man never asked about any bus schedule. (T1602)

Stephanie Mefford worked at the Stuckey's restaurant in September of 1991. (T1605) On Sunday morning, September 8, 1991, Mefford remembers three black people coming in, one woman and two men. (T1606) One man ordered orange juice but when she put it on the tray he complained about the size, so the man ordered a soda instead. (T1607) The woman paid for the check. (T1608)

Detective Gary Kimball conducted an experiment with the victim's car whereby he locked himself in the trunk. (T1647-1648) While he was in the trunk, Kimball was able to stick three fingers outside the driver's edge of the trunk by using a crescent wrench. (T1648) Kimball's fingers were visible from the outside of the car. (T1648) Kimball also pulled up a rubber gasket that lines the trunk and found an area that had a bent appearance or kind of ripple. (T1649) Kimball was able to create a similar effect when he used a wrench to try to get his hand out. (T1650) Kimball admitted that he might have enlarged the damaged area a bit. (T1650) While Kimball was in the trunk, two other officers got in the passenger area of the car and were able to hold a conversation with each other and with Kimball.

(T1656) Kimball had no difficulty hearing them. (T1656) Kimball admitted that it would have been difficult but possible to get his fingers out of the trunk without using the crescent wrench. (T1657) At the time Kimball and the other officers were carrying on the conversation, the radio was not on and the car was not turned on as the battery was dead. (T1658)

James White who works for Bob's Auto Glass and Detail in Tampa testified that on September 8, 1991, at approximately 10:00 a.m., a vehicle drove up with one woman and two men inside. (T1672-1673) The individuals asked how much it would cost to get the car cleaned and White replied that it would cost $12.00 since the car was extra dirty. (T1674) All three individuals appeared to have been up all night. (T1674) While White cleaned the car, all three individuals watched him closely. (T1675) White asked if they wanted the trunk cleaned, but they said no. (T1675) As White was vacuuming the interior he found a cloth with blood on it on the floor in the backseat behind the driver. (T1676) White never saw any gun or bullets. (T1676) White washed the vehicle and cleaned the tires. (T1676) He also vacuumed the inside and washed the windows, inside and outside, and also wiped down the interior of the car. (T1676) After White finished washing the car, the woman paid him and they left. (T1677)

Linda Browning, supervisor of the research department of the Tampa Bay Credit Union, testified that in reviewing the records of the victim's account, she found two transactions on September 8, 1991, using the ATM card. (T1699-1704) The final

transaction was a $30.00 withdrawal at 3:18 a.m. on September 8, 1991. (T1706)

Earl Andrews, director of the Presto Network which is owned and operated by Publix, checked his journal tape from the Presto machine at the Publix located on the corner of Bearss Avenue and Florida Avenue in Tampa. (T1707-1709) On September 8, 1991, there were five unsuccessful attempts to use an ATM belonging to the victim. (T1710) The first of these transactions occurred at 10:07 a.m. and the last at 10:08 a.m. (T1710) Although Publix does have surveillance cameras at its ATM machines, the camera malfunctioned on that day. (T1712-1713)

John Herman, a Florida investigator for First Florida Bank, reviewed computer records and videotape records of transactions at his bank located on the corners of Florida and Bearss Avenues on the morning of September 8, 1991. (T1716-1718) There were two attempts, one at 10:17 a.m. and one at 10:18 a.m., using the same card that was used at the Presto machine at the Publix earlier. (T1719-1721) Herman also presented still photographs that he took from the videotape that was working that day at the bank. (T1723-1725)

PENALTY PHASE

Annie Fennie, Appellant's mother, testified that Appellant is the second of her four children. (T1949) Appellant lived for a time with his mother and part-time with the mother of his daughter. (T1950) Appellant has three children, ages

fifteen, thirteen and nine. (T1950) Ms. Fennie never married and Appellant's father was in fact married to someone else. (T1951-1952) Appellant did not see his father on a regular basis, but saw him once every five to six months for less than an hour. (T1952) Appellant never spent any nights with his father. (T1952) As Appellant grew up, they lived in the projects and Appellant had no real friends. (T1954) Appellant would gamble and with his winnings would contribute to his mother if Appellant had enough money. (T1953) Appellant had asthma and breathing problems as he was growing up. (T1956) Appellant would often help his sister and her children. (T1961)

Kathy Lewis Reed, is Appellant's older sister. (T1966) Before Appellant was arrested, he would come over often and check on her and her children. (T1967) Ms. Reed has a seven-year-old daughter who is blind, brain damaged, and cannot walk or talk. (T1968) Appellant would play with her daughter and feed her. (T1968) Appellant was a father figure for her children, helping them and encouraging them. (T1968) Appellant was especially encouraging to her sixteen-year-old son whom he often lectured about staying out of trouble. (T1969) Ms. Reed remembers Michael Frazier coming by with rock cocaine, but knew that Appellant did no drugs. (T1972-1973)

Erwin Ward, a rehabilitation counselor for the state of Florida, has known Appellant for sixteen years. (T1980-1981) Appellant is a good mechanic and has always wanted to help Ward if he needed it. (T1981) Ward would see Appellant three to four

times a month and they would sit around and talk. (T1981) Ward has never known Appellant to be violent and is not the type to do violent crimes. (T1983-1984) Appellant always seemed to be a caring individual. (T1985)

Denise Williams has known Appellant for seven years. (T1988) Appellant was always quiet and kept to himself and she had never heard him say a harsh word to anyone. (T1988) Williams has never known Appellant to be violent. (T1989) Appellant has sent Williams numerous drawings from the jail. (T1990,1993)

Melanie Simmons, who works for the Hillsborough County Home Base Program, met Appellant through his sister. (T1995-1996) Appellant's sister has a daughter with cerebral palsy and has observed Appellant's interest with his niece. (T1997) Appellant seemed very concerned and often assisted in feeding and exercising his niece. (T1998-1999) Appellant is very concerned about his family and appeared to be loving, kind and helpful. (T2001) Simmons feels that Appellant could help others by being an example of how easy it is to get into trouble. (T2001)

Five correction officers at the Hernando County Jail testified that while Appellant was housed in their jail, he presented no discipline problem whatsoever. (T2075,2079,2083, 2086,2089) These officers believe that Appellant adjusted very well to incarceration and would present no discipline problem if he were to be incarcerated. (T2076,2081,2083,2086,2089)

SUMMARY OF THE ARGUMENTS

POINT I: The trial court abused its discretion when it refused to grant a continuance where the defense counsel learned for the first time the evening before trial that a codefendant had struck a deal with the State Attorney's Office and would be testifying against Appellant. This surprise announcement drastically altered defense counsel's trial strategy since Frazier was the only person who could provided extremely damaging testimony such as placing the murder weapon in Appellant's hand and otherwise materially disputing Appellant's statement to the police. The trial court further erred by refusing a continuance when the state, in the middle of trial, presented police officers who had just conducted tests on the murder victim's car, and defense counsel was unable to secure expert witnesses of his own to possibly rebut this testimony. Appellant's right to a fair trial was severely compromised by the trial court's ruling. A new trial is required.

POINT II: Because the state informed defense counsel at the last moment that Michael Frazier, a codefendant, would be testifying for the state, defense counsel requested permission, which was granted, to take Frazier's deposition. Defense counsel asked permission for Appellant to be present during the deposition because of the timing of the situation and since defense counsel did not have the luxury of conducting discovery in the normal fashion. The trial court denied this request for no other reason other than that the Rules of Criminal Procedure

did not require the defendant's presence at deposition. Once again, this ruling was an abuse of discretion in that defense counsel demonstrated good cause to have Appellant present and there was no extenuating circumstances which would preclude Appellant's attendance.

POINT III: The trial court erred by refusing to give the requested instructions defining heinous, atrocious and cruel, and cold, calculated and premeditated aggravating circumstances. The instructions given by the trial court were inadequate to sufficiently channel the jury's discretion.

POINT IV: The statutory aggravating factor of especially heinous, atrocious and cruel is unconstitutionally vague because the factor has been applied inconsistently.

POINT V: The cold, calculated and premeditated aggravating statute is unconstitutional because this Court's interpretation and application thereof has resulted in an arbitrary and capricious application of the death penalty.

POINT VI: Reversible error occurred when the prosecutor was permitted, over defense objection, to make statements which could reasonably be interpreted as commenting on Appellant's failure to testify before his jury. The error was not harmless since it involved a comment regarding the main witness against Appellant.

POINT VII: Appellant's death sentence must be vacated because the trial court improperly found three aggravating circumstances.

circumstances.

POINT VIII: Florida's death penalty scheme is unconstitutional on its face and as applied for numerous reasons.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING A CONTINUANCE AFTER THE LATE DISCLOSURE OF A MATERIAL STATE WITNESS WHICH DEPRIVED THE DEFENSE OF THE OPPORTUNITY TO INVESTIGATE POTENTIAL IMPEACHMENT EVIDENCE TO USE AGAINST THE WITNESS.

Appellant's trial commenced on Thursday, November 5, 1992. (T14) Defense counsel at that point moved for a continuance on the grounds that at 4:08 p.m. the day before, the state for the first time informed the defense that Michael Frazier, a convicted codefendant, was going to testify against Appellant. (T15) Defense counsel pointed out that the entire trial preparation was keyed to the fact that no codefendant would be testifying and that subsequently the state would be unable to present any evidence which would in essence place a gun in the hand of Appellant. (T15-17)

The court conducted a hearing and noted that trial counsel should not be surprised since Mr. Frazier's trial had been videotaped by the Public Defender's Office and thus they would be privy to his trial testimony. (T17) However, defense counsel pointed out that they did not have the opportunity to depose Mr. Frazier nor did they question the other state witnesses regarding statements Mr. Frazier may have made concerning the offense. (T17-19) The state attorney admitted that he had not yet supplied defense counsel with the statement

their office took from Mr. Frazier although they certainly intended to do so. (T20) At the conclusion of the hearing the trial court denied the motion to continue the case and found that in its opinion, defense counsel had been aware of Michael Frazier and his involvement in this case from the very beginning. (T32) Accordingly, the trial court did not find that the defense was surprised or that the defense had been adversely affected in the ability to prepare for trial. (T32) However, the trial court then concluded with the statement:

> I will say this for the record, Mr. Fanter, I will reconsider your motion to continue if <u>at any time</u> it appears to you that you are unable to get a witness that you want for purposes of impeachment, or any other documents that you want for purposes of impeachment about Michael Frazier be called to testify.

(T33) On Saturday, November 7, 1992, defense counsel took the deposition of Michael Frazier. On November 11, 1992, during the trial, the state attorney announced that following the deposition of Mr. Frazier the previous Saturday, he had requested Deputy Gary Kimball to perform some tests on the victim's car. (T1560-1566) The state attorney announced that he would be seeking to admit these at a later point in the trial but was informing the defense counsel now for the first time that he may need to speak with Mr. Kimball prior to his testimony. (T1560-1563) Defense counsel moved in limine to preclude the introduction of Mr. Kimball's testimony, and the trial court denied that at that point. (T1564) The following morning, before the trial

recommenced, defense counsel moved for a continuance based on the deposition of Deputy Kimball which was taken the night before. (T1627) In particular, defense counsel noted that Kimball testified to some pry marks that were found in the trunk and his conclusion as to what caused them and therefore defense counsel wanted time to have his own expert examine the car with regard to this testimony. (T1627-1628) The court treated this motion for continuance as an objection based on a discovery violation and concluded that there was no violation on the part of the state since the tests were necessitated solely because of Mr. Frazier's testimony a few days previously. (T1635-1636) However, in determining whether the defense was prejudiced because of this, the trial court noted that the evidence that was presented through these tests concerned an issue that was "clearly put before the defense early on." (T1640) However, defense counsel pointed out that the trial court's ruling was somewhat inconsistent in that on the one hand he was saying that defense counsel knew about this evidence for thirteen months, but on the other hand, found no violation since the state only found out about this evidence during the course of the trial. Defense counsel then pointed out, if the evidence was clearly available and subject to the defense, then the state obviously would have been on the same notice thirteen months ago and should have done those tests at that time. The trial court, nonetheless, denied the motion to exclude the evidence and also the motion for continuance. (T1641-1642)

A trial judge has considerable discretion in deciding whether to grant or deny a motion for continuance. Jackson v. State, 464 So. 2d 1181 (Fla. 1985); Magill v. State, 386 So. 2d 1188 (Fla. 1980); Cooper v. State, 336 So. 2d 1133 (Fla. 1977). However, where the circumstances establish that defense counsel cannot adequately investigate and prepare a defense, a continuance must be granted. Jackson, supra; Smith v. State, 525 So. 2d 477 (Fla. 1st DCA 1988); Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983). The First District Court of Appeal held that deference to a trial court's ruling on a motion for a continuance is not absolute, and:

> [a] denial of a motion for continuance will be reversed when the record demonstrates ... that adequate preparation of a defense was placed at risk by virtue of the denial.

Smith, 525 So. 2d at 480. Preparation of Appellant's defense was placed at risk and impaired by the denial of his motions for continuance. His rights to adequate representation by counsel, due process and a fair trial were denied. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, Fla. Const.

In Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983), the court reversed for a new trial after concluding the trial court abused its discretion in denying a continuance. The trial was held on a Tuesday morning. Defense counsel learned of a hypnosis session of a state witness midday of the Friday before trial. Counsel deposed the hypnotist on Monday. A motion for continuance was premised on counsel's need to secure an expert

witness to assist in rebutting the state's evidence. The court wrote:

> A number of cases detail circumstances rising to the level of a palpable abuse of discretion. Harley v. State, 407 So. 2d 382 (Fla. 1st DCA 1981); Lightsey v. State, 364 So. 2d 72 (Fla. 2d DCA 1978); and Sumbry v. State, 310 So. 2d 445 (Fla. 2d DCA 1975). The common thread running through each of these cases is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defenses. This right is inherent in the right to counsel. Harley, at 384, citing Brooks v. State, 176 So. 2d 116 (Fla. 1st DCA 1965), cert. denied, 177 So. 2d 479 (Fla. 1965). Further, it is founded on constitutional principles of due process and casts in the light of notions of a right to a fair trial. Harley, at 383-384; see also Sumbry, 310 So. 2d at 447.

426 So. 2d at 80. The court held "[s]urely, due process demands that counsel be afforded a fairer means by which to prepare his defense to this critical evidence." Id. at 81.

In Smith v. State, 525 So. 2d 477 (Fla. 1st DCA 1988), the court reversed the trial court's order denying a continuance of a sentencing hearing where the defense was furnished with a notice of a state's expert witness one day prior to the hearing. The one-day notice did not provide defense counsel and opportunity to depose the witness, contact an expert for the defense, or "assemble other evidence in opposition of" the state's expert witness. Id. at 480. Recognizing that the defense was jeopardized by the late notice, the First District Court of Appeal reversed emphasizing that a palpable abuse of

discretion in denying a continuance is shown where the defense is deprived of sufficient opportunity to prepare.

The time element in this case also placed Appellant's counsel at a great risk of inadequate preparation. Although Appellant's statement to the police officer had been ruled admissible at trial and these statements contained major discrepancies, the consistent point in all of Appellant's statements was that he never killed the woman. When the state informed defense counsel for the first time on the eve of trial that it was going to present the testimony of Michael Frazier who would actually place the gun in the hand of Appellant, defense counsel's entire trial strategy was blown out of the water. While defense counsel may have known what Mr. Frazier's story was, he certainly had no reason to believe that he would testify at Appellant's trial, particularly since no deal had been struck prior to Mr. Frazier going to trial. The inherent problems with the trial court's denial of the continuance pretrial was underscored when due to the eleventh hour activities of the state in securing Mr. Frazier as a witness, the state was then permitted to present testimony regarding tests which were conducted based directly on Mr. Frazier's testimony. This was done even though defense counsel was not permitted the opportunity to secure their own expert to possibly refute these tests. Simply put, the trial in the instant case became a trial by ambush due to the eleventh hour dealings by the state attorney with Michael Frazier. The denial of the continuances as

requested by defense counsel constituted palpable abuses of discretion on the part of the trial court. This Court must now reverse Appellant's convictions and remand for a new trial.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO BE PRESENT DURING THE DEPOSITION OF MICHAEL FRAZIER.

On the morning of trial Appellant requested a continuance due to the last minute notice that the codefendant Michael Frazier would be testifying at his trial. (T15-33, Point I, infra) The court denied the motion for continuance but ruled that Mr. Frazier would be available for a deposition. (T34) Defense counsel then requested that Appellant be present for the deposition of Frazier on the grounds that since they were in the middle of trial, he did not have the luxury of conducting normal discovery and therefore it was necessary to have Appellant present to assist defense counsel in the deposition. (T37) The trial court denied this request. (T37) Defense counsel renewed his request to have Appellant present at the deposition, but again the court denied citing Rule 3.220(h)(6), Florida Rules of Criminal Procedure which states that the defendant shall not be physically present at a deposition except upon good cause being shown. (T134-136) Defense counsel made two further requests to have Appellant present at the deposition of Frazier and pointed out to the trial court that since Frazier's deposition would be taken at the jail where Appellant was also being held, that there would be no inconvenience or safety concerns. (T655-656,720-721)

The trial court continued to deny Appellant's request.

Rule 3.220(h)(6), Florida Rules of Criminal Procedure, provides that a defendant shall not be physically present at a deposition except on stipulation of the parties or a court order for good cause shown. Where the defendant moves for an order permitting physical presence of the defendant, the trial court may consider the need for the presence of the defendant to obtain effective discovery, the intimidating effect of the defendant's presence on the witness, if any, and any cost or inconvenience related to the defendant's presence. A trial court should also consider other alternative electronic or audio/visual means to protect the defendant's ability to participate in discovery without the defendant's physical presence. In the instant case, defense counsel never had an opportunity at pretrial to depose Michael Frazier. Indeed, until the eve of trial, Michael Frazier was not going to be a witness against Appellant. As defense counsel pointed out once the trial court denied his motion for continuance, he would no longer have the luxury of conducting discovery in the same fashion that he would if the deposition was being taken pretrial. In particular, if a pretrial deposition is taken, once defense counsel was then given a copy of it, he would have the luxury of taking the deposition and reviewing it with the defendant and following up on any leads which the defendant would then bring to light. Because of the late addition of Mr. Frazier as a witness, this luxury was no longer available to defense counsel. Thus, defense counsel argued, it was essential

that Appellant be physically present at the time of the deposition so that his assistance could be provided immediately. (T37) Defense counsel further pointed out that there would be no security risk or any inconvenience to any party involved since Mr. Frazier and Appellant were both housed at the jail and the deposition was to be taken at the jail. (T655-656) At no time did the state ever allege any reason for denying Appellant's request other than the rule doesn't require it. Appellant submits that since the situation was created by the state, they were certainly in no position to oppose Appellant's reasonable efforts to prepare for trial. On the facts of this case, good cause was shown by defense counsel to allow Appellant to be physically present during the deposition of Michael Frazier. The denial of his request constitutes reversible error.

POINT III

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE LIMITING INSTRUCTIONS WITH REGARD TO THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED AS REQUESTED BY DEFENSE COUNSEL.

Defense counsel requested special limiting jury instructions on the aggravating circumstances of heinous, atrocious and cruel and cold, calculated and premeditated. (R404,405,T2021-2025,2026) The trial court refused to give these instructions:

> In considering the aggravating factor of heinous, atrocious and cruel, the following definition should be considered:
>
> Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of another. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies; the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> In order to find that the aggravating factor of especially heinous, atrocious and cruel apply to these facts, the victim's knowledge of his impending death should be considered.

> Acts committed after the death of the victim are not relevant in considering whether the homicide was "especially heinous, atrocious or cruel."
>
> * * *
>
> In considering the aggravating factor of cold, calculated and premeditated, you are instructed that simple premeditation does not qualify under this circumstance. This circumstance requires a "greater level" of premeditation or methodical intent than the amount of premeditation necessary for a first degree murder conviction.
>
> This aggravating circumstance requires proof of premeditation in a heightened degree, a degree higher than that required for premeditation necessary to convict for first degree murder.
>
> This aggravating circumstance emphasizes cold calculation that occurs before the commencement of the murder.
>
> a) "cold" means totally without emotion or compassion.
>
> b) "calculated" means a careful plan or prearranged design.

(R404-405) Instead, the trial court instructed the jury as follows:

> The crime for which the defendant is to be sentenced was especially heinous, 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. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show

> that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
>
> * * *
>
> The 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. "Cold" means without emotional passion. "Calculated" means a careful plan or prearranged design.

(R393,T2142-2143) Because these instructions are fatally flawed, Appellant's death sentence cannot be sustained.

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

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

POINT IV

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

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

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

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

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

(1988). The concurring opinion explained why the limiting constructions being utilized by the various states are not up to constitutional standards:

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

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

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

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

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

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

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

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

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

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

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

POINT V

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

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

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

This aggravating factor was added to Florida's death penalty statute after the decision in Proffitt v. Florida, 428 U. S. 242 (1976). To date, the United States Supreme Court has not specifically reviewed the constitutionality of this aggravating factor either on its face or as applied. However, in Hodges v. Florida, 52 Cr. L. 3015 (U.S. S. Ct., October 5, 1992), the Supreme Court in summary fashion applied Espinosa v. Florida, 505 U. S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (1992), to a petition for certiorari alleging that the cold, calculated and premeditated jury instruction is unconstitutionally vague.

The function of a statutory aggravating factor has been

explained by the United States Supreme Court to be as follows:

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

Zant v. Stephens, 462 U. S. 862, 879 (1983). The court in Zant went on to state that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." Id. at 877. Thus, it is clear that a statutory aggravating factor can be so broad as to fail to satisfy Eighth and Fourteenth Amendment requirements and that even if it is narrow on its face, it can be so arbitrarily applied that it is rendered unconstitutional.

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

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

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

> Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and

> limited so as to minimize the risk of wholly arbitrary and capricious action.

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

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

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

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

In Godfrey, the Court held that capital sentencing discretion can be suitably directly and limited only if aggravating circumstances are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating

circumstances, the limiting constructions must, as a matter of Eighth Amendment law, be both instructed to sentencing juries and consistently applied from case to case. Id. at 429-33. Accord, Espinosa v. Florida, 505 U. S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (1992).

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

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

Id. at 305-306.

It is well-established that, although a state's death

penalty statute is constitutional, a single aggravating factor may be unconstitutionally vague, arbitrary, or overbroad. State v. Chaplain, 437 A. 2d 327 (Del. Super. Ct. 1981); Arnold v. State, 224 S. E. 2d 386 (Ga. 1976); Cartwright v. Maynard, 822 F. 2d 1477 (10th Cir. 1987); Collins v. Lockhart, 754 F. 2d 958 (8th Cir. 1985). Appellant contends that Section 921.141(5)(i), Florida Statutes (1991), on its face and as applied, has failed to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance has been applied by the Florida Supreme Court to virtually every type of first-degree murder. This aggravating circumstance has become a "catch-all" aggravating circumstance, thereby violating the teachings of Furman and its progeny. Second, even though principles for applying this aggravating circumstance have been established by the Florida Supreme Court, those principles have not been consistently applied.

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

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

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

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

It is recognized that death is different from any other punishment which can be imposed and therefore a capital sentencing procedure calls for a greater degree of reliability due to its severity and finality. Lockett v. Ohio, 438 U. S. 586, 605-606 (1978). The (5)(i) circumstance requires a finding that the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." However, the statute gives no real guidance as to when the factor can exist. Some level of premeditation will exist in all first-degree, premeditated murders and the adjectives cold and calculated are nothing more than vague subjective terms directed to emotions. The terms cold and

calculated suffer from the same deficiency as terms held vague in People v. Superior Court (Engert), supra. Here, as in Engert, "The terms address the emotions and subjective idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content." 647 P. 2d at 78. Here, as in Arnold v. State, supra, the terms are "highly subjective." 224 S. E. 2d at 392. The terms cold and calculated are unduly vague and subjective.

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

As previously stated, a statute, or a portion of a statute, may be constitutional on its face, but applied in an unconstitutional fashion. McClesky v. Kemp, supra at 1773. The

(5)(i) aggravating factor is unconstitutional as applied by juries in recommending penalties, trial courts in imposing sentences and the Florida Supreme Court in reviewing death sentences. It has been applied in such a way as to allow it to be applied to any premeditated manner, and the original limiting principles developed by the Florida Supreme court have been applied in such an inconsistent manner so as to render the circumstance arbitrary and capricious.

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

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

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

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

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

In Caruthers v. State, 465 So. 2d 496 (Fla. 1985), the

court disallowed a finding of cold, calculated and premeditation where a robber shot a store clerk three times. The court stated "the cold, calculated, and premeditation factor applies to a manner of killing categorized by heightened premeditation beyond that required to establish premeditated murder." Id. at 498 (emphasis added). However, in the next reported decision, this Court approved the same factor, stating "This factor focuses more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So. 2d 499, 507 (Fla. 1985) (emphasis added). Then, in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), the court reverted to the prior standard, stating "... as the statute indicates, if the murder was committed in a manner that was cold, calculated, the aggravating circumstance of heightened premeditation is applicable." Id. at 1183. More recently, in Banda v. State, 536 So. 2d 221 (Fla. 1988), this court again returned to the subjective intent of the murderer in determining whether the aggravating circumstance should apply. It is impossible for trial courts to consistently apply the aggravating circumstance if the reviewing court cannot decide which standard to apply.

Further, there is a patent inconsistency in application of the second prong of the cold, calculated and premeditated factor. " -- without any pretense of moral or legal justification." In Banda v. State, supra, the court stated "We conclude that, under the capital sentencing law of Florida, a 'pretense' or justification is any claim of justification or

excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Id. at 225 (emphasis added). In Cannady v. State, 427 So. 2d 723 (Fla. 1983), the court disapproved the finding of a cold, calculated or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times.

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

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

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

contemplated by (5)(i). The loss of that distinction, Justice Ehrlich warned:

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

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

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

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

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

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

Id. at 798. Thus, application of this factor rested on the fact that the weapons were all from the deceased's premises causing the court to strike this factor. In Mason v. State, 438 So. 2d 374 (Fla. 1983), which was decided the same day of Harris, supra, the (5)(i) circumstance was upheld by the Florida Supreme Court in a burglary/murder, where the weapon was taken from the victim's premises, and there was no evidence of prior planning of the homicide. Mason burglarized the victim's home, obtained a knife there, and killed the victim by stabbing her. The fact that Mason did not carry a weapon, but obtained it at the burglary site, was relied on to negate this factor in Harris, but not in Mason.

This aggravating circumstance has also been arbitrarily applied in cases where the victim was abducted, taken to a remote area, and then killed. In three cases, the Florida Supreme Court has relied upon abduction in upholding the application of this aggravating factor. Hill v. State, 422 So. 2d 816 (Fla. 1982); Smith v. State, 424 So. 2d 726 (Fla. 1983); Justus v. State, 438 So. 2d 358 (Fla. 1983). In three other cases, this aspect of the offense was present yet the aggravating factor was disallowed. Mann v. State, 420 So. 2d 578 (Fla. 1982); Cannady v. State, 427 So. 2d 723 (Fla. 1983); Preston v. State, 444 So. 2d 939 (Fla. 1984). In Preston, the victim had

been abducted from a convenience store and money was missing from the store. The victim's nude body was found in a field with multiple stab wounds and her throat slit. Pubic hairs, consistent with the victim, where found on Preston. The Florida Supreme Court held that these facts were insufficient to support this aggravating circumstance. 444 So. 2d at 947. However, in Smith, supra, this circumstance was upheld in a very similar case. Smith also involved the robbery of a convenience store, abduction of the clerk, taking her to a secluded area and killing her. 424 So. 2d at 728.

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

In summary, Appellant asserts that Section 921.141(5)(i), Florida Statutes (1989) is unconstitutional. It is vague and overbroad in its language. Further, this Court has been arbitrary and capricious in its application of this aggravating circumstance. Appellant's death sentence was imposed on reliance of this aggravating circumstance. Because his death sentence rests upon a totally unconstitutional aggravating

circumstance, this Court cannot let the death sentence stand. Appellant is entitled to a new penalty phase.

POINT VI

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND DENYING HIS MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED DURING HIS CLOSING ARGUMENT IN THE PENALTY PHASE ON APPELLANT'S FAILURE TO TESTIFY.

The main witness for the state below was Michael Frazier, a codefendant, who had previously been convicted of the same charges for which Appellant was being tried. Frazier's jury recommended that he be sentenced to life. During defense counsel's closing statement, he argued to the jury that they should consider the treatment of the codefendants, that is, that both of the codefendants received life recommendations. During the state's closing argument, the prosecutor made the following statement:

> The question that I ask you to determine is how much weight are those recommendations to be given? And when you are considering that question, I ask you to consider some of the salient facts that you heard during the course of this trial. For example, with regard to Mr. Frazier's recommendation for life, Mr. Frazier told you that he testified before his jury. They had his testimony to consider when they decided to --

(T2100) Defense counsel immediately objected and moved for a mistrial on the grounds that this was an indirect comment on Appellant's failure to testify at his trial. After hearing argument on this objection, the trial court ruled that it was a

proper comment and overruled the objection and denied the motion for mistrial. (T2101-2105) The state attorney then continued along the same lines emphasizing to the jury that Mr. Frazier had testified in his trial and his jury had the benefit of his testimony before returning a verdict recommending life. (T2105-2106) Appellant contends that the comment and argument by the state attorney were grossly improper and serve to destroy Appellant's right to a fair trial.

A prosecutor is prohibited from making any comment before the jury which is even "barely susceptible" of being interpreted as a comment on the defendant's right to remain silent or failure to testify. State v. Kinchen, 490 So. 2d 21 (Fla. 1985); David v. State, 369 So. 2d 943 (Fla. 1979). The prosecutor's comments here fall into the prohibited category. They were not merely comments on the uncontradicted nature of the evidence. See White v. State, 377 So. 2d 1149 (Fla. 1980). Rather, the comment directly implied that the jury recommended life for Mr. Frazier because he testified. In fact, there is no way to know whether or not this factor had any influence on the jury's recommendation. This is especially true since Appellant's jury was not told what quantum of mitigating evidence was put forth in Mr. Frazier's trial. The obvious implication of the state's argument is that since Mr. Frazier testified in his trial his testimony was more believable than Appellant's who chose to exercise his constitutional right and not testify in his trial. In Jones v. State, 260 So. 2d 279 (Fla. 3d DCA 1972), the

district court reversed on the basis of comments made by a prosecutor which drew the jury's attention to the lack of testimony at trial. The court wrote:

> The appellants argue that the prosecutor's statement amounted to a comment on their failure to testify on their own behalf. The state argues that the comment should be regarded as having had reference only to testimony of the witnesses who testified. We hold the appellants' argument has merit.
>
> * * *
>
> In the present case, while the comment of the prosecutor may have been susceptible of differing constructions, it well could have been regarded by the jury as having reference to failure of the defendants to take the stand and deny their participation in the crime when faced with the state's evidence indicating their participation.

Id. at 280-281. The prosecutor's comments in this case are also susceptible to being interpreted as a reference to Appellant's failure to take the witness stand.

The prosecutor's comment on Appellant's failure to testify deprived him of due process and a fair penalty phase trial. His death sentence has been unconstitutionally imposed. This Court must reverse his sentence for a new penalty phase with a new jury.

POINT VII

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE BASED UPON ERRONEOUS FINDINGS OF SEVERAL AGGRAVATING FACTORS.

In imposing the death sentence on Appellant, the trial court found five aggravating factors had been established beyond a reasonable doubt. Appellant asserts that the trial court erroneously concluded that several of these aggravating factors were proven.

A. THE AVOIDING ARREST CIRCUMSTANCE, SECTION 921.141(5)(e), FLORIDA STATUTES (1991).

The avoiding arrest aggravating factor is not applicable in cases where the victim is not a police officer, unless the evidence proves that the **sole** or **dominant** motive for the killing was to eliminate a witness. Perry v. State, 522 So. 2d 817 (Fla. 1988); Bates v. State, 465 So. 2d 490 (Fla. 1985); Riley v. State, 366 So. 2d 19 (Fla. 1978). Evidence that the homicide victim was the only witness to other felonies does not meet this requirement. Jackson v. State, 502 So. 2d 409 (Fla. 1986); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983). Even the fact that the victim knew and could identify the defendant is insufficient. Perry, supra; Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert, supra. The sole motive of eliminating a witness must be established beyond a reasonable doubt. This case

does not meet that test because the evidence provides that at best elimination of a witness was only a partial reason for the homicide.

In his findings of facts in this aggravating factor, the trial court noted that had she survived, the witness would have been a key witness against Appellant in the robbery and kidnapping. He also pointed to a statement by Michael Frazier wherein it was purported that Appellant claimed that he had to kill the victim because she saw his face. The problem with the trial court's findings is that they fall short of the proof beyond a reasonable doubt required to support this aggravating circumstance. It certainly is true, of course, that the victim, had she survived, would have been a key witness against Appellant in any trial with charges of robbery and kidnapping. This, however, is true of any situation wherein a person commits separate crimes and then ultimately kills a victim. This Court has specifically disapproved the avoiding arrest factor in other similar circumstances, even where the victim knew the defendant. In Perry v. State, 522 So. 2d 817 (Fla. 1988), the defendant killed his former next door neighbor during an attempted robbery. In Amazon v. State, 487 So. 2d 8 (Fla. 1986), the defendant also killed his next door neighbor during a burglary, robbery and sexual battery. Amazon stabbed the mother and her eleven-year-old daughter when he saw the daughter telephoning for help. In Rembert v. State, 445 So. 2d 337 (Fla. 1984), the defendant killed a victim who had known him for a number of years.

Eliminating a witness was no more the sole or dominant reason for the homicide here than it was in these cases.

With regard to the purported testimony of Michael Frazier, this too, is insufficient to prove that the sole or dominant motive for the murder was the elimination of a witness. First, it must be remembered, that Michael Frazier, a convicted codefendant, admitted that he lied with regard to other factors concerning this incident. Second, the evidence as a whole is much more susceptible to the theory that the victim was killed simply out of frustration because it was perceived that she was lying about the numbers needed to withdraw money from the ATM. Even Frazier supported this theory in that he recounted the numerous times that Appellant allegedly questioned the victim concerning these numbers. This occurred even as they were driving to Hernando County. In a similar situation, in Amazon v. State, 487 So. 2d 8 (Fla. 1986), this Court held that the avoiding arrest factor was not proven even though there was evidence that Amazon told a police officer that he killed to eliminate witnesses and in fact one of the victims was killed as she was telephoning the police. Surely the evidence in Amazon was much stronger than the evidence in this case. Yet, if the avoiding arrest factor was not proven beyond a reasonable doubt in Amazon, it cannot be said to have been proven beyond a reasonable doubt in this case.

In summary, while it is of course true that the killing of the victim eliminated her as a witness, the evidence is

woefully insufficient to show that she was killed solely to prevent her from being a witness. This Court must reverse the finding of this aggravating factor and remand the cause for resentencing.

B. THE HEINOUS, ATROCIOUS OR CRUEL CIRCUMSTANCE, SECTION 921.141(5)(h), FLORIDA STATUTES (1991).

In State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), this Court held:

> ... that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Recognizing that all murders are heinous, in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious and cruel. In Lewis v. State, 398 So. 2d 432 (Fla. 1981), this Court stated the principle that "a murder by shooting, when it is ordinary in the since that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious and cruel."

In Kampff v. State, 371 So. 2d 1007 (Fla. 1979), this Court reversed a finding of heinous, atrocious and cruel where

the defendant had grieved for three years over his divorce from his wife. He then procured a gun and shot his wife three times, the last of which was a point blank shot to the head. In several other cases, this Court has reversed findings of heinous, atrocious and cruel in situations involving worse scenarios than in the instant case. See, e.g., Menendez v. State, 368 So. 2d 1278 (Fla. 1978) [defendant shot victim twice as he stood with his arms raised in a submissive position]; Lewis v. State, 377 So. 2d 640 (Fla. 1979) [defendant shot victim in the chest and then shot him several more times as he tried to escape]; Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) [victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was facing death]; Rembert v. State, 445 So. 2d 337 (Fla. 1984) [victim beaten with a club one to seven times and lived for several hours].

In the instant case, the trial court's analogy of the instant case to strangulation cases is simply improper. Certainly, this Court has never applied the virtual per se rule of heinousness in strangulation cases to shooting cases. The trial court's order with regard to this aggravating factor contains several unproven assertions. The trial court notes that while the victim was in the trunk she was in a position to hear the occupants of the car discussing the merits and methods of killing her. However, there is no proof that the victim in fact did hear these statements. While a police officer testified that he conducted an experiment whereby he got into the trunk and

other officers got in the car and they could hear each other, this experiment was not conducted under the same conditions which were present when the victim was in the trunk. For instance, the car was not running nor was it out on a busy highway when the officers conducted their experiment. It is also not clear whether the radio was playing at the time that the victim allegedly was in the car. These factors would all be significant in determining whether the victim heard the purported discussions concerning her death. The trial court's allusion to this is nothing more than mere conjecture. Further, the trial court's statement that the victim was raped is again nothing more than a mere conjecture. Appellant admitted that he and the victim had sexual intercourse, although stating that it was consensual. There was no sign of forced sexual intercourse found by the medical examiner. Michael Frazier's statement that he heard the victim say that she doesn't even do that with her husband, does not necessarily mean that she was referring to simple sexual intercourse. In fact, Frazier did not even state that he saw the sexual intercourse occurring. Finally, there is no evidence that the victim begged for her life to be spared. The only evidence was that she inquired about seeing her children, but again, this is short of the situation alluded to by the trial court in Cooper v. State, 492 So. 2d 1059 (Fla. 1986) and Koon v. State, 513 So. 2d 1253 (Fla. 1987). The evidence in the instant case is insufficient to prove beyond a reasonable doubt that the murder was committed in a heinous, atrocious and cruel fashion. This

aggravating circumstance must be stricken and the cause remanded for resentencing.

C. THE COLD, CALCULATED AND PREMEDITATED CIRCUMSTANCE, SECTION 921.141(5)(i), FLORIDA STATUTES (1991).

At least one commentator has exposed the inconsistency with which this Court has reviewed this aggravating circumstance. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson Law L. Rev. 47 (1987). It does appear, however, that the cold, calculated and premeditated aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself'." Perry v. State, 522 So. 2d 817 (Fla. 1988). This Court has made it clear that this factor requires proof of "a careful plan or prearranged design." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Mitchell v. State, 527 So. 2d 129 (Fla. 1988). As stated in Preston v. State, 444 So. 2d 939, 946 (Fla. 1984):

> [T]he cold, calculated, and premeditated] aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State, (eyewitness related a particularly lengthy series of events which included beating, transporting, raping and setting victim on fire); Middleton v. State, 426 So. 2d 548 (Fla. 1982) (defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State, 422 So. 2d 833 (Fla. 1982), cert.

denied, ___ U. S. ___, 103 S. Ct. 2111, 77 L. Ed. 2d 315 (1983) (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

The trial court's findings of fact with regards to this aggravating circumstance falls short of the proof beyond a reasonable doubt necessary to support this aggravating circumstance. This was simply a robbery that didn't work out and escalated. It is somewhat inconsistent for the court on the one hand to find that the reason for the killing was because the victim saw Appellant's face at which point he then decided he had to kill her, while on the other hand finding that Appellant concocted this elaborate scheme and planned to murder her. The fact that Appellant may have driven to a remote area where the murder was then committed does not mean that this was a cold, calculated and premeditated murder. It merely means that he sought a place where detection would be less likely. In a similar case, Preston v. State, 444 So. 2d 939 (Fla. 1984), this Court disapproved a finding of CCP even though the defendant abducted a woman, drove her to a remote area and marched her into a field where he stabbed her numerous times. Additionally, the evidence certainly supports the theory that during the time that they were driving the victim around, Appellant was attempting to still secure the numbers for use in withdrawing money from the victim's ATM account. Thus, this time was not spent in furtherance of a cold and calculated plan to murder the victim, but rather was furtherance of the robbery. Once again, the trial

court's finding that the victim begged for her life is simply not supported by the evidence. At best the evidence showed that the victim inquired about whether she could go home to see her children. That she was scared is undoubtedly true. However, most victims are scared. This factor cannot then be said to equate to a cold, calculated and premeditated plan. Once again, the evidence is woefully short of that required to support this aggravating circumstance. This Court must strike this circumstance and remand for resentencing.

POINT VIII

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

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

The Florida capital sentencing scheme allows the exclusion of otherwise qualified jurors based upon their moral opposition to the death penalty. This unfairly results in a jury which is prosecution prone and denies a defendant the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U. S. 510 (1968). Appellant attacked this procedure below. (R918-927,928-931,215-220)

Appellant asked the State to disclose which aggravating circumstances they sought to prove. (R986-993,168-169) The failure to provide a defendant with a notice of the aggravating circumstances on which the State will attempt to rely in seeking the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U. S. 349 (1977); Argersinger v. Hamlin, 407 U. S. 25 (1972).

Section 921.141, Florida Statutes, is unconstitutional for the following reasons: (1) the statute provides for cruel and unusual punishment; (2) the statute allows excessive and disproportionate penalties; (3) the statute provides that the jury recommendation at the penalty phase be by a fair majority with no requirement of unanimity; (4) the charging document does not specifically allege the aggravating circumstances relied on by the State; (5) the jury instructions do not provide any guidance to the jury as to the weighing process of aggravating and mitigating circumstances; (6) the jury is not required to make specific findings concerning the aggravating circumstances that they determined established beyond a reasonable doubt; (7) the statute allows the trial court to consider aggravating circumstances that the jury may not have concluded were established beyond a reasonable doubt; and (8) the jury instructions on the aggravating and mitigating circumstances are unconstitutionally vague and overbroad and fail to provide any guidance or to channel the jury's discretion in any way. (R770-1022) Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9,

16, and 17, Fla. Const.

CONCLUSION

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

As to Points I and II, reverse Appellant's convictions and sentence and remand for a new trial;

As to Points III, IV, V and VI, reverse Appellant's sentence and remand for a new penalty phase before a new jury;

As to Points VII and VIII, reverse Appellant's sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Alfred L. Fennie, #B-490989, P.O. Box 221, Raiford, FL 32083, this 6th day of August, 1993.

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